

Origins of the Non-Delegation Doctrine

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Table of Contents

Introduction

- I. Human Nature and Political Problems
 - a. Government by Humans
 - b. Controlled Rebellion
- II. The Separation of Powers
 - a. The Principle of Least Authority
 - b. Executive Discretion
 - c. Executive Abuses
 - i. By Monarchs
 - ii. By Governors
- III. Representation
 - a. Representation of Concrete Interests
 - b. The Tyranny of the Legislatures
 - c. Representation by Filtering
- IV. Delegation By Statute
 - a. The Non-Delegation Doctrine
 - b. Executive Discretion to Interpret Statutes
 - c. Sloppy Language and the Principle of Least Authority
 - d. Delegation to the Executive in the Early Congresses
 - e. His Highness, the President
 - f. Delegation in *Ius Gentium* versus *Ius Civile* law
 - 1. Commerce with the Indian Tribes
 - ii. Naturalization
 - iii. Patents
 - iv. Copyrights
 - v. Crimes
 - a. Defined by Congress
 - b. Common Law
 - g. The Sedgwick Amendment Debate
 - i. The Post Office and 18th Century Media Empires
 - ii. The Postal Statute and the Sedgwick Amendment
 - iii. Non-Delegation as a Constitutional Question
 - iv. Laws as Principles
 - v. The Divisibility and Specificity of Delegation
 - vi. What is “Power”, and How Much is Too Much?
 - vii. Residual Discretion over Post Roads
 - viii. Danger of Executive Abuse of Power
 - ix. Representation of Interests
 - x. Knowledge and Expertise

Conclusion

Introduction

This paper explores the philosophical, political, constitutional, and statutory origins of the non-delegation doctrine, especially with respect to the delegation to the executive of the power to make domestic (*ius civile*) law. The paper will discuss a variety of principles related to delegation to the executive of the power to make law, such as the separation of powers, representation, and the interpretation of statutes. It will look at certain early cases in related areas (as there was no early Supreme Court case on point for delegation to the executive in *ius civile* statutes), and will focus on an important but little known debate in the early Congress over the non-delegation doctrine in a postal statute. A number of factors and distinctions are uncovered that may shed light on modern non-delegation cases. Distinctions include those between *ius gentium* (foreign policy) and *ius civile* (domestic policy) law and between criminal law and civil law. Factors include expertise, representation distance, the degree to which a delegation will combine not only law-making and executive power but also judicial power, and the power given by a delegation to deprive persons of life, liberty, or property.

I. *Human Nature and Political Problems* a. *Government By Humans*

Many classical republicans had advocated the inculcation of virtue as essential to a republic. But in designing the structure of the federal government, the founders would not rely on the success of such a venture.

David Hume described the problem of factions and wrote that “[a]ll is self-love.”¹ Henry St. James Bolingbroke, a leader of the Opposition to Walpole, wrote that “the love of power is natural, it is insatiable; it is whetted, not cloyed, by possession.” As a result, “the notion of a perpetual danger to liberty is inseparable from the very notion of government.”² For Montesquieu, who was inspired by Bolingbroke and in turn inspired the Founders, “constant experience shows us, that every man invested with power is apt to abuse it; he pushes on till he comes to the utmost limit. Is it not strange, though true, to say, that virtue itself has need of limits?”³

James Madison wrote, in explaining the new U.S. Constitution, that “the latent causes of faction are ... sown in the nature of man.”⁴ “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls would be necessary.” The external controls of the federal government created by the Constitution were representation and federalism; the main internal control was separation of powers into three branches, with checks and balances between them: “ambition must be made to counteract ambition. The interest of the man must be connected with the rights of the place.”⁵ Two of these issues – external control by representation of interests and internal control by separation of powers – remain crucial to understanding constitutional law today and in particular to understanding the non-delegation doctrine. The fallibility and passions of both rulers and their subjects had been amply demonstrated by history, and that history inspired the Founders and their philosophical forebears to find ways to use the law itself to control the passions and flaws of both rulers and subjects.

¹ David Hume, “On the Dignity or Meanness of Human Nature”,

<http://www.constitution.org/dh/humannat.htm>.

² Henry St. John, Viscount Bolingbroke, “Remarks on the History of England”, in *Works of Lord Bolingbroke* (London, repr. 1967; Bohn, 1844), vol. 1, p. 296, quoted in Gary Maddox, “Religious Dissent and Political Opposition: thoughts on ancient and modern democracy”, *Electronic Antiquity* I:2, <http://scholar.lib.vt.edu/ejournals/E1Ant/V1N2/maddox.html>

³ Montesquieu, *The Spirit of the Laws* XI:4.

⁴ *The Federalist* No. 10 (James Madison). On this point the anti-Federalists agreed. For Brutus, “it is a truth confirmed by the unerring experience of the ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way.” *Essays of Brutus I*, *New York Journal* (18 October 1787), in H. Storing ed., *The Complete Anti-Federalist* (1981).

⁵ *Id.*

b. *Controlled Rebellion*

In the 1560s, an “intermittent civil war” started between Protestants and Catholics in France. On St. Bartholomew’s Day, 1572, encouraged by the government authority, mobs murdered “as many as 10,000” Protestants, targeting their leaders.⁶ The same year, the Dutch Protestants began their rebellion against the Hapsburg monarchy.⁷ Soon thereafter, Theodore Beza,⁸ the successor to Calvin, wrote about the right of rebellion⁹ and the need to control government so that such rebellion would not be necessary. Beza’s ideas were expanded by an anonymous author, probably the Huguenot Philippe due Plessis-Mornay, in *Vindicae Contra Tyrannos*. (1579).¹⁰ “If kings commit injustices...they become the enemy,” Plessis-Mornay wrote. But if individuals determined for themselves when to revolt, the result would be anarchy. It was, therefore, the role of the Estates and lesser magistrates to guard individual rights against tyrants. According to constitutional historian Scott Gordon, the Huguenots “extended their argumentation to encompass less extreme conflicts between a prince and his subjects. Rebellion is exercised *in extremis*, but more important are the constraints that operate in ordinary times and bear upon a government that might feel quite secure against insurrection.”¹¹ The Huguenots and their successors stressed two ways of controlling tyranny that remain crucial to understanding the non-delegation doctrine today: first, control by distributing and checking power; second, control by representation of interests. According to Beza, institutional organs that represent the people “are established to check and bridle the magistrate.”¹²

John Locke elaborated on many of these ideas in his *Second Treatise On Government*. Since humans are unjust towards each other without government,¹³ we must form such a government through a compact with each other.¹⁴ We agree to surrender some of our natural rights so that government can function to preserve the remainder. “Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government, which men would not quit the freedom of the state of nature for, nor tie themselves up under, were it not to preserve their lives, liberties, and fortunes; and by stated rules of right and property to secure

⁶ Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* 120 (Harvard University Press 1999) (citing Robert M. Kingdon, “Calvinism and Resistance Theory,” in J.H. Burns, ed. *The Cambridge History of Political Thought, 1450-1700*, (Cambridge University Press 1991)).

⁷ *Id.* at 174

⁸ Theodore Beza wrote *The Rights of Magistrates*. Beza was a close associate of Calvin and, upon the latter’s death, succeeded him as leader of the Calvinist movement. Normally, Beza taught, one should obey a divinely appointed leader, but this is conditioned on a covenant between the monarch and the people. In this contract, people do not give up their freedom entirely, for to do so would deprive them of any remedy against a wicked sovereign. Kings hold their authority subject to condition, which when violated justifies rebellion. Gordon, *supra* note 6 at 123-4.

⁹ The idea of a legal or moral right, or even obligation, to rebel against tyranny goes back as far as we can read in Northern European legal history. According to the *Sachsenspiegel* (Saxon Mirror), a description of Saxon law written in the early thirteenth century, “a man must resist his king and his judge if he does wrong, and must hinder him in every wrong, even if he be his relative or feudal lord. And he does not thereby break his fealty.” Fritz Kern, *Kingship and Law in the Middle Ages*, S.B. Chimos trans. (Oxford 1939), pp. 83-64, quoted in Harold J. Berman, *Law and Revolution* (Harvard 1983), pg. 293.

¹⁰ *Vindicae* would be cited by the Dutch in their revolt against the Spanish monarch, by the English to justify the trial and execution of Charles I, by American founder John Adams. Huguenot political thought was probably also a major source for John Locke, the Opposition Whigs, and Montesquieu, who more substantially and directly influenced the founders. Gordon, *supra* note 6 at 128.

¹¹ Gordon, *supra* note 6 at 124.

¹² *Id.*

¹³ John Locke, *The Second Treatise On Government* (1691) IX:123.

¹⁴ *Id.* at VIII:95 et. seq.

their peace and quiet.” Power is also more dangerous if concentrated: “He being in a much worse condition who is exposed to the arbitrary power of one man who has the command of 100,000, than he that is exposed to the arbitrary power of 100,000 single men.”¹⁵

When judicial or executive officers distort the law, with the result that injuries go without remedy, the result is nothing less than a state of war. “Where an appeal to the law and constituted judges lies open, but the remedy is denied by a manifest perverting of justice and barefaced wrestling of the laws, to protect or indemnify the violence or injuries of some men or party of men, there it is hard to imagine anything but a state of war. For whenever violence is used and injury done, though by hands appointed to administer justice, it is still violence and injury, however colored with the name, pretences, or forms of law.”¹⁶

II. *Separation of Powers*

Because of the human nature of political actors, Madison wrote, “it is necessary ... to divide and arrange the several offices in such a manner as each may be a check on the other – that the private interests of every individual may be a sentinel on the public rights.”¹⁷ Much confusion and vague language exists in constitutional scholarship and judicial opinions regarding the separation of powers, but if looked at the way the founders and their immediate forebears thought of it – as a mutual veto machine – it is actually a very clear concept. In the founders’ conception, separation of powers, mixed government, and “checks and balances”, which scholars have often treated as different and even mutually contradictory, all play a crucial role.

Separation of powers has often been described with mechanical metaphors. The first and most common metaphor is that of “balance.” Polybius compared two branches of the Spartan constitution with balance scales; when they got out of balance a third was required.¹⁸ He also compared the balance of powers to the process of keeping a ship on course with respect to the winds and ocean currents.

Having learned force vectors from Newton, William Blackstone^{19 20} compared the three branches of government to three horses pulling a cart in different directions. Separate branches would prevent government from going too fast in any direction unless there was substantial agreement on where to go.

While this kind of “balance of powers” thinking has dominated separation of powers analysis, it has two major problems. First, it doesn’t describe what is meant by “power.” When analyzing delegation of law-making powers, it is crucial to characterize how much “power” is being delegated. Following Locke’s belief that the purpose of government is to protect life, liberty, and property by being given power under law over life, liberty, and property, we will measure “power” as, quite specifically, the amount of influence a government official has in determining whether the force of law will deprive an individual of life, liberty, or property.²¹ Alternatively, we will see that Madison connected the delegation of power by statute to the specific offices created by that statute,²² suggesting that the power delegated can be measured by the number of offices created.

¹⁵ *Id.* at XI:137.

¹⁶ *Id.* at III:20.

¹⁷ *The Federalist* No. 51 (James Madison).

¹⁸ David Wootton, “Liberty, Mechanism, and Metaphor: ‘checks and balances’ and the origins of modern constitutionalism” 9, http://www.constitution.org/lg/check_bal.htm.

¹⁹ *Id.* at 17.

²⁰ Dummy footnote to save paper.

²¹ According to Locke and many of the Founders this trilogy of rights is the very purpose for which governments are formed. “Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can.” – Samuel Adams, *The Report of the Committee of Correspondence to the Boston Town Meeting* (November 20, 1772); “No person shall be deprived of life, liberty, or property, without Due Process of Law”, U.S. Const., amend. V.

²² See the Sedgwick Amendment Debate, *infra*.

A more fundamental problem with the balance metaphor is that it obscures the legal cycle by taking separate steps and making them simultaneous, and by taking qualitatively different functions and turning them into mere force vectors. Separation of powers can be much better understood by looking at the chronological and conjunctive process of making, enforcing, and adjudicating laws -- in other words, by looking at the complete life-cycle of a particular law, and how that law comes to result in the deprivation of the life, liberty, or property of a particular individual. Such a law must be passed by both branches of Congress, signed by the President, executed by the President's agents, and adjudicated by the judiciary before such a deprivation can take place.

To see this chronological and conjunctive process created by separation of powers, let's look at the law-making cycle as an abstract procedural rule:

Given certain facts, the life, liberty, or property of an individual can be taken away if

- a) A general positive law (*leges*) was passed by the legislature
 - i) Passed by the lower house **and**
 - ii) Passed by the upper house
- and then**
- b) That law is interpreted, facts found to apply, and enforced by the executive
- and**
- c) That law is interpreted, facts found to apply, and the case finally decided by the judiciary

The key to separation of powers is that it creates a mutual partial or total veto between those powers.²³ This is not just in the form of a specific written legal power to veto, but, when functions are properly separated, inheres in the institutional inability of one branch to perform the functions of another. The mutual veto is structural; in a well-separated government it cannot be circumvented just because one branch chooses to violate a written law. At least two, and often all three, branches must collude in order to unjustly deprive an individual of life, liberty, or property; they must also cooperate in order to justly do so.²⁴ For Bolingbroke, this required branches both dependent in certain ways and independent in others.²⁵ For Montesquieu, power is properly

²³ *Quod dubitas, ne feceris* -- when you doubt, do not act. John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union*, "Maxims" (Revised Sixth Edition 1856), <http://www.constitution.org/bouv/bouvier.htm>. The legal cycle is further separated by a bicameral legislature. "The people can never willfully betray their own interests, but they may possibly be betrayed by the representatives of the people; and the danger will be evidently greater where the whole legislative trust is lodged in the hands of one body of men than where the concurrence of separate and dissimilar public bodies is required in every public act." *The Federalist* No. 63 (James Madison).

²⁴ "It may perhaps be said that the power of preventing bad laws includes that of preventing good ones... this objection has little weight with those who can properly estimate the inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of lawmaking, and to keep things in the same state... as much more likely to do good than harm..." *The Federalist* No. 73 (Alexander Hamilton). A major downside, however, besides the lack of "energy" elsewhere lauded by Madison and Hamilton, is that it becomes equally difficult to repeal a bad law once it has been enacted.

²⁵ "The constitutional dependency... consists in this, that the proceedings of each part of the government, when they come forth into action and affect the whole, are liable to be examined and controlled by the other parts. The independency pleaded for consists in this, that the resolutions of each part, which direct these proceedings, be taken independently and without any influence, direct or indirect, on the others. Without the first, each part would be at liberty to attempt destroying the balance by usurping or abusing power; but without the last there can be no balance at all." Wootton, *supra* note 18 at 17 (quoting Bolingbroke from *The Craftsman*).

separated when “it is necessary that by the very disposition of things power should be a check to power”²⁶ -- when the three powers are “obliged to act in concert.”²⁷ “When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”²⁸ Madison also called the three powers combined into one body “tyranny”. Again, rather than being hermetically separated the branches should have partial agency in and some control over each other.²⁹ “...unless these departments should be so far connected and blended as to give each a constitutional control over the others, the degree of separation...essential to a free government can never be in practice duly maintained.”³⁰ As Thomas Jefferson described it, “the powers of government should be so divided and balance among the several bodies of magistracy, so that one could transcend their legal limits, without being effectually checked and restrained by the others.”³¹ This can happen when functions are allowed to overlap only in specific ways, for the purposes of mutual control that strengthens the ultimate separation of function, but the functions should only overlap in such ways that the legal cycle still cannot be short-circuited. Requiring each step in the legal cycle is the main way in which the separation of powers preserves liberty.

a. The Principle of Least Authority

An idea important to the separation of powers and important in particular, as we shall see, to the non-delegation doctrine, is the principle of least authority. That principle, a key idea of delegation in modern organization and security theory,³² was well expressed by an anonymous writer from Maryland in 1776: “All men are by nature fond of power...unwilling to part with the possession of it...[; accordingly,] no man, or body of men, ought to be intrusted with the united powers of Government, *or more command than is absolutely necessary to discharge the particular office committed to him*”³³ (emphasis added). John Stevens, a delegate to the

²⁶ Montesquieu, *supra* note 3 at IX:4.

²⁷ *Id.*

²⁸ *Id.* at XI:6(4). Worse still, “miserable indeed would be the case, were the same man, or same body whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes or differences of individuals.” *Id.* at XI:6(6).

²⁹ *The Federalist* No. 47 (James Madison).

³⁰ *The Federalist* No. 48 (James Madison).

³¹ Wood at 453 (quoting Thomas Jefferson, *Notes on Virginia*, Peden ed., 110).

³² The principle of least authority, also known as the principle of least privilege, has, like the separation of duties, been applied for the delegation of abusable functions in organizations. See, for example, Jeff Langford, “Implementing Least Privilege at Your Enterprise”, <http://www.sans.org/rr/papers/8/1188.pdf>, discussing the principle of least privilege and the related idea of separation of duties as principles of secure enterprise management. The principle has been most formally developed for information systems security. See, for example, Jerome H. Saltzer, Michael D. Schroeder, “The Protection of Information in Computer Systems”, *Proceedings of the IEEE*. Vol. 63, No. 9 (September 1975), pp. 1278- 1308, <http://www.cs.virginia.edu/~evans/cs551/saltzer/>; Ka-Ping Yee, “Secure Interaction Design and the Principle of Least Authority”, CHI 2003 Workshop on Human-Computer Interaction and Security Systems, Ft. Lauderdale, Florida; Mark S. Miller, Bill Tulloh, and Jonathan S. Shapiro, “The Structure of Authority: Why security is not a separable concern,” <http://www.erights.org/talks/no-sep/secnotsep.pdf>

³³ Wood, *supra* note 32 at 150 (quoting “To the People of Maryland” (1776), Force, ed., *American Archives*, 4th Ser., VI., 1095).

Continental Congress for New Jersey,³⁴ described the relationship between the principle of least authority and the separation of powers as follows: “The several component powers of government should be so distributed that no one man, or body of men, should possess a larger share thereof than what is absolutely necessary for the administration of government.”³⁵ As these quotes suggest, the principle can be applied at scales as small as the lowest government office, or as high as the three branches of government. For rules, the principle applies from the most detailed regulation, to statutes, up to the scale of the constitution itself. A larger scale rule can delegate power either by expressing delegating rule-making power or by implicitly giving discretion. Every constitution, every statute, every regulation, and every instruction of a boss delegates some power.

According to Locke, we ought to part with no more of our rights to life, liberty, or property than is necessary for government to preserve those rights from each other. The right to do whatever one thought fit to preserve oneself is given up to be regulated by society “so far forth” as the preservation of himself and others “shall require.” When any rights are given up, it is “only with an intention in every one to better preserve himself, his liberty, and his property.”³⁶ A corollary is that government officials ought not to be given more power to take away those rights than is necessary for government to fulfill its role of the preservation of those rights.

At a constitutional scale, the principle of least authority is reflected in the enumeration of powers and in the Tenth Amendment.³⁷ Under a Lockean interpretation, the federal government was given certain enumerated powers only in order to protect life, liberty, and property. These enumerated powers gave the federal government no more authority over life, liberty, or property than it needs to protect life, liberty and property. Other powers, where more local decisions protect rights better, should be retained by the states, or by smaller groups, or by individuals, the ultimate source of all such authority. The Ninth Amendment³⁸ is a mirror-image of the Tenth. Whereas the enumeration of powers should restrict the federal government to the least authority required to execute those powers³⁹, the enumeration of individual rights is open-ended -- to coin a phrase, a “principle of most rights” consistent with protecting the life, liberty, and property of others.

The principle of least authority, when applied at the statutory scale, depends first on clearly defining those enumerated powers, and then on giving the executive via statute, within the bounds of those powers, no

³⁴ Wikipedia, “John Stevens (New Jersey)”,

http://en.wikipedia.org/wiki/John_Stevens_%28New_Jersey%29

³⁵ Wood, *supra* note 32 at 584 (quoting John Stevens, *Observations on Government*, 14).

³⁶ Locke, *supra* note 13 at IX:129.

³⁷ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X. My observations on the Ninth and Tenth Amendments and the necessary and proper clause draw on, in addition to the other cited sources, Randall E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press 2004).

³⁸ “The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” U.S. Const. amend. IX.

³⁹ The principle of least authority at the constitutional level is also captured well by the phrase “necessary and proper” interpreted according to its plain language meaning. U.S. Const. Art. I § 8. Samuel Johnson’s Dictionary (1755) defined “necessary” as “1. needful; indispensable; requisite”, “2. Not free; fatal; impelled by fate,” “3. Conclusive; decisive by inevitable consequence.” The Johnson Dictionary Project, <http://www.fab24.net/jd100203/>. Under this interpretation an authority defined by statute is *necessary* if it is required for or essential to executing an enumerated power; it is *proper* if it does not violate an enumerated, unenumerated (Ninth Amendment), or natural right; it is constitutional only if it passes both tests. A looser principle of least authority comes about if “necessary” is redefined to mean “conducive” or the like. *McCulloch v. Maryland*, 17 US 316 (1819). See also *The Federalist* No. 33 (Alexander Hamilton), No 44 (James Madison).

more specific offices, authorities, or remedies than it needs solve specific problems of people infringing each other's rights.

b. *Executive Discretion*

Locke, while both championing the consent of the governed via the legislature, and, as we shall see, forbidding the delegation of legislative power, nevertheless saw a major role for executive discretion.⁴⁰ Executive discretion is needed because “the law-making power is not always in being, and is usually too numerous, and too slow, for the dispatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm if they are executed with an inflexible rigour on all occasions and upon all persons that may come in their way; therefore there is latitude left to the executive power to do many things of choice which the laws do not prescribe.”⁴¹ Madison agreed.⁴² So did James Wilson, who observed that “...prerogative, or a discretionary power of acting where the laws are silent, is absolutely necessary... this prerogative is most properly intrusted to the executor of the laws.”

However, Wilson also warned that “...the crown will take advantage of every opportunity of extending its prerogative, in opposition to the privileges of the people.”⁴³ According to Montesquieu, in a republic, compared to a monarchy, “the laws seem to speak more, and the executors of the law less”; the result is more liberty.⁴⁴ Locke wrote that government should operate “by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court and the countryman at plough.”⁴⁵ Thomas Paine declared in 1776 that “in America, LAW IS KING.”⁴⁶ Adams⁴⁷ and Marshall⁴⁸ spoke of “a government of laws, and not of men.” In a republic the law should limit discretion.

At the Constitutional Convention of 1787, Blackstone's account of the British constitution provided a continual inspiration, model, and source of terminology and meaning. But when it came to the executive power, many of the express prerogatives of the British monarch, as listed by Blackstone, were given to Congress as a bicameral legislature, and others to the Senate to exercise jointly with the executive. The monarch's prerogatives were thereby divided the way most other federal powers were divided – into a power of the legislature to write statutory law, on the one hand, and the power, however tightly or loosely constrained by the language of the

⁴⁰ “For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of nature a right to make use of it for the good of society, in many cases, where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it. Many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of [the executive].” Even the laws themselves “should in some case give way” when “all the members of society are to be preserved...For wherein many accidents may happen wherein a strict and rigid observation of the laws may do harm...’tis fit the ruler should have a power in many cases to mitigate the severity of the law, and pardon some offenders...even the guilty are to be spared where it can prove no prejudice to the innocent.” Locke, *supra* note 13 at XIV:159.

⁴¹ *Id.* at XIV:74.

⁴² “Energy in government is essential to that external and internal danger and that prompt and salutary execution of the laws...Execution in government requires not only a certain duration of power, but the execution of it by a single hand.” *The Federalist* No. 37 (James Madison).

⁴³ James Wilson, “Considerations on the nature and Extent of the Legislative Authority of the British Parliament” (1774), <http://www.etsu.edu/cas/history/docs/parliamentauth.htm>.

⁴⁴ Montesquieu, *supra* note 3 at IX:2.

⁴⁵ Locke, *supra* note 13 XI:142.

⁴⁶ Thomas Paine, *Common Sense* III:49 (emphasis in the original), <http://www.bartleby.com/133/>.

⁴⁷ Novanglus (John Adams), No. 1 (Feb. 6, 1775) at 1.

⁴⁸ *Marbury v. Madison*, 5 U.S 137 (1803).

statute, to execute those statutes on the other. Alexander Hamilton argued, quoting Montesquieu,⁴⁹ that the executive should be given broad discretion in foreign policy.

The first Congresses, as well shall see, chose to write broadly worded, or expressly delegatory, laws in the areas roughly corresponding to the British royal prerogative or the *ius gentium*, effectively giving much of this power back to President Washington. Some other executive prerogatives, such as being able to confer titles of nobility and being the head of a state church, were eliminated entirely, by the original Constitution and the First Amendment respectively.⁵⁰

C. *Executive Abuses*

When “[w]e the people”⁵¹ delegated the power to execute law, which entailed the powers necessary to tax, apply legal remedies, and conduct war, we necessarily also delegated the power or potential for killing, arresting, imprisoning, and confiscating -- the destruction, on scales small or large, of life, liberty, or property. In both the history known to the founders, and in the history since, executives have abused this power. Every time a statute empowers the executive, the potential for such abuse is increased, in various ways and by degrees small or large, unless that power is well controlled by the law.

i. *By Monarchs*

A major motivation of republican rebellions, from the Huguenot uprisings, through the Dutch rebellion against Spain, to the English Civil War, was to overcome the despotism and abuses of monarchs. The American Revolution was no different. Although the initial motivation was primarily the improper jurisdiction of Parliament over the colonies, the abuse by the King became the main target of the Declaration of Independence and thereafter in works such as Paine’s *Common Sense*.⁵² The Declaration gave a long list of complaints against the King, among them, that he “has erected a Multitude of new Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance.”⁵³

ii. *By Governors*

The colonial governors had attempted to dictate electoral districts and apportion representation. Worse, “they had sought to manipulate the representatives of the people, by appointing them to executive or judicial posts, or by offering them opportunities for profit through the dispensing of government contracts and public money.”⁵⁴ Combined with the power to execute the laws made by these representatives, and with the power to fire these officers, they could coerce votes. For example, the governor of Massachusetts during the Stamp Act “dismissed even colonels of the militia from their positions for their adverse votes in 1766.”⁵⁵

The greatest targets of revolutionary ire in the colonial governments were their executive departments. Every new state except South Carolina eliminated the office of the governor.⁵⁶ “When Americans spoke in 1776 of keeping the several parts of government separate and distinct, they were primarily thinking of insulating the judiciary and particularly the legislature from executive manipulation.”⁵⁷

IV. *Representation*

⁴⁹ *The Federalist* No. 9 (Alexander Hamilton). Hamilton lauded “a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government” (quoting from Montesquieu, *The Spirit of the Laws* IX:1).

⁵⁰ McDonald at 246-49; U.S. Const. art. I, § 9; U.S. Const. amend. I.

⁵¹ U.S. Const., preamble. In the original (seen by the author at the National Archives, Washington, D.C.) this phrase is highlighted with large letter calligraphy.

⁵² Paine, *supra* note 47.

⁵³ Declaration of Independence para. 11 (U.S. 1776).

⁵⁴ Wood, *supra* note 32 at 157.

⁵⁵ *Id.*

⁵⁶ *Id.* at 207.

⁵⁷ *Id.* at 157.

a. *Representation of Concrete Interests*

Classical republicans had a strong historical background for their model -- the classical and medieval city-states of Greece and Italy.¹ They believed representation was fiduciary, principal-agent relationship: the principals not only could choose their agent; they could also advise, instruct, and elect so frequently that their ideal might be expressed as “employment at will” -- the will of the handful of principals who the representative knew intimately.

In arguing against the replacement of the Articles of Confederation with the Constitution, the Anti-Federalist writer Brutus maintained that “a free republic cannot succeed over a country of such immense extent.”¹ He quoted Montesquieu: “In a large republic there are men of large fortunes, and consequently of less moderation; there are trusts too great to be placed in any single subject; interests are divided... In a small [republic], the interest of the public is easier perceived, better understood, and more within the reach of every citizen; abuses have a lesser extent, and of course are less protected.”² When the Greek and Roman republics conquered vast territories, they turned into empires and lost their liberties.³

In classical republics, the representative had to live close to his principals, to learn each principal’s interests and sentiments, and to inform the principals frequently of pending legislation.⁴ The *res publica*, the “public things” could be concretely defined as the combination of all individual preferences, which the representatives, being intimately familiar with their principals, actually knew. A representative had to live among his principals, and faithfully reconcile and fulfill their interests above his own.⁵

In a democracy individuals would educate and influence each other’s preferences through deliberation, but this was a reciprocal and local matter, not a nationwide advertising or propaganda campaign to impose

¹ Gordon, *supra* note 6, gives excellent accounts of the constitutions of Athens, Rome, and Venice, especially with respect to the separation of powers.

¹ *Essays of Brutus*, I:2.9.11, from New York Journal (October 18, 1787), reprinted in H. Storing ed., *The Complete Anti-Federalist* (1981).

² Montesquieu at VIII:16(3),(4).

³ *Essays of Brutus*, at I:2.9.11.

⁴ This was arguably also true in local American politics and in some states. Under Pennsylvania’s first constitution, enactment of each and every piece of legislation first required representatives to inform constituents of its provisions, allowing them to read and discuss the statute, and then polling them. If as a result the actual provisions of laws were actually read, and the resulting informed comments of constituents were actually read by the representatives, this would have meant a far higher quantity and quality of information exchanged between constituent and representatives than would later occur in our national republic, except for certain interactions between lobbyists and Congressmen (it is not unknown for lobbyists to actually draft as well as deliberate at length over the actual legislation). However, this ideal of deliberation with constituents was probably not achieved even in a state, a republic intermediate in size between a city and a continent, and the Founders largely considered the Pennsylvania experiment a failure.

⁵ Whatever remains of actual individual interests in our vast republic, once they get filtered up to the national level, locality remains a powerful symbolic issue. Senate Majority Leader Tom Daschle was unseated from the Senate in the 2004 elections in part because his opponent John Thune campaigned on the claim that he Daschle was no longer living among his constituents in South Dakota. “He’s not the same guy who put his suitcase in his station wagon and drove his family to Congress back in 1978,” Thune said. “He now is an inside-Washington, D.C. guy who lives in a multimillion-dollar mansion. The broader question is, who is more in touch with South Dakota?” <http://www.nrsr.org/nrsrweb/races2004/sd/archive/article79.shtml>. See also <http://www.nationalreview.com/comment/clyne200410220927.asp>. Under our analysis, living in the district is the least of the problems -- it is the sheer number of constituents, and the resulting shallowness of the interactions between representatives and constituents, whether Democrat or Republican, whether face-to-face or remote, that is the problem.

preferences on strangers.⁶ Such a government “must at least be limited to such bounds as that the people can conveniently assemble, be able to debate, understand the subject submitted to them, and declare their opinion concerning it.” Since people cannot declare their consent in person, representatives “are supposed to know the minds of their constituents.”⁷ For Brutus, each person’s informed and effective control over his informed and motivated representative makes the crucial difference between being ruled by the “will of the whole” and “the will of one, or a few.”⁸ A relationship so intimate that a representative knows the concrete sentiments of each constituent is not possible in a large country.⁹ With a vote lost in a sea of votes, with a voice lost in an ocean of crashing waves, what happens to the unique needs of each individual after the national political process, which calls strangers “representatives”, gets through with it?

Brutus’ arguments are similar to those made over a century later against socialist economic planning by the Austrian school of economists, who argued that central plans could not take account of the diverse knowledge and preferences of people and would therefore under-perform market economies¹⁰. Essentially, for Brutus this argument also applies to allocating the *res publica*, the public goods. In the sphere of political knowledge and preferences (“sentiments”), the “town hall” model of democratic deliberation described by Brutus can conceivably allow minds to share most of their knowledge and sentiments, but such information quickly becomes compressed, abstracted, generalized, distorted, and finally lost as the deliberation must occur among more people. Brutus went on to describe problems for representation and deliberation created by the economic, cultural, and legal diversity of the United States”¹¹ The large number and wide variety of

⁶ In a democracy, the people’s will “is declared by themselves; for this purpose they must all come together to deliberate, and decide.” Brutus, *supra* note 62 at 2.9.13.

⁷ *Id.*

⁸ *Id.*

⁹ Representatives must understand and care about “the sentiments of the people: for if they do not know, or are not disposed to speak the sentiments of the people, the people do not govern, but the sovereignty is in the few.” In a large country, “it is impossible to have a representation, possessing the sentiments, and of integrity, to declare the minds of the people” without it being “too unwieldy”. *Id.*

¹⁰ F. A. Hayek, “The Use of Knowledge in Society” (1945), <http://www.econlib.org/library/Essays/hykKnw1.html> . “If we possess all the relevant information, if we can start out from a given system of preferences, and if we command complete knowledge of available means, the problem which remains is purely one of logic...however...The ‘data’ from which the economic calculus starts are never for the whole society ‘given’ to a single mind which could work out the implications and can never be so given.” In the sphere of politic knowledge and preferences (“sentiments”), the “town hall” model of democratic deliberation described by Brutus can conceivably allow most minds to share the most important such information, but such knowledge and sentiments quickly become compressed, abstracted, distorted, and finally lost as the deliberation expands to include larger groups of people.

¹¹ “[E]ach would be in favor of his its own interests and customs and, of consequence, a legislature, formed of representatives from the respective parts, would” be “too numerous to act with any care or decision.” Brutus at I:2.9.16.

constituents would lack knowledge of the acts of their representatives¹² and their representatives would lack knowledge of them.¹³

“[T]he great officers of government would soon become above the control of the people, and abuse their power to the purpose of aggrandizing themselves, and oppressing them.” When offices are “attended with great honor and emolument” they will be the objects of “ambitious and designing men,” such men “will be ever restless in their pursuit after [these offices]. They will use the power, when they acquire it, to the purposes of gratifying their own interest and ambition, and it is scarcely possible, in a very large republic, to call them to account for their misconduct, or to prevent their abuse of power.”¹⁴

As the gap grows between the local knowledge of the circumstances and interests of individual citizens, and the understanding of the same by government officials, the more “distant” that official gets from the citizen. The less a government official knows of these details, the more wasteful is the allocation of the *res publica*. The less informed citizens are of the detailed clauses and consequences of public laws, the greater the opportunities for abuse of the citizen’s life, liberty, and property by officials empowered by those laws. Especially now, in Internet age, this “distance” is not primarily due to physical separation, but is even more due to social separation and the diversity and number of constituents represented. We will call the gap in knowledge of the concrete interests between a government official and the persons impacted by his or her decisions as the *representation distance* of that government official.¹⁵ Classical city republics had small representation distances; modern national republics large representation distances. Brutus’ thesis can be recast as the idea that large representation distances are wasteful and destructive of liberty. The subsequent political success of the United States national government does not make him wrong. Our national government has come up with other ways in which concrete interests can be directly represented, such as political lobbying, ways that Brutus probably would have characterized as aristocratic, a “government of the few”, rather than a “republic”. The United States has also retained in many areas of the law the common law, which grows from the details of concrete cases.¹⁶

a. *The Tyranny of Legislators*

¹² “The confidence which the people have in their rulers, in a free republic, arises from their knowing them, from their being responsible to them for their conduct, and from the power they have of displacing them when they misbehave.” But in a large republic “the people in general would be acquainted with very few of their rulers: the people at large would know little of their proceedings, and it would be extremely difficult to change them.” It would also be difficult for voters to “be informed of the reasons upon which measures were founded.” Hence the government will, like a socialist economy, “be nerveless and inefficient” (and, as Brutus noted elsewhere, oppressive). *Id.*

¹³ The legislature in such a large republic “cannot attend to the various concerns and wants of the different parts.” It cannot be sufficiently numerous to be acquainted with the local conditions and wants of the different districts, and if it could, it is impossible it should have sufficient time to attend to and provide for all the variety of cases of this nature, that would continually be arising.” Brutus at I:2.9.19.

¹⁴ *Id.* at I:2.9.20.

¹⁵ The two main factors comprising representation distance are the amount of knowledge the representative has of the actual interests of each individual principal, and the degree of accountability, which is greater the more frequent the elections and the greater the knowledge of voters of the details and consequences of the representative’s actions, such as the actual clauses and consequences of statutes enacted. As these important details are abstracted away from, representation distance grows.

¹⁶ Both lobbying and the common law have a high degree of knowledge about the constituent (the lobbyists or the party to the case) but a very small degree of accountability (since judge nor lobbyist are directly elected), although arguably the target of lobbying must somehow have a high degree of accountability to the lobbyist, or the lobbyist wouldn’t bother.

That “the people” could perform acts “against their own interests” was “a paradox”, something that republican theory said wasn’t supposed to happen (Adams).¹⁷ Much of the impetus of the Constitutional Convention was the abuses of the newly powerful state legislatures, what Gordon Wood referred to as “the frightening discrepancy between people and their spokesmen.”¹⁸ Madison worried that the “impetuous vortex” of a legislature could draw all power to it.¹⁹

Locke warned that the “greater part” of humanity were “no strict observers of equity and justice.”²⁰, and legal tradition advocated for stability in the laws.²¹ For Bolingbroke, the representatives no less than the monarch himself could become despotic and thus might also lose their right to rule, and must also be externally checked in a variety of ways. He explained, “[f]reemen, who are neither born to the [monarchy and nobility], nor elected to the [Commons], have a right however to complain, to represent, to petition, and, I add, even to do more in cases of the utmost extremity. For sure there cannot be a greater absurdity, than to affirm, that the people have a remedy in resistance, when their prince attempts to enslave them; but that they have none, when their representatives sell themselves and them.”²²

b. Representation by Filtering

Madison noted that “the true distinction between [classical] republics and American governments lies in the total exclusion of the people, in their collective capacity, from any share in the latter.” However, unlike the classical republicans, he considered this to be “a most advantageous superiority.”²³ In a small republic, majorities can collude to oppress minorities.²⁴ Hamilton felt “sensations of horror and disgust” at the “distractions” with which the “petty republics of Greece and Italy” were “agitated”, along with the “rapid succession of revolutions.” He credited the “bright talents and exalted endowments” of those lands to their “favored soils” rather than to those very same governments.²⁵

Madison thought, used a theory of factions, derived from Hume,²⁶ who rejected classical republican theory. According to Hume’s theory, conflicting interests could be better reconciled if they were more diffused. Larger republics involve more difficult communications, which makes collusion by a majority faction to oppress minorities more difficult.²⁷ Furthermore, in larger districts there are a larger number of wise and just people from whom to choose the representatives.²⁸ Madison assumed that that larger elections would choose

¹⁷ The confusion of the singular and the plural (esp. treating “the people” as a singular, which creates the supposed “paradox” here) has caused no end of trouble and grief for our political system, but that is a subject for another time.

¹⁸ Wood at 28.

¹⁹ *The Federalist* No. 48 (James Madison).

²⁰ John Locke, *Second Treatise of Government* (Dover 2002), 57.

²¹ *Legis figendi et refigendi consuetudo periculosissima est*. The custom of fixing and refixing (making and annulling) laws is most dangerous. Bouvier’s Dictionary, *supra* note 24, “Maxims” (citing 4 Co. Ad. Lect.).

²² Henry St. James Bolingbroke, “Remarks on the History of England”

²³ *The Federalist* No. 63 (James Madison).

²⁴ *The Federalist* No. 10 (James Madison).

²⁵ *The Federalist* No. 9 (Alexander Hamilton).

²⁶ David Hume, “Of Parties In General”, <http://www.constitution.org/dh/pargener.htm> “Factions subvert government, render laws impotent, and beget the fiercest animosities amongst men...” “[T]hese weeds...rise more easily, and propagate themselves faster in free governments, where they always infect the legislature itself.” In a small republic, “[e]very domestic quarrel...becomes an affair of state,” so there personal factions arise most easily. On the other hand, “in despotic governments...the more powerful oppress the weaker with impunity, and without resistance; which begets a seeming tranquility in such governments.” Hume also spoke of factions arising from “affection”, i.e. “founded on the different attachments of men towards particular families and persons, whom they desire to rule over them.”

²⁷ *The Federalist* No. 10 (James Madison).

²⁸ *Id.*

these better people, but he admitted that “by enlarging too much the number of [voters], you render the representative too little acquainted with all the local circumstances and lesser interests.” He contrasted these interests, the concrete details of the lives of diverse people that Brutus valued, with the “great and national objects”, the abstract ideas that a national government would promote, and found more value in the national abstractions than in “lesser interests”.²⁹

In favor of filtering theory, the incorporation of fewer actual interests means the incorporation of fewer sinful desires of humans to steal from each other, to attack those of foreign customs they find threatening, and other such interests that may be expressed at the voting booth. Pure democracy brings out more of these human flaws than any other form of government. This was amply illustrated by the violations of property rights under the Articles of Confederation, the “tyranny of legislatures” that we have seen the Founders were trying to guard against, and many other episodes from democratic history.³⁰ Filtering cleverly masks and obliterates most of these sinful interests, all in the ironic name of “the people” who in actual practice are to be kept at a large representational distance.

For the Federalists, the “public good” became something abstract, something in the air, something involving the vast struggles between abstract classes such as North versus South, sea-coast versus inland, debtor versus creditor, labor versus capital, and the like discussed in newspapers and election-year mailers. It was these “great and national objects” that a carefully selected leader had mystical insight into, perhaps as a result of reading these newspapers as well as being promoted by them. No longer was the “public good” the immediate and detailed *res publica* of the ancient Greeks and Italians in their city assemblies or of the colonists in their town hall meetings. How much would the public good, as the undistorted combination of all actual individual goods, be distorted, or simply forgotten, by distant agents without the ability to learn the many and diverse particular needs of all their particular principals? When it came to delegating the law-making powers still further, to the executive branch, the new mystical mass-media idea of the “public good”, abstracted away from actual private interests, would again be invoked. The Anti-Federalists argued that there were concrete and real interests behind the façade of the Federalist “public good”, namely the private interests of an “aristocratic junto”.³¹ Such interests would be better served the greater the representation distance between the voter and the governmental official, if the representation distance (through lobbying, rather than voting) between the “junto” and the representatives could remain relatively small. Furthermore, the tendency of a small number of deliberating lobbyists to oppress each other, not to mention to oppress all the outsiders with no seat on K Street, might be as strong as the tendency of factions to oppress each other in local republics derided

²⁹ *Id.* Madison also observed that state and local governments could take care of the local concerns, while the federal government would take care of the national concerns. This assumes that the federal powers accurately define the national interests and are strictly enumerated, or that voters can reliably distinguish local from national interests, or both.

³⁰ For example, ancient democracies were considered to be more brutal in war than governments of other kinds. There is no room in this paper to sufficiently argue this claim, just an anecdote. During the Peloponnesian War when Cleon, the demagogic leader of Athens, whipped the crowd into a frenzy over the rebellion of Athens's ally, Miteline, and convinced them to vote in favor of massacring every man in the city and enslaving all the women and children. Within a few days the crowd relented and sent out a messenger ship to chase after the first ship and rescind the order. The messenger arrived too late to save the men, who had just been massacred per orders. One can only imagine what a direct democracy which could directly control nuclear weapons from the voting booth might accomplish. Thucydides, *History of the Peloponnesian War*. On the other hand, when it comes to oppressing their own populations, totalitarian governments, ranging from the French royal campaign against the Huguenots cited above to the 20th century tyrannies of communism and fascism, have been far worse than democracies, although the latter have not been completely free of such tendencies. *Korematsu*, Cherokee Indian case.

³¹ Their fears have arguably been confirmed by K Street and the phenomenon of “regulatory capture” studied by public choice theorists.

by Hamilton and Madison. Only the degree of such oppression, occurring on a national scale, might be proportionately greater. As we shall see, Federalists such as Sedgwick would promote broad delegations to President Washington and other executive officials, further increasing the representational distance between government officials and voters, while Republicans and wavering Federalists such as Madison would argue against such further delegation.

Another problem with the filtering theory is that it ignores the insight Brutus had about the greater ignorance of voters when representation distance is greater. Voters may pick less wise and less just representatives when they can only “meet” these politicians through the mass media rather than getting to know them personally. Yet another problem with the filtering theory is that it ignores the ancient wisdom of the Opposition Whigs about the corrupting influence of power. Even if a larger district elects a wiser and more just representative, that person will have correspondingly greater power and will be corrupted all the more quickly. A final problem is that the Federalists ignored the potential for *abstract* oppression. The coercive tools of government, taxation and remedies, are the tools whereby government can deprive persons of life, liberty, or property. If this is not done in the prevention of even greater losses of life, liberty, or property, these tools become the means of oppression. In contrast to the many details that must be incorporated into laws regulating citizens to make them a proper fit to actual diverse circumstances and interests, the use of taxation and remedies for the redistribution of property can be very general and abstract. Practically everybody who has unencumbered property can under threat of force convert it into money. Taxation and fines thus provide a very general means for majorities to deprive minorities of property. It requires no sophisticated collusion to implement such abstract oppression, just an ideological mass-media campaign. Furthermore, skilled lobbyists can collude to further their concrete interests and engage in oppression both abstract and concrete. Killing people and destroying property requires less military skill and coordination than pacifying a country intact, and the same is true in the more peaceful, if still coercive, realm of politics. Oppression requires less coordination than the protection of life, liberty, and property.

Delegation By Statute

a. The Non-Delegation Doctrine

Two maxims of law current at the founding were *delegata potestas non potest delegari* – a delegated authority cannot be again delegated,¹ and *delegatus non potest delegare* -- a delegate or deputy cannot appoint another.²

According to John Locke, “The legislative is ... sacred and unalterable in the hands where the community have once placed it; nor can any edict of anybody else, in what form soever conceived, or by that power soever backed, have the force and obligation of a law...”³ Furthermore, “[t]he legislative power 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...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...the legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have.”⁴

¹ Bouvier’s Dictionary, *supra* note 24, “Maxims” (citing 2 Co. Inst. 597; 5 Bing. N. C. 310; 2 Bouv. Inst. n. 1300).

² *Id.* (citing 2 Bouv. Inst. n. 1936; Story, Ag. 33).

³ Locke at XI:134.

⁴ Locke at XI:141. Of what does the legislative power consist? According to Locke, “[t]he legislative power is that which has a right to direct how the force of the commonwealth shall be employed for preserving the community and the members of it.” Locke at XI:143. For Montesquieu, the legislative power was the power to make the *leges*, or statutory law. “Montesquieu in England: his ‘Notes on England’, with Commentary and Translation – Commentary, translation, and annotations by Iain Ste The power to enforce and decide specific cases, on the other hand, was to rest in the executive and judiciary branches.

It not clear from Locke, however, whether *some* of the power may be transferred, or whether it may be transferred revocably; and if so how much of that power may be transferred before it constitutes “the” power of making laws. That Locke did not intend to remove all discretion from the executive is clear from his discussion about executive prerogative, highlighted earlier.

The Articles of Confederation expressly both allowed and limited Congress to delegate certain powers, at certain times, to the executive council (the "Committee of States"):

The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of the nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled be requisite.⁵

The U.S. Constitution does not address the issue directly. The main constitutional provision cited in support of the non-delegation doctrine reads simply, “All legislative Powers granted herein shall be vested in a Congress.”⁶ Another arguably relevant constitutional passage gives the President the duty to “take care that the laws be faithfully executed.”⁷ Implicit in this clause is that the laws are, in the first place, in a form that can be “faithfully executed.” If statutes are vague, or give open-ended discretion, how is the executive supposed to faithfully execute them, without usurping legislative power (“[a]ll” of which is given to the legislative branch) by making the laws itself? We will now turn to the discretion of the executive to interpret statutes, and how much power it can obtain thereby, before we turn to delegation proper.

i. Executive Discretion to Interpret Statutes

Before we reach the question of whether statutory language improperly delegates too much power or the wrong kind of function, it is very useful to first look at whether the regulation or discretion has actually exceeded the bounds defined by the statute – in other words, if the executive is taking more power than Congress has delegated, or taking on a function of a kind that Congress did not delegate. This is straightforwardly answered by two cases, which together create the rule that the executive can’t expand or contract statutory categories in ways that expand the class of forbidden behavior.⁸ However, those cases were arguably contradicted by another line of cases in which the judiciary defers to the expertise of the regulatory agency.

In *Morrill v. Jones*,⁹ the statute stated: “Animals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free [of duty], upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe.” The Secretary wrote a regulation stating that before a collector admitted such animals free he must “be satisfied that the animals are superior stock, adapted to improving the breed of the United States.” When Jones imported animals for breeding purposes, and Morrill, the collections agent, demanded the duties because he didn’t think the animals were superior, Jones sued to recover his money. The Court gave it to him, striking down the regulation. “The statute clearly includes animals of all classes,” wrote Chief Justice Waite. “The regulation seeks to confine its operation to animals of ‘superior stock’. This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe.” Arguably, the Secretary was clarifying a subjective test (“purpose”) with an easier to administer objective test (“superior stock”). However, under *Morrill*, such a clarification is *ultra vires* if its tendency is to

⁵ Articles of Confederation, art. IX para. 5.

⁶ U.S. Const. Art. I § 8.

⁷ U.S. Const. Art II.

⁸ These cases may now be limited by a line of cases arguing that deference be given to executive or independent agency interpretation. See e.g. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁹ 106 US 466 (U.S. 1882).

expand rather than contract the class of forbidden behavior.¹⁰ Such a rule makes eminent sense from a non-delegation perspective, where the measure of delegation is that of power over life, liberty, and property of potential law violators, and the function being delegated is rule-making that covers a general category, “animals of superior stock”. Making *leges*, a general positive rule, is a core legislative function, not to be delegated lightly, and certainly not to be taken by the executive where it has not been clearly delegated.

In *U.S. v. Eaton*,¹¹ the problem was a rule that added to a forbidden category. The rule, in other words, enlarged the persons subject to a statutory reporting requirement and potential fines. The statute -- along with the resulting regulations presumably advocated by the dairy lobby -- laid a large tax on oleomargarine, and expressly required manufacturers of oleomargarine to keep books for inspection by the tax collectors. The Secretary of Treasury then wrote a regulation that also required oleomargarine wholesalers to keep such books. In auditing, it is much easier to detect fraud if both sides of a transaction are keeping books -- simply compare the books of the wholesaler and manufacturer. The two companies would now have to collude to defraud the tax authorities. (This is, not coincidentally, similar in principle to the segregation of duties of the purchasing, sales, etc. cycles in corporations). So the regulation made eminent practical sense.¹² The problem was, it went beyond the statute by expanding the forbidden category. “The secretary of treasury cannot by his regulations alter or amend a revenue law ... much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of the department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted ‘in violation of a public law, either forbidding or commanding it.’¹³” Is the Court implying that such a regulation is not “law”, and thus cannot be made the basis for initiating criminal process, unless the alleged perpetrator already falls within the statutorily prescribed categories? “If Congress intended to make it an offense...it would have done so distinctly.” However, the court explained, “regulations prescribed by the president and by the heads of departments, under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.”¹⁴

Such rules of interpretation work well as a check on executive power when Congress and the courts cooperate in defining language clearly and interpreting it straightforwardly, respectively. The non-delegation doctrine proper is invoked when either side fails in this task. When Congress writes vague or overly broad language, it not only may delegate too much power or the wrong kind of function, in violation of “All legislative powers ... shall be vested in a Congress,”¹⁵ but it also may hinder the ability of the executive to “take Care that the laws be faithfully executed.”¹⁶ How can the President “faithfully execute” a law that is vague, or that is so broad as to allow execution nearly at whim? If Congress frustrates the executive’s ability to obey the Constitution, that is arguably as much a violation of the Constitution as if the President directly disobeyed the Constitution.

Prohibiting interpretations that expand legal categories to take more life, liberty, or property than another reasonable construction of the category would allow (under *Morrill*, *Eaton*, and the principle of least authority) is

¹⁰ *Incommodum non solvit argumentum* -- an inconvenience does not solve an argument: Bouvier’s Dictionary, *supra* note 24, “Maxims”; *quamvis aliquid per se non sit malum, tamen si sit mali exemple, non est faciendum*. -- although, in itself, a thing may not be bad, yet, if it holds out a bad example, it is not to be done. *Id.* (citing 2 Co. Inst. 564).

¹¹ 144 U.S. 677 (1892).

¹² But as in *Morrill*, an inconvenience does not solve the argument. *Morrill*, *supra*. Use of executive power can be convenient, or even necessary, but still not proper if not authorized by the statute.

¹³ *Id.* (citing Amer. & Eng. Enc. Law, 642; 4 Bl. Comm. 5).

¹⁴ *Id.* cf. *U.S. v. Hudson and Goodwin*, *infra*.

¹⁵ U.S. Const., Art. I § 1.

¹⁶ *Id.*, Art. II § 3.

not merely consistent with the “rule of lenity”. It also prevents improper delegation of legislative power via the following legal principles: *derivata potestas non potest esse major primitiva* -- the power which is derived cannot be greater than that from which it is derived,¹⁷ *nemo praesumitur donare* -- no one is presumed to give,¹⁸ and *potestas strict interpretatur* -- power should be strictly interpreted.¹⁹

ii . *Sloppy Language and the Principle of Least Authority*

Madison feared the sloppy use of language. “Besides the obscurity arising from the complexity of objects and the imperfection of human faculties, [language] adds a fresh embarrassment.” The “unavoidable inaccuracy” of terminology “must be greater or less, according to the complexity and novelty of the objects defined.”²⁰ While Madison feared the impact this would have on constitutional interpretation, the accuracy, or lack thereof, of terminology is also a major issue when it comes to statutory interpretation and the non-delegation doctrine, especially considering the complexity and novelty of issues when dealt with on a national scale.

We have seen how at the constitutional level, the principle of least authority is reflected in the Tenth Amendment. At a statutory level, the principle of least authority depends on a clear definition of the function, or “office”, to be performed, and specific definitions of the authorities over and remedies against life, liberty, or property available to the executive. If the function delegated by a statute is vague, then we must guess as to the amount of authority to give to the official. If we don’t give the official enough authority, then he might be unable to perform the function, or he might perform it too poorly resulting in a net loss of rights. Delegate too much authority, and we have taken on the risk of the abuse of that excess authority for too little gain in functionality. The sloppier the statutory language is, the more abusable excess authority we must give our officials, and the less we can actually expect them to get done.

Furthermore, specific language provides less room for discretion than general language. If the goals of a statute can be accomplished with more specific language, this is to be preferred, as the excessive generality supplies the official with excessive authority, which can be abused.²¹

Under the principle of least authority should construe statutory language as conferring the least amount of power necessary and proper (under the plain language meaning of those terms) to execute the statute. This was the approach we saw above in *Morrill* and *Eaton*, enforcing *derivata potestas non potest esse major primitiva* -- the power which is derived cannot be greater than that from which it is derived. The principle of least authority adds the idea that, when, unlike in *Morrill* and *Eaton*, a statute is genuinely vague or ambiguous, we must construe it as conferring only the most specific and limited powers consistent with its vague language. Thus, for example, if the statute’s purpose or “intelligible principle” can be construed in multiple ways, it should be construed as having the purpose or principle that requires the least authority to execute. The result may be similar to the “rule of lenity”,

¹⁷ Bouvier’s Dictionary (1856), “Maxims”. Also, *injuria non praesumitur*. A wrong is not presumed, *Id.* (citing Co. Litt. 232); *a verbis legis non est recedendum*, from the words of the law there must be no departure, *Id.* (citing Broom’s Max. 268; 5 Rep. 119; Wing. Max. 25); and *Augupia verforum sunt judice indigna* -- twisting of language is unworthy of a judge, *Id.* (citing Hob. 343) – even moreso is it unworthy and dangerous of an executive, who has the direct power to deprive the citizen of life, liberty, or property.

¹⁸ *Id.*

¹⁹ *Id.* As an alternative to voiding such regulations, rules of construction can sometimes be used to prune them back to the scope of the statute; e.g. *quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est*. -- when more is done than ought to be done, that shall be considered as performed, which should have been performed; as, if a man having a power to make a lease for ten years, make one for twenty years, it shall be void for the surplus. *Id.* (citing Broom’s Max. 76; 8 Co. 85).

²⁰ *The Federalist* No. 37 (James Madison).

²¹ *Dolosus versatur generalibus* – a deceiver deals in generals, Bouvier’s Dictionary, “Maxims” (citing 2 Co. 34); *Fraus latet in generalibus* -- fraud lies hid in general expressions, *Id.*; *Generale nihil certum implicat* -- a general expression implies nothing certain, *Id.* (citing 2 Co. 34); *In maxim potenti minima licentia* – in the greater power is included the smaller license, *Id.* (citing Hob. 159).

but the analysis here derives from representation and the separation of powers, not from the Sixth Amendment notice rights of the defendant. The principle of least authority in statutory construction should be used not only by the judiciary in interpreting the statutory language as applied to a specific case, but also by the executive in “filling in the details”²² of a statute by writing regulations.²³

Once we have so clarified the scope of power delegated by a statute, we must then ask whether that delegation of power in statutory language is consistent with the separation of powers, with the rights of representation and political accountability provided thereby, and with the Lockean idea, incorporated into the Constitution via the Ninth and Tenth Amendments, that a government should have no more power over life, liberty, or property than it needs to preserve the life, liberty, or property of citizens from each other or from foreign powers.

I. Delegation to the Executive in the Early Congresses

David Currie called the First Congress a kind of “continuing constitutional convention,” because so many of its members had helped to compose or ratify the Constitution, and because they were filling in the “great outlines” of governmental structure laid down in the Constitution.¹ The non-delegation doctrine, which was never expressly discussed during the Convention, would in the early Congresses be the subject of both extensive practice (the actual scope of powers the Federalist Congress delegated to Washington in a variety of early statutes) and extended debate over constitutionality.

I. His Highness, the President

During the Revolution, John Adams had called for an end to the “Idolatry of Monarchs.”^{2 3} In 1789 as Vice President, however, he instigated the formation of a joint committee to consider “what style or titles [if any] it will be proper to annex to the offices of the President and Vice-President of the United States.” The committee and the House agreed that no extra titles were needed, but a Senate committee proposed that the President be addressed as “His Highness, The President of the United States of America, and Protector of their Liberties.” The House stood firm and the Senate yielding, leaving the President with just his Article II title, “the President of the United States.”⁴

II. Delegation in Ius Gentium vs. Ius Civile Law

²² *Waymand v. Southard*. Note also the maxim, *de minimis non curat lex* - the law does not notice or care for trifling matters, *Id.* (citing Broom's Max. 333; Hob. 88; 5 Hill, N.Y. Rep. 170), suggests that at some point rules become trifling enough to not constitute laws.

²³ Since the executive and judiciary here are expounding a statute, not a constitution, the reasoning for loose interpretation given in *McCulloch v. Maryland* does not apply. However, the arguments we have seen for executive dispatch and flexibility should still be weighed against the principle of least authority. As with the rule of lenity, there is a distinction to be made between criminal and civil penalties; this distinction will be discussed *infra*.

¹ David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, (quoting John Marshall) at 3.

² David Hume had wondered at how ““It may seem unaccountable, that men should attach themselves so strongly to persons, with whom they are in no wise acquainted, whom perhaps they never saw, and from whom they never received, nor can ever hope for any favor. Yet this we often find to be the case... we are apt to think the relation between us and our sovereign very close and intimate. The splendor of majesty and power bestows an importance on the fortunes even of a single person. And when a man’s good-nature does not give him this imaginary interest, his ill-nature will, from spite and opposition to persons whose sentiments are different from his own. Hume, “Of Parties in General”, <http://www.constitution.org/dh/pargener.htm> at 6.

³ Wood at 48.

⁴ Currie, *supra* note 112 at 35-36.

President Washington was elected in 1788 with every elector casting a vote for Washington.⁵ Early Federalists Congresses gave him wide discretion in certain areas of military and foreign policy, while restricting him with very detailed legislation in other areas.

i. Commerce with the Indian Tribes

In 1790, Congress passed a statute “to regulate trade and intercourse with the Indian tribes.” Section 1 required those who wished to trade with Indians to obtain, from a superintendent appointed by the President, a license and post a bond “in the penal sum of \$1,000” (a hefty amount of wampum for its day, but not out of the ordinary for a civil penalty), to ensure compliance with “the true and faithful observance of such rules, regulations, and restrictions as are now, or hereafter shall be made for the government of trade and intercourse with the Indian tribes.” The superintendents and their licensees were to be “governed in all things touching the said trade and intercourse, by such rules and regulations as the President shall prescribe”. The President could at his option allow persons to trade with “tribes surrounded in their settlements by citizens of the United States” without a license.⁶ If a trade transgressed on of these rules or regulations, the superintendent had power to revoke his license and to bring a civil suit up to the amount of the bond.⁷

In this sweeping language, “for the government of trade and intercourse with the Indian tribes” arguably constitutes an “intelligible principle” in the modern sense,⁸ and Congress but this statute is perhaps not much less than the what David Currie describes it as, a delegation of “virtually all of Congress’s own authority over Indian commerce.”⁹ The delegation is, however, in the area of foreign relations and limited to civil penalties, and the Presidential rule-making is easily reversible since Congress could itself later add to or subtract from the “rules, regulations, and restrictions” without disrupting the other structures it set up in this statute. Furthermore, the statute goes on to state more specific rules governing trade and other individual relations with Indians: forbidding land sales from Indians within the United States outside of a treaty,¹⁰ making crimes against Indian(s) subject to the same punishments as crimes against a citizen or white inhabitant,¹¹ and establishing certain procedures for prosecuting the same.¹²

ii. Naturalization

The function of naturalization was not given to the President; it was made a judicial, rather than an executive function. A wide degree of discretion was implicit in the statute, which provided that any free white alien having resided in the U.S. for two years could become a citizen by proving “good character” and promising to “support the constitution” to “any common law court of record.”¹³

iii. Patents

Under the first patent statute, any two out of three of the Secretary of State, the Secretary of War, and the Attorney General could grant patents if they deemed the inventions “useful and important”, while district courts

⁵ *Id.* at 4.

⁶ 1 Cong. Sess. II Ch. 33; 1 Stat. 137 § 1 (1790).

⁷ *Id.* at § 2.

⁸ *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394 (1928) would define the “intelligible principle” test for the non-delegation doctrine.

⁹ Currie, *supra* note 113 at 86. The author of this paper also discovered the statutes discussed in this section in Currie, but I have consulted Statutes at Large and added to Currie’s account for several of them, and hopefully without adding errors of my own corrected Currie’s citations, in which I found some ambiguities and errors.

¹⁰ 1 Cong. Sess. II Ch. 33; 1 Stat. 137 at §4.

¹¹ *Id.* at §5.

¹² *Id.* at §6.

¹³ 1 Cong. Sess. II Ch. 3; 1 Stat. 103 (1790).

were given the power to, upon motion of a person seeking to invalidate the patent, to do so for any patent obtained fraudulently.¹⁴

iv. *Copyrights*

Under the first copyright statute, a claimant to a copyright had to deposit two copies of the work to be claimed. Congress deputized the district courts and the Secretary of State to accept and retain these copies.¹⁵ This is an interesting overlap of duties given to two branches in a situation where such redundancy reduces rather than increases the chances of collusion to abuse the legal process. Here, due to the redundancy, if one branch falls down on the job, the other retains the evidence of that breach as well as the evidence of the right infringed in their records.

v. *Crimes*

1. *Defined by Congress*

The first Congress under the Constitution took advantage of its Article I powers to pass statutes defining crimes for treason¹, misprision of treason,², piracy, mutiny, and certain other crimes on the high seas,³ counterfeiting,⁴ theft or falsification of federal court records,⁵ local criminal laws governing United States territory such as forts and the District of Columbia, and a variety of other federal crimes. In each case a specific (and harsh, by modern standards) punishment was specified. Nor did Congress give the executive any express ability to write rules and regulations to further clarify the statutes; much less the somewhat open-ended ability to regulate granted to the President for commerce with the Indians.

2. *Common Law*

The very short history and demise of federal common law crimes also sheds some light on the non-delegation doctrine. Some federal circuit cases during the 1790s supported the existence of such crimes, but *United States v. Hudson and Goodwin*⁶ in 1812 did away with them. Justice Johnson declared that “in no other case for many years has [federal common law crime] jurisdiction been asserted; and the general acquiescence of legal men shews the prevalence in favor of the negative of the proposition.”⁷ The main justification for Johnson’s opinion was the doctrine of enumerated powers. Many common law crimes, such as the supposed crime of libel in *Hudson*, go beyond the enumerated powers of Congress, and Congress cannot create inferior federal courts with jurisdiction over legal areas in which Congress has no power to legislate. Johnson also declared that “the legislative authority of the Union must first make an act a crime, affix a punishment for it, and declare the Court that shall have jurisdiction over the offence” before a person can be convicted of a crime in federal court, with the exception of certain crimes necessary for the court to enforce remedies, such as contempt of court.⁸

The expressed holding of *Hudson* could have been narrower, or might even had decided the case the other way, and still satisfied its rationale. That is, some common law crimes, beyond those like contempt necessary to enforce remedies, might have been found to be necessary and proper for the execution of Congress’ enumerated powers. Proponents of a federal common law crime for libel against the officers of the federal government had argued that such a crime was implied by the very existence of the federal government: “upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation,

¹⁴ 1 Cong. Sess. II Ch. 7; 1 Stat. 109 (1790)

¹⁵ 1 Cong. Sess. II Ch. 15; 1 Stat. 124 § 3, 4 (1790)

¹ 1 Cong. Sess. II Ch. 9; 1 Stat. 112 § 1 (1790)

² *Id.* at § 2.

³ *Id.* at §§ 8-13.

⁴ *Id.* at § 14.

⁵ *Id.* at § 15.

⁶ *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812).

⁷ *Id.* at 32.

⁸ *Id.* at 33.

necessarily results to it.”¹ As another example, even if Congress had never passed an anti-counterfeiting statute, a common law crime of counterfeiting might have well have been found to be a necessary and proper common law to execute Congress’ enumerated power to coin money.²

However, the Court chose to hold more broadly. Perhaps this holding was implicitly related to the necessary and proper clause. Congress, not the executive or the courts, has the power to “make all Laws which shall be necessary and proper for carrying into Execution of the foregoing powers.”³ Again we see the power to create “all” laws ascribed to Congress only. The necessary and proper clause implies that the executive does not have the power to make any laws *even if* those laws are necessary and proper for carrying into execution a law Congress has passed. Nor could the courts, through common law, have a similar power to allow the executive to enforce laws not made by Congress. If we take the modern view that common law also involves “making” the law, this analogy implied by *Hudson*’s broad holding becomes an identity. Such an analysis explains why the holding of *Hudson* was broader than its rationale, and suggests that the necessary and proper clause is another basis for the non-delegation doctrine. If the executive could make laws necessary and proper for carrying into execution the statutes passed by Congress, then Congress would no longer be making “all Laws” necessary for that execution. This analysis also suggests that the non-delegation doctrine should be much more strictly enforced for crimes than for civil actions, since a federal civil common law continued to exist long after *Hudson*.⁴

There are strong arguments for maintaining a strong common law tradition, at least for civil law at a state level. According to Madison and Hamilton, the main source of wisdom in the legal system in the United States was to be the filtering process of the prescribed methods for choosing officials. But Bernard Mandeville wrote in 1714 on the wisdom of accumulated tradition: “we often ascribe to the Excellency of Man’s Genius, and the Depth of his Penetration, what is in Reality owing to length of Time, and the Experience of many Generations, all of them very little differing from one another in natural Parts and Sagacity.”⁵ Very few laws are the work of a single generation, much less of “Men of very bright Parts and uncommon Talents”. Good laws are rather the “the joynt Labour of several Ages....The Wisdom I speak of, is not the Offspring of a fine Understanding, or intense Thinking, but of sound and deliberate Judgment, acquired from a long Experience...and a Multiplicity of Observations.”⁶ The abstractions resulting from the long evolution of the common law over many concrete cases and narrow holdings, as opposed to the shallow and free-floating abstract categories of national issues and factions that dominate the political debates over statutes, (and as opposed to the tendency of some modern judges to use policy arguments to “legislate from the bench”) are essential to our legal system. Such may also be said of the Constitution itself, insofar as it incorporated wisdom learned over long ages in Britain, the Netherlands, the medieval Italian republics, the ancient republics of Greece and Rome, and other related predecessors, rather than being reasoned from scratch.

Furthermore, statutes themselves may derive much of their meaning from the concrete cases adjudicated by the courts. Madison wrote that “all new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning is liquidated and ascertained by a series of particular discussions and adjudications.” Congress lacked concrete knowledge when they made the laws, so the courts must fill it in using the slowly accumulating process of common law. Federal judges, appointed for life, and juries, appointed for particular cases, have a very small degree of accountability to the citizens over whom they enforce laws. However, since these judges and juries come to grips

¹ *Id.*

² U.S. Const. art. I § 8.

³ *Id.*

⁴ Federal common law in civil cases was much later substantially restricted, but not eliminated, in *Erie Railroad Co. v. Tompkins*, 304 US 64 (1938).

⁵ Bernard Mandeville, *The Fable of the Bees*, Third Dialogue, http://oll.libertyfund.org/Texts/LFBBooks/Mandeville0162/FableOfBees/HTMLs/0014-02_Pt02_Part2.html.

⁶ *Id.* at Sixth Dialogue, http://oll.libertyfund.org/Texts/LFBBooks/Mandeville0162/FableOfBees/HTMLs/0014-02_Pt03_Part3.html

with the concrete details of actual cases, across many cases they feed a high degree of concrete, empirical knowledge into the laws that are “made” in the process of common law.

i. The Sedgwick Amendment Debate

a. The Post Office and 18th Century Media Empires

The colonial era issue of open carriage illustrates the political nature of the 18th century postal system and its interrelationship with the main mass media organ of the era, the newspaper. It also illustrates the potential of the postal powers as a tool for censorship, or at least for coercive influence by government over the content of newspapers.

In the 1730s Benjamin Franklin and Andrew Bradford owned competing newspapers in Philadelphia. Bradford was also the Postmaster of Philadelphia, and officially denied Franklin the right to mail his newspapers. Franklin temporarily got Colonel Alexander Spotswood, the postmaster of the American colonies, to order Bradford to carry competing newspapers. However, there were less official ways of making it hard for Franklin to get his papers through. Franklin still had to bribe the postal riders. Franklin worried that, besides the expense, “it was imagined [Bradford] had better opportunities of obtaining news, [and] his paper was though a better distributor of advertisements than mine.”¹

In 1737 Col. Spotswood kicked out Bradford and installed Franklin as Postmaster of Philadelphia. Franklin wrote that he “found it of great advantage, for though the salary was small, it facilitated the correspondence that improved my newspaper, increased the number demanded, as well as advertisements to be inserted, so that it came to afford me a very considerable income.”²

Three years later, Bradford hired away John Webbe, an employee of Franklin’s, and starting a competing general-interest magazine. Franklin denounced his employee’s betrayal in his newspaper, and banned Bradford from the mails. Webbe responded by announcing the ban in Bradford’s paper. There ensued a newspaper debate on open access. Franklin responded by saying that Bradford had already been officially banned. Webbe retorted that Franklin had allowed his riders to continue to carry it unofficially, but now he was actively suppressing the carriage. Moreover, Webbe wrote that Franklin had allowed unofficial carriage because it motivated Bradford to not printing anything too critical of Franklin. “He had declared that as he favored Mr. Bradford by permitting the Postman to distribute his Papers, he had him therefore under his thumb.”³

In the new national republic, concrete interests were replaced by abstract, ideological interests. The newspaper was the main way in which these abstract ideas were promulgated -- by which voters would learn about binary labels such as “Federalist” and “Republican”, and about which abstract issues, e.g. the English versus the French, they stood for. The franking privilege, by which Congressmen could use the mails free of charge, was a major way for representatives to sell themselves to their constituents. Such mail would be full of the abstract accomplishments of the representative -- rarely, if ever, the actual text of laws, much less the details of how such laws would be applied to various cases. The glowingly and abstractly described statutes, the franked mail would proclaim, would produce very important, if rather general and vague, benefits to the constituents. Such political communications depended on the postal system to reach its audience.

a. The Postal Statute and the Sedgwick Amendment

In the first Congress after ratification, the postal bill had, as originally drafted, empowered the President to decide where to establish post offices and post roads. This language was stricken after an unidentified representative objected: “This is a power vested in Congress by an express clause of the Constitution, and therefore

¹ Walter Isaacson, *Benjamin Franklin, An American Life*, pg. 115. The two references given therein for this and the following two quotes are Walter Isaacson, “Info Highwayman”, *Civilization* (Mar. 1995) at 48; Benjamin Franklin, *Autobiography of Benjamin Franklin*, (New York: Penguin Putnam 2001) at 114.

² *Id.*

³ *Id.* at 116.

cannot be delegated to any person whatever.”⁴ The final bill directed “[t]hat there shall be appointed a Postmaster General; his powers and salary...and the regulations of the post office shall be the same as they last were under the resolutions and ordinances of the late Congress.” It established the Postmaster General to be under the authority of the President, “in performing the duties of his office, and in forming contracts for transportation of the mail.”⁵ It also listed specific postal roads.

In the second session (1790) a new bill,⁶ defining an expanded number of postal roads, was reported out of committee, and the debate resumed. This bill, and a proposed amendment to it by Rep. Theodore Sedgwick, stirred up the first major debate over the constitutionality of delegation of legislative power, and still perhaps the most substantive debate on the issue in United States history. The participants included James Madison of Virginia, Elbridge Gerry of Massachusetts, Rep. Sedgwick of Massachusetts,⁷ Samuel Livermore of New Hampshire,⁸ John Vining of Delaware,⁹ and Alexander White of Virginia¹⁰, all of whom had previously served in the Continental Congress. Madison and Gerry had actively participated in both the Constitutional Convention of 1787 and their respective state ratifying conventions. Livermore, Sedgwick, and Thomas Hartley of Pennsylvania had been delegates to their states’ conventions to ratify the U.S. Constitution.¹¹ Livermore was also chief justice of the New Hampshire Supreme Court from 1782 until 1789. John Page had fought with Washington, was a delegate the Virginia state constitutional convention in 1776, and later would become the Governor of Virginia.¹²

The debate started when Rep. Sedgwick moved to strike out all the language in the bill, reported from committee, which designated specific post roads (i.e., section 1) and insert “by such routes as the President of United States shall, from time to time, cause to be established.”¹³

a. Non-Delegation as a Constitutional Question

Given that no express phrase of the constitution forbids partial revocable delegation of legislative powers, was non-delegation even a constitutional issue? Rep. Madison argued that “[t]here did not appear to be any necessity for alienating the powers of the House; and if this should take place, it would be a violation of the Constitution.”¹ Rep. Hartley agreed: “The Constitution seems to have intended that we should exercise all the powers respecting the establishing of post roads as we are capable of.” However, nobody on either side of the debate actually cited any part of the constitution except the enumerated power of Congress “[t]o establish Post Offices and post Roads.”² Rep. Robert Barnwell of South Carolina said that he was “astonished” that the constitutionality of Sedgwick’s amendment was questioned.

⁴ *Id.*, (quoting from 2 Annals at 1579 and citing U.S. Const., art. I, § 7, clause 7: “The Congress shall have power...to establish post offices and post roads.”). Note – Currie is citing a different pagination of Annals than my online reference.

⁵ 1 Cong. Sess. I Ch. 16; 1 Stat. 70.

⁶ The bill (or something largely resembling it, with a detailed list of postal roads) would not be passed until 1792. 2 Cong. Sess. I Ch. 7; 1 Stat. 232 (1792), as Congress continued the debate over postal roads, defined in *Id.* § 1 (see attachment).

⁷ http://www.fact-index.com/t/th/theodore_sedgwick.html

⁸ <http://www.seacoastnh.com/framers/livermore.html>

⁹ <http://www.famousamericans.net/johnvining/>

¹⁰ <http://www.famousamericans.net/alexanderwhite/>

¹¹ <http://www.famousamericans.net/thomashartley/>.

¹² <http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000018>

¹³ Annals of Congress, House of Representatives, 2nd Congress, 1st Session, pg. 229, currently at <http://memory.loc.gov/ammem/amlaw/lwac.html>.

¹ *Id.* at 238-239.

² U.S. Const. art. 1 § 8. The House reporter, however, wrote in a style that sounds like he was paraphrasing the speeches of the representatives (this means that quotes reported here from the Annals are actually this paraphrasing). A possibly lengthy speech by Elbridge Gerry was almost entirely omitted. So it is possible that a brief citation to a clause of the Constitution would be elided by the reporter.

b. *Laws as Principles*

Rep. Sedgwick argued that “in this, as in every other subject, he thought it sufficient that the House should establish the principle³, and then leave it to the Executive to carry it into effect.”⁴ Sedgwick agreed that “it was impossible to precisely define a boundary line between the business of the Legislative and the Executive;” but “he was induced to believe, that as a general rule, the establishment of principles was the peculiar province of the former, and the execution of them of the latter.”⁵ “The whole purpose, in his opinion, is answered, when the rules by which the business is conducted are pointed out by law...”⁶

Rep. Livermore, by contrast, “did not think they could with propriety delegate that power, which they were themselves appointed to exercise. Some gentlemen, he knew, were of the opinion that the business of the United States could be better transacted by a single person than by many; but this was not the intention of the Constitution.”⁷ Rep. Madison agreed that “as to the second section of the bill, if it requires amendment, “it can be rectified when it comes before us.”⁸

c. *The Divisibility and Specificity of Delegation*

Rep. Egbert Benson of New York, while also cautioning “against delegating the powers of the legislature to the Supreme Executive,” he noted “attempting a definition of their powers, or determining their respective limits ... was extremely difficult to do.”⁹

Congress, argued Sedgwick, is empowered to coin money, “and if no part of their power be delegable, he did not know but they might be obliged to turn coiners, and work the Mint themselves.”¹⁰ Rep. Bourne thought the amendment constitutional, noting that the constitution speaks in “general terms” about “post roads” and “post offices” “as it does of a mint, excises, etc. Hartley replied that under the bill “the minutiae are submitted to [the Postmaster General]”, presumably referring the location of post offices, contracts for residual post roads, and the many details of the post office trade left to the executive.

Rep. Page took the *reduction ad absurdum* in the opposite direction, suggesting that, if the present amendment passed, he would propose another “which will save a deal of time and money, by making a short session...for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction.”¹¹ Rep. Madison opined, “However difficult it may be to determine with precision the exact boundaries of the Legislative and Executive powers,” the arguments for the amendment “admit of such construction as will lead to blending those powers so as to leave no line of separation whatever.”¹²

³ *Principium est potissima pars cujusque rei*. The principle of a thing is its most powerful part. Bouvier’s Dictionary, “Maxims” (citing 10 Co. 49). Samuel Johnson’s Dictionary (1755) defined “principle” as “1. element, constituent part, primordial substance,” “2. Original cause,” “3. Being productive of other being; operative cause,” “4. Fundamental truth; original postulate; first position from which others are deduced.”, “5. Ground of action; motive,” “6. Tenet on which morality is founded.” The Johnson Dictionary Project, <http://www.fab24.net/jd100203/>.

⁴ Annals, *supra* note 152 at 229.

⁵ *Id.* at 239-240.

⁶ *Id.* at 230-231.

⁷ *Id.* at 229-230.

⁸ *Id.* at 238-239.

⁹ *Id.* at 239.

¹⁰ Compare *tractent fabrilia fabri*. Let smiths perform the work of smiths. Bouvier, “Maxims” (citing 3 Co. Epist.).

¹¹ Annals, *supra* note 152 at 233-234.

¹² *Id.*, pg. 238-239.

Rep. Sedgwick introduced what we might call the Zeno-Sedgwick paradox of delegation.¹³ What does it mean to say that a “post road” is “established by law”? “No gentleman had contended for carrying into execution the principles they attempted to establish, to an extent which they would go. ‘That no road can be a post road but such as shall be established by law.’ The bill establishes the road from place to place [for example, from Maine to Georgia], leaving the intermediate distance untouched; as for instance, from Boston to Worcester. Between those two points is, or is not, a post road, if the bill should become law, established?” Sedgwick declared that he could find no “well-founded distinction” between delegating all the choices of intermediate routes, given the two endpoints defined in the committee bill, and delegating the choice of the entire route, via his amendment. “All the objections that had been made [to Sedgwick’s amendment] would also apply to [the committee bill]”.¹⁴ The non-delegation doctrine was, it seems, disproved by *reductio ad absurdum*, but the argument was simply the converse of the representative who argued that, if the delegation of power of this amendment was constitutional, then any delegation was constitutional, and Congress might just as well delegate all its power to the President and spend the rest of the session on vacation.

Both extremes are absurd – there must be a non-delegation doctrine, and it must lie somewhere between these two extremes.¹⁵ No one, however, has found a clear and general rule indicating where, and it is highly unlikely that such a rule will be found. Instead, the best approach may be a case-by-case analysis based on the factors considered in this paper, as outlined in the Conclusion.

d. *What is “Power”, and How Much of It Are We Giving Away?*

Madison compared the delegation problem to the power of creating executive offices. Madison argued that the Constitution “has not only given the Legislature the power of creating offices, but it expressly restrains the Executive from appointing officers, except such as are provided by law....the President is invested with the power of filling those offices; does it follow that we are to delegate to him the power to create them? Madison’s comment suggests another way to measure “power” – by the number of new officers, or even just new government and contract employees, who will be needed to execute the legislation.

Rep. Sedgwick paraphrased Madison’s argument as follows: “that the creation of offices was by the Constitution confined solely to the Legislature.”¹⁶ This position was undoubtedly just, if by it was meant ‘that the powers and duties of offices must be defined by law.’ But he understood the gentleman to extend his meaning much further, and to have declared, in substance, ‘that all offices, however subordinate and dependent, must be numerically provided for by law.’¹⁷

Madison’s comparison suggests that another factor in weighing delegation problems may be the number of new offices or positions that the statute gives the executive power to create. Another way to measure power, as we have seen, is the power given to said officials over the life, liberty, and property of citizens. If a government

¹³ Zeno, a classical Greek philosopher, came up with the following paradox: if you run half the distance the finish line in non-zero amount of time, and then half the remaining distance in non-zero amount of time, and so on, then there are an infinite number of steps to the race, each of which take non-zero time to finish, and therefore you will never finish. Zeno came up with many such paradoxes involving the infinite subdivision of the finite. See also 9 Co. 45 – *Infinitum in jure reprobatur* -- that which is infinite or endless is reprehensible in law, and *quod non habet principium non habet finem* -- what has no beginning has no end. Co. Litt. 345, quoted in Bouvier’s Law Dictionary, “Maxims”.

¹⁴ Annals, *supra* note 152 at 239-240.

¹⁵ *Probatis extremis, praesumitur media*. The extremes being proved, the intermediate proceedings are presumed. Bouvier’s Dictionary, “Maxims” (citing 1 Greenl. Ev. 20.)

¹⁶ Annals, *supra* note 152 at 239; emphases in the original replaced by single quotes here.

¹⁷ *Id.* at 239-240. Although this sounds extreme to modern ears, it is not inconsistent with the Constitution. Congress may vest the appointment of officers in the President, but the Constitution, and even Hamilton’s interpretation of it, does not say that the executive has any power create new offices however subordinate. *The Federalist* No. 75 (Alexander Hamilton).

employee has no such power, it might be considered a relatively innocuous delegation of power. However, conceivably all such employees at least have this power indirectly in the ability to gather evidence for and influence those officials which do have this power. Furthermore, the degree of power over property varies with the amount of that property at stake, and power over liberty is more dangerous than that over property, and over life the most dangerous power of all. This suggests, for example, that those aspects of foreign policy directly involving war powers (in contrast to, for example foreign trade) should be more constrained by statute than the relatively free hand given to the President in trade with foreign nations and other more peaceful aspects of foreign policy.

a. Residual Discretion and Choice of Post Offices

The committee reporting the bill, Sedgwick argued, had already implied the constitutionality of his own amendment with another provision of the bill – “it shall be lawful for the Postmaster General to establish such other roads as post roads, as to him may seem necessary.” “If the power was altogether indelegable, no part of it could be delegated; and if a part of it could, he saw no reason why the whole could not.”¹ The opponents of his amendment might have replied that such delegation is a judgment call, based on the variety of factors discussed in this debate. Just as they need not define the local details of every route, they may leave the addition of at least some routes, the choice of which is constrained by the choices already set down by Congress.²

Rep. Egbert Benson of New York wondered why the constitutionality of Sedgwick’s amendment was denied, when there was “not a single post office designated in the bill.”³ Rep. Livermore replied that if there was any constitutional defect in the second section of the committee bill, [leaving the appointment of deputy postmasters and branching offices to the Postmaster General], it could be amended when they came to it, but it was Mr. Sedgwick’s amendment to the first section, to allow the President to choose the routes for post roads, that was under discussion; the argument from the supposed constitutionality of the second clause to the constitutionality of the current clause was really intended to obstruct the bill from passage. .⁴ The opponents of Sedgwick’s amendment might have replied that, given that the post roads were already defined, the discretion to define post offices was severely constrained -- the choice of one by the Congress practically dictated the choice of the other.

The severe constraints on the “design space” for the postal system provided by the specifications of this bill went well beyond Sedgwick’s or the modern idea of a mere “principle”. The contrast between the postal act as proposed (and later as passed in 1792) and Sedgwick’s amendment are like the difference making farmers themselves build dams and irrigation canals, as well as pumps and pipes, versus other entities building the dams and canals and leaving just the placement of the pumps and pipes to the farmers. Just because the farmers can extend the reach of the system with pumps and pipes does not mean it makes sense to delegate to them the entire design of the system.

b. Danger of Executive Abuse of Power

Abuse of power is a most delicate subject; whenever discussed one runs the risk of gravely insulting the current member of the office one claims might be abused. The standard style, then and more recently, is to be sure to flatter the office holder before raising the potential for the abuse of that office.

Livermore also feared censorship -- “If the post office were to be regulated by the will of a single person, the dissemination of intelligence might be impeded, and the people kept entirely in the dark with respect to the

¹ *Id.*

² The bill when eventually enacted specified that the Postmaster General could contract to private persons for “extending the line of posts” for “terms not exceeding eight years”; during such contract these lines would be considered as post roads. Such choice was constrained by the caveat that “no such contract shall be made, to the diminution of the revenue of the general post-office...” 2 Cong. Sess. I Ch. 7; 1 Stat. 232 § 2.

³ *Annals, supra* note 146 at 239.

⁴ *Id.* at 238-239.

transactions of Government.”⁵ As we have seen, the coercive used of the postal system by the government which ran it, whether for political ends or just to favor particular newspapers with commercial advantage, was an all too real possibility during this era.

Rep. Hartley argued that “if the amendment takes place, the office as well as the revenue will be thrown back to the executive, who may increase the roads and offices as far as the revenue will go.” “No one in the United States has greater respect for the President than myself,” but “we must not suppose that this country will always remain incorrupt.”⁶ Rep. Livermore argued that an officer invested with the whole power, might engage in empire-building – “might branch out the offices to such a degree to make them prove a heavy burden to the United States.”⁷ Hartley then recommended at least putting a sunset provision into Sedgwick’s amendment,⁸ and Rep. Bourne said this would be sufficient.⁹

Rep. White feared “[s]uch advances toward Monarchy, if not checked in season...,” and a concentrated power of patronage: “At the time of general election, for instance, how easy would it be for [a future President] to dictate to particular towns and villages, ‘If you do not send such a man to Congress, you shall have no post office; but if you elect my friend, you shall have a post office, and the roads shall be run agreeably to your wishes.’” He also noted the power to intercept or block letters and newspapers, “checking the regular channel of information throughout the country.”¹⁰

Rep. Sedgwick claimed to be uninfluenced by the “preeminently great and good character” of President Washington, “for he had always considered that, with sagacious minds, that should be the season of political caution, when the Executive was in the hands of one to whom all hearts justly bowed.” In the present case, “he thought an Executive officer, responsible to the public for the performance of an important and interesting trust, would inquire with more scrupulous caution, and decide with more justice, than could be expected from a popular assembly.”

The representatives, in their politeness and respect for President Washington, failed to mention the many abuses of the executive power which the colonists had rebelled against or many warnings of political philosophers who inspired the Constitution and who, as we have seen, warned about the temptations to abuse power and generally favored the rule of law over executive discretion. More recent history, mostly outside the United States but some right at home, have again proven the truth of their warnings.

The executive has his own interests, and bureaucracies have their own interests, and in many respects these diverge sharply from the interests of “the people” they claim to represent. Bureaucrats want to increase their salary and power. Collectively, this translates into increasing the tax revenues from and increasing their power over people’s lives. Indeed, this is just the trajectory that American history has taken since the founding. Colonial Americans revolted against tax rates that were far lower, and regulations which were far fewer and less intrusive, than modern taxes and regulations.

The concerns over executive power expressed these political philosophers and by the representatives in this debate, and demonstrated by history since, strongly suggests caution when delegating power in any area where that power, when combined with the executive power, might be used to abuse citizens, taking away their lives, liberty, or property, or, as here, might be used to suppress free speech and the free flow of political information.

c. *Representation of Interests*

⁵ *Id.* at 229-230.

⁶ *Id.* at 231-232.

⁷ *Id.* at 229-230.

⁸ *Id.* at 232-233. The eventual bill would both specify a large number of post roads and put a maximum eight year sunset on contracts let by the Postmaster General that extended the post roads.

Supra note 171.

⁹ *Id.* at 232-233.

¹⁰ *Id.* at 233.

Rep. Sedgwick worried that the representatives' "opinions were liable to be biased by local interests..."¹¹ Rep. Sedgwick, possibly recalling the "tyranny" of the state legislatures in issuing paper money, repudiating debts, etc. saw the unfiltered reflection of real and actual interests as a problem, in contrast to Brutus and other classical republicans, who thought that accurate representation of such local interests was essential to a free republic. As we have seen, Brutus thought representatives should "know the minds of their constituents."¹² This knowledge of the "sentiments of the people" made for classical republicans the difference between being ruled by the "will of the whole" and "the will of one, or a few."¹³ Rep. Livermore thought that reflection of local interests was essential to their function as representatives, that government should be "administered by Representatives of the people's choice; so that every man, who has the right of voting, shall be in some measure concerned in making every law for the United States." Representation should not leave behind actual local interests but should, to the extent possible, reflect them. If Congress delegated this power to the executive, this actual representation would almost entirely disappear, since the representatives collectively had a much greater knowledge of these actual interests, and could thus keep "every man ... in some measure concerned in making every law." Hartley saw the House, not the executive, as the main representatives of the people -- "We represent the people...and... ought not to delegate the power to any other person."¹⁴

Rep. Elbridge Gerry's replies to the arguments in favor of the motion are, very unfortunately, lost from the record. He concluded by claiming that diffusion of knowledge via the posts was as important to the inland inhabitants (presumably favored by road plan in the bill) as to the commercial interests (presumably favored by President Washington), and with a substantive comment to the effect that the postal revenues would increase in the future, making up for the costs of the additional roads proposed in the bill.¹⁵ Rep. John Steele, a member of the committee who drafted the bill, defended the postal road plan, claiming they had laid out the routes "for the general advantage of the United States, rather than to accommodate a few trading places only on the sea coast." Steele feared that a coastal President, with a primarily coastal cabinet, would reflect the interests of the coast, not of the entire country. Congress, not the President, represented the interests of the entire country; the executive, being singular, despite being elected by a majority of electors might after the election represent the actual interests of just a faction.

Rep. White complained that nearly 500,000 inhabitants west of the Potomac in Virginia were without a single post road.¹⁶ Mr. White implied that the coastal executive was neglecting the inlands.¹⁷ Alternatively, one might look at this as an early example of pork barrel -- these inhabitants would get postal roads, not because they could pay for the service themselves with postage, but because they were enough people to have a representative. Furthermore, Mr. White is not discussing the particular interests of particular constituents (some of these 500,000 people probably wanted postal roads badly, while others, including much of the large illiterate population and those who moved West to escape civilization, might have cared less about them or opposed them as an intrusion), but the abstracted and imputed interests (the average voter would want a postal road), and the interests of Mr. White himself (who would get franking privileges to send out, at taxpayer expense, campaign literature over these roads).

For Rep. Barnwell the diversity of interests known to Congress argued for rather than against delegation to the executive: "It was very natural to supposed members from the same State would differ in opinion, and this showed the greater degree of necessity there was to vest the power in the hands of a high responsible officer to determine upon it; for, by doing, so, there would be less partiality exhibited in the delineation of roads, etc. But, if

¹¹ Annals, *supra* note 146, at 229.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 231.

¹⁵ *Id.* at 236.

¹⁶ *Id.* at 238-239.

¹⁷ While forgotten in the latter tumult of North vs. South, inland and rural "red" versus coastal and urban "blue" may be an old abstract divide in American politics as well.

left to the House, it would be almost impossible to reconcile any line to all parties; for the members from each State would probably be guided more by the principle of domestic convenience than by a sense of the general good.” Filtered representatives were supposed to be looking to the abstract public good, not to actual, selfish, and conflicting interests. Madison, who had advocated a filtering theory of representation in his *Federalist* essays, admitted that “the greatest obstacle to the due exercise of the powers vested in the Legislature by the bill, which has been mentioned, is the difficulty of accommodating the regulations to the various interests of the different parts of the Union; and this is said to be almost impracticable.” When such difficulties had appeared with other bills, “members were obliged to be governed, in a great degree, by mutual information and reciprocal confidence.” The abstract imputed interests of the different regions (not to mention the vast variety of actual interests) themselves conflict, but Madison believed that, despite the observed difficulties, that Congress can reconcile these to arrive at an even more abstract collective national interest.

Rep. Egbert Benson recalled that a bill that would “give satisfaction” to the problem of defining the postal roads had “been tried” in the old Congress [under the Articles of Confederation], “and was often defeated by the partial and local clauses proposed by the different members.” Thus, “it would be better to delegate the power, and let the regulations be made by the President, than to be enacting supplementary laws year after year, at the insistence of individual members.”¹⁸ While Congress in theory might represent the interests of all the country, in practice its deliberations fell short of reflecting those interests properly in legislation. Sedgwick, attempting to politely point out the limitations of the offices held by himself and his colleagues, declared that “[n]o man had a more respectable opinion of the Representatives of the people than himself; he need not, however, observe to them, that they were men, subject to like passions and imperfections with their fellow-citizens.” The committee members “had a very important interest in establishing the directions of the post; that on the declarations of men thus interested, we must rely for the justness of our ultimate conclusions; on evidence of interested individuals, individuals who are, by their relation to the subject of the inquiry, excluded, on principles of law, from all credit,¹⁹ must we rely for a knowledge of those facts which are to direct our judgment.” He didn’t explain why the executive would lack any such interests, but he might have been recalling Hamilton’s description of the careful selection process of the President in the original electoral college. Voters would vote for electors, themselves not currently holding government office, and thus supposedly independent, who would in turn would elect the President and Vice President. This filtering process would afford “a moral certainty that the office of the President would seldom fall to the lot of any man who is not in some eminent degree endowed with the requisite qualifications.”²⁰

The modern federal government, which impact citizens in an innumerable variety of ways, should ideally reflect the equally detailed real interests of real people, rather than mere general and abstract ideological goals combined with the concrete and specific interests of only skilled lobbyists. This ideal may suggest a stricter rule of delegation so that more such decisions are made by deliberating representatives who collectively know much more about their constituent's interests than the executive. However, the ideal goal is, as Brutus claimed, unachievable -- such representation of the vast variety of concrete interests is not possible with and has not been a reality in our national republic. Alternatively, one might agree with the Federalists that the representation of such interests is a bad thing, and that instead the filtered representatives should strive for the abstract “public good.” Given this, it is a small step to further suggest with Hamilton, Sedgwick, and Barnwell that the executive department, is the a result of more comprehensive filtering than the House, and thus has an even wiser opinion of this public good. Either

¹⁸ *Id.* at 239.

¹⁹ Legal maxim from Bouvier -- “A man ought not to be a judge in his own cause”. Presumably Sedgwick thinks the President is less free from sectional interest than, not only an individual representatives, but even group of representatives after they have finished deliberating and compromising. Bouvier’s Dictionary, *supra*.

²⁰ *The Federalist* No. 68 (Alexander Hamilton).

way, the vast variety of specific and concrete interests of a nation are inevitably lost when statutes or regulations of a national scope are written. This fundamental epistemological limitation on national rule-making is a problem common to both the legislative and the executive branches. It can be avoided neither by delegating authority to an executive branch to solve the problem behind the curtains, in the C.F.R. and out of the limelight of the democratic process, nor merely through enforcing a non-delegation doctrine and insisting Congress write sufficiently detailed laws. It is primarily the role of other constitutional doctrines or political processes to recognize when the federal government is overreaching its epistemological limits and prevent it from occurring.

d. *Knowledge and Expertise*

The House also discussed who was more competent to define the roads, the House or the President. Rep. Vining thought the power of establishing roads would be a “burden” on the President.²¹, while Rep. Barnwell thought it would be a “pleasure.”²² Rep. Vining said that President Washington himself expected Congress to do the planning, “with respects to the post offices and post roads, he so warmly recommends it to the Legislature to take up the subject. This expression is as strong an argument as can possibly be adduced, to show that he had no other conception of the matter than that it was the peculiar privilege of the Legislature.”²³

Rep. Sedgwick argued that “[t]he members of the House could not be supposed to possess every information that might be requisite to this subject,”²⁴ and that he “did not, for his part, know the particular circumstances of population, geography, etc., which had been taken into the calculation by the select committee, when they pointed out the roads delineated in the bill.”²⁵ He remarked on the “apathy and torpor which prevailed on a former attempt to demark the post roads.”²⁶

At that time, Congress probably knew far more such details than they do today, when it is common for members to not even read the bills that they pass, much to less investigate the vast array of facts that justify them or to make much headway in predicting the wide variety of consequences on the actual variety of people, which Sedgwick properly here accuses the House of falling short on. Rep. Bourne confirmed this, observing that “in the excise law, the House “not thinking themselves possessed of sufficient information, empowered the President to mark out the districts and the surveys.” The President, he claimed, could gather better information, and “it will be occasionally necessary to change the route, and lay out new roads.”²⁷

Rep. Hartley, on the other hand, after expressing his opinion that the Constitution intended for Congress to exercise those postal powers that it was competent to exercise, and delegate only the remainder to the President,²⁸ argued that Congress knew “the people’s interests and circumstances...however distinctly or differently situated.” As for Sedgwick’s ignorance of the roads, he should learn about the roads and the various interests in them via deliberation: “if he will be so good as to attend to the gentlemen who represent the different parts of the Union, he ought to be satisfied. Unless they are prejudiced, they can certainly give the best information. If it were left to the President or Postmaster General, neither is acquainted with all the roads contemplated; they must depend in a great measure on the information of others.”²⁹ As we have seen. Rep. Livermore complained that “dissemination of intelligence” by the mails might be impeded if regulated by “the will of a single person”. While he probably had in mind the potential for corruption and censorship, he might have also been referring to the relative lack of

²¹ *Id.* at 235.

²² *Id.* at 236.

²³ *Id.* at 235.

²⁴ *Id.* at 229.

²⁵ *Id.* at 229-230.

²⁶ *Id.* at 239-240.

²⁷ *Id.* at 232-233.

²⁸ Note XX *supra*.

²⁹ Annals, *supra* note 152 at 231.

knowledge or competence of a person from one part of the country compared to the representatives who came from every part of the country where postal roads would be set.³⁰

This was the view expressed by Rep. White. “No individual could possess an equal share of information with the House on the subject of the geography of the United States.”³¹ While it might be the case that “no one [House] member knows all the roads, yet it must be allowed that every road is known to some of the members.”³² But again he is merely talking about high-level knowledge of the existence, rough route, and perhaps some other general characteristics of the road. It is doubtful, for example, whether the representatives knew personally most of the people who lived along these roads, much less what each one thought of the increased traffic or the accessibility of the mails. Nor did they have information as good as a private businessman would tend to have about, for example, the costs, demand, and as a result the viability of and the best postage rate along particular roads would be.

But it was easy to show that the President, at least in his person, would be even more ignorant about such matters, and Rep. Page piled on: “How the President should be better acquainted with the proper places for post offices and post roads than the Representatives of the people, I cannot conceive. In Virginia, for instance, cannot the ten Representatives say, with more certainty, what post roads would be proper in that State than any one man? I look upon the motion as unconstitutional, and if it were not so, as having a mischievous tendency...” Since the President could veto the legislation, even assuming the President had better information than the Congress, “it is paradoxical to say that we lose the advantage of [his] superior wisdom and knowledge of the subject, if we do not leave it to the President alone.”³³ Meanwhile, Rep. Madison rebuked the idea that the constantly changing supply and demand for roads required executive dispatch in redefining the routes -- “With respect to future cases, should there be a necessity for additional post roads, they can be provided for by supplementary laws.”³⁴

The process of representation in our national government rather resembles what Hamilton and Madison envisioned -- it is ideally a filtering process for expertise and public-mindedness, not a process for representing the actual variety and detail of interests. Hamilton, for example, had argued that the original electoral college, in which electors who were not legislators or government officers were elected by the people,³⁵ would practically guarantee a remarkably wise and just President.

Even if such an election process was so much more remarkably effective than other hiring processes in our culture, and even if it somehow remained true with modern Presidential elections which, in contrast to Hamilton’s electoral college, are essentially popularity contests it could hardly mean that these qualifications could be expected to include the divine attribute of omniscience, or of any substantially greater degree of knowledge than is typical of the talented, who all have the same sized brains and all can only be in one place looking at one thing at a

³⁰ *Id.* at 229-230.

³¹ This may have brought to mind two maxims dating back at least to Lord Coke -- *quod quisquis norat in hoc se exerceat* -- let every one employ himself in what he knows. Bouvier’s Law Dictionary, “Maxims”, (citing 11 Co. 10), and *securius expediuntur negotia commissa pluribus, et plus vident oculi quam oculus*. Business entrusted to several speeds best, and several eyes see more than one eye. *Id.* (citing 4 Co. 46). The comparison is misleading if meant to imply that the executive is really one person, rather than a command hierarchy – the real comparison in such a case would be how well knowledge and decisions flow in the centralized executive versus the less centralized Congress, and how much and how well that knowledge can be incorporated in language, by statute, rather than determined by more frequent discretion of the executive branch. White and/or others opposing Sedgwick’s amendment with these kind of arguments are also referring to knowledge about their constituents’ sentiments, i.e. about the diverse interests of the country, which argument has more weight than if the argument is about mere technical knowledge (e.g. “the geography of the United States.”)

³² Annals, *supra* note 152 at 238-239.

³³ *Id.* at 233-234.

³⁴ *Id.* at 238-239.

³⁵ fn. XX, *supra*.

time. Given filtering as the criteria, however, other political processes may be even more effective at this than media-driven mass elections. Our modern bureaucrats, who make detailed policy analysis and rule-making in particular areas their career, may be even better filtered for expertise and public-mindedness than media celebrity politicians. Our modern Congress is then properly merely a check on the bureaucracies. "The people" under this updated filtering ideal, although still in theory the source of all law and government, have and should only the distant control over law making, just as they have only a distant control over the federal judiciary. Under this thinking, statutes should broadly delegate rule-making power to career experts, and perhaps (but this would be a judgment of policy, not of law) courts should even strike down legislation that is too detailed as being beyond the expertise of Congress.

Applying Hartley's principle of competence generally to all the enumerated powers of Congress suggests a test for non-delegation -- Congress has "[a]ll legislative Powers" under the Constitution,³⁶ and "legislative power" means all aspects of all the enumerated powers that the legislature is capable of exercising itself. The remainder is executive power and can be delegated. Unfortunately, it may just be a matter of opinion what aspects of the powers Congress is incapable of exercising itself. Furthermore, the fact that Congress lacks knowledge in an area by no means implies that the President will have it or that the President can effectively further delegate the problem to bureaucrats who do have the knowledge. On the contrary, if Congress cannot through its committees and teams of experts acquire the knowledge, it is more rather than less likely that the national government in general lacks a form of such knowledge effective for either making laws or executing them. An alternative way to interpret Hartley's test, is if Congress fails to express its capability by specifying the details in a statute, it may be presumed incapable and the delegation considered proper. The first test seems unworkable and the second test, really a deference, is probably much closer to the modern view than to what Hartley had in mind, unless he was opposed to judicial review.

Conclusion

The "[a]ll legislative Powers" and "all laws necessary and proper to the execution" clauses³⁷ might be read to say that no legislative power, that is no power to make general law and no discretion to spend money, whatsoever can be delegated to the executive or to any other body, for then no longer would all of the legislative powers be vested in the Congress. It might also be read to not forbid the partial and revocable delegations that occur when statutes confer law-making power to the executive in certain areas. The nature of language and the execution of laws is such that a statute cannot avoid providing some discretion to the executive. Given such discretion, it is healthy for the executive to make its own rules to prevent its agents from abusing that discretion.

The earliest Congresses sometimes put sweeping language in their statutes, essentially allowing the executive to write most of the rules in a certain area of law. Their practices in this regard diverged sharply between foreign relations law, where delegation was often sweeping, and domestic law, where Congressional control was usually tight and detailed, as with the post road bill. How sweeping can such language be before it is an unconstitutional delegation of power?

According to Rep. Sedgwick and the modern doctrine, Congress merely needs to create a principle, a broad general statement for the executive to follow. The fact that delegation of the specifying of post roads was considered to be a constitutionally questionable delegation, and indeed was ultimately defeated based mostly on a debate over said constitutionality, suggests that many of the Founders had in mind a more stringent standard for domestic laws. The concerns over executive power expressed by philosophers who inspired the founders, and demonstrated by the tyrannical abuses of power before and since, balanced with the practical need for some executive discretion and dispatch, also suggest more caution in delegation in any area where executive power might be used to abuse citizens, and more flexibility in areas such as foreign policy where more dispatch is needed.

³⁶ U.S. Const. art. I § 1.

³⁷ U.S. Const. art. I §§ 1,8.

The starting point for non-delegation analysis is the interpretation of the statute. Prior to reaching non-delegation, a court should ensure that the executive has not taken any more power than it was delegated. Following *Morrill*, it is unconstitutional for the executive to subtract via rule-making (and probably also via discretion) from an allowed category of behavior. Under *Eaton* it is unconstitutional to add to a forbidden category. These cases forbid the executive from expanding or contracting statutory categories in ways that expand the class of forbidden behavior. This is similar to the “rule of lenity”, but the main rationales, from our perspective, are to maintain the separateness of functions in the legal cycle, to minimize representation distance, and in particular to ensure that “[a]ll legislative Powers herein granted”³⁸ remain with the Congress.

A statute should be construed according the principle of least authority. The executive should derive the least amount of power over taxation, war, legal remedy, or rule-making, and the least amount of discretion over life, liberty, property, or the creation of new offices, consistent with the language and purpose of the statute. Deference to executive branch interpretation should play no role, since this would make the executive a “judge in its own case” in terms of determining the scope of its power, even where the executive itself is not a party to the case. If a court cannot determine from expert testimony the meaning of specialized terminology used in statutes or regulations this suggests, given the epistemological limitations we have seen in the executive and legislative branches, that the federal government in general is not competent to make or enforce statutes in the area. Such a statute or regulation should at the very least be construed to agree with the expert opinion that minimizes the power it gives the government to take away life, liberty, or property, if indeed such an obscure part of a statute or regulation ought to be held as valid at all.

Early constitutional history also suggests the following criteria should be used either as elements to distinguish the application of different non-delegation rules, or as factors to be weighed against each other. Non-delegation test(s) should be:

- Stricter for criminal law than civil law. Thus, for example, criminal sentencing³⁹ and the scheduling of drugs as criminally prohibited substances⁴⁰ should be subjected to a stricter non-delegation test than similar laws with only civil penalties. This is consistent with a qualitative difference between the power of criminal penalty and the power of civil penalty, and that the non-delegation doctrine is primarily about the delegation and separation of such power over life, liberty, and property.
- Laxer when there is special need for executive dispatch. Arguably, for example, new addictive drugs become widespread so quickly that Congress must take too long to respond.⁴¹
- Stricter for *ius civile* (domestic) than *ius gentium* (foreign policy related) law, following the practice of the early Congresses. Thus cases like *Brig Aurora* (delegating the power to find facts, upon which the entire power of a law is conditional, to the executive with respect to seizure of ship cargoes)⁴² and *Field v. Clark* (delegating the power adjust tariff schedules in response to the behaviors of foreign governments)⁴³ should be distinguished when developing a non-delegation tests for domestic statutes. Since domestic law effects primarily citizens, versus foreign policy law which involves people all over the planet, the representation interests of citizens are more heavily implicated in *ius civile* statutes. Furthermore, the need for executive characteristics such as dispatch tends to be greater with *ius gentium*.
- Stricter for delegations to the executive than to the judicial branch. Since the federal judiciary already retains some (quasi-) law-making power with federal common law (see footnote 114), it is less out of

³⁸ U.S. Const. art. 1 § 1.

³⁹ *Mistretta v. United States*, 488 U.S. 361 (1989).

⁴⁰ *Touby v. United States*, 500 U.S. 160 (1991).

⁴¹ *Id.*

⁴² *The Cargo of the Brig Aurora, Burnside, Claimant, v. The United States*, 11 U.S. 382 (1813).

⁴³ *Field v. Clark*, 143 U.S. 649 (1892).

its nature to delegate it some further law-making power, at least for civil law, procedure, and remedies. Furthermore, the judicial branch has no “quasi-executive” power to compare to the “quasi-judicial” power of executive and independent agencies, so the dangers of combining all three powers into one body is greatly reduced. A case such as *Wayman v. Southard*⁴⁴ is thus not apropos as precedent for delegations to the executive.

- Stricter when the delegation not only combines the executive power with the delegated law-making power, but further combines it with an effective original judicial power over the law. Such a double delegation short-circuits the legal cycle, creating in the executive or independent agency a combination of the executive, legislative, and judicial powers -- a specialized tyranny. “Quasi-judicial” forums within these agencies are often effectively courts of original jurisdiction for cases arising out of the regulations which have been made in, and executed by, that very same agency. “Quasi-constitutional” statutes such as the Administrative Procedures Act⁴⁵ may provide checks and balances that partially address this concern, mitigating the need for a non-delegation doctrine to ensure that these powers remain separated, but such analysis is beyond the scope of this paper.
- Stricter the more representation distance lies between the rule-making process and those impacted by the rule. People deserve to have their real and varied interests represented. This is exemplified by the modern lobbying industry, where billions of dollars are spent each year, and ongoing face-to-face, two-way dialogue is undertaken, to ensure that concrete and detailed interests, not the mere abstract ideologies that “inform” mass elections, are represented in Congress. K Street may be the aristocracy the anti-Federalists warned about. However, it at least it represents the concrete and specific interests which both classical republicans saw and modern lobbyists see as crucial. Where a rule primarily effects just a specialized industry, representation distance may be decreased by delegating the power to make that rule to a specialized agency which industry members may deal with directly. Where the rule primarily effects the general voter, delegating the power to make rules increases the representation distance and should be shunned.
- Stricter when the statute allows the executive to create new official positions and hire new employees. Statutes should describe at least the high-level positions necessary for the execution of statute, and what kinds of authority that official requires, and any other changes in authority necessary. If such are not specified, the least authority necessary and proper (under their plain language meaning) to execute the statute should be presumed.
- *Not* more lax when Congress lacks the expertise to specify detailed rules in the area. When such is the case it is more, not less, likely that the executive also lacks such expertise. No greater knowledge should be presumed available to the executive, except in cases of news where there is need of dispatch. Because of the corrupting influence of power and despite the fact that our national Congress does not know the actual detail and diversity of the interests of nearly 300 million people, the filtering argument for delegating legislative power to unelected bureaucrats is not sustainable. However much scientific knowledge and legal expertise they may have, they also lack the crucial knowledge of detailed circumstances and interests. Where Congress lacks the expertise, as it often currently does, it should either hire its own set of experts to draft legislation, or admit to the epistemological limitations statutory and regulatory law and refrain from making the cultural or economic problems at issue a matter of such law. Indeed, to the extent constitutional law should be based on policy, the courts should invalidate statutes and regulations that have been enacted without the input of due deliberation, expertise, and other fact-finding sufficient to meet the importance and consequences of the legislation. If the rule-making is broad the input of details should be equally broad (and thus, unavoidably, vast),

⁴⁴ *Wayman v. Southard*, 23 U.S. 1 (1825).

⁴⁵ 5 U.S.C. §§551-559, 701-706.

not confined to abstract and general elections and opinion polls or the more detailed but narrow input of the K Street regulars.

Examination of the non-delegation problem sheds light on the separation of powers, on the potential for abuses of the powers delegated, on the limitations of statutory and regulatory law on a national scale, and the other problems related to delegation that we have surveyed, but the non-delegation doctrine has done little to solve these problems. The factors outlined here may be of some help. Looking for these factors may also alert us to situations where neither branch is competent to make rules and where delegation is the most prone to abuse.