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Before There Were Mouseholes¹: Resurrecting the Non-delegation Doctrine

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.

-The Federalist No. 51 (James Madison)

I. INTRODUCTION

There are now over five hundred federal agencies and departments.² Some are executive, others independent, but most are a far cry from the strict separation of powers originally conceived in the United States Constitution and envisioned in other founding-era documents. The purpose of this paper is to examine those documents and other fundamental writings that influenced the delegates to the Federal Convention of 1787 in order to demonstrate that the non-delegation doctrine was—and still is—an integral and inherent part of separation of powers. In fact, it is the doctrine upon which the bedrock principle of separation of powers was laid. This assertion invites the reader to critique in new light the Court’s decisions regarding the administrative state since *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).³

Part II is an analysis of the definition of non-delegation in founding-era dictionaries and the Supreme Court’s early understanding of the non-delegation doctrine. Part III begins a historical analysis by consulting the writings of Locke and Montesquieu. These Enlightenment writings provide the philosophical backdrop with which to

1. This references a line from Justice Scalia’s opinion in *Whitman v. Am. Trucking Association*, 531 U.S. 457, 468 (2001). “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”

2. See *A-Z Index of U.S. Government Departments and Agencies*, USA.GOV, <https://www.usa.gov/federal-agencies/n> (last visited Oct. 17, 2015).

3. This refers to the “intelligible principle” doctrine set down by Chief Justice Taft: “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.” *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

understand the Framers' understanding of separation of powers. Part IV consults "Thoughts on Government" by John Adams and the thirteen state constitutions that were influenced by that work and informed the delegates to the Federal Convention. Part V consults Madison's notes of the Federal Convention and reveals that the Framers understood the non-delegation doctrine to be inherent in separation of powers. Part VI introduces Madison's original draft amendments for the Bill of Rights, which included an amendment expressly addressing non-delegation. Lastly, part VII concludes.

II. DEFINITION OF NON-DELEGATION

This paper approaches the issue of non-delegation from an Originalist perspective.⁴ True to form, the root of the debate about separation of powers and non-delegation is perhaps a semantic one. To quote Justice Scalia, "Words have meaning. And their meaning doesn't change."⁵ This, of course, means that Justice Scalia is a textualist proponent of prescriptive definitions, as opposed to descriptive definitions.⁶ Thus, any attempt to define non-delegation must come from some originalist and authoritative source and cannot rely on how the doctrine has evolved.

Samuel Johnson's founding-era *Dictionary of the English Language* provides some insight on what "non-delegation" means. Since the word is hyphenated, I analyze it in its constituent parts: "non" and "delegation." This analysis will reveal how the verb "delegate" was prescribed by that dictionary and would have been understood by the Framers.⁷

First, we begin with "non." Johnson's dictionary defines the term as "Not. Never used separately, but sometimes prefixed to words with a negative power."⁸

Second, we proceed with "delegation" by first observing its verb-

4. Originalism "implies that those who make, interpret, and enforce the law ought to be guided by the meaning of the United States Constitution—the supreme law of the land—as it was originally written." David Forte, *The Heritage Guide to the Constitution: The Originalist Perspective*, <http://www.heritage.org/constitution/#!/introessays/3> (last visited Oct. 17, 2015).

5. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/>.

6. Prescriptive definitions are those that dictate what the word *should* mean whereas descriptive definitions are those that simply report how a word is used in common parlance.

7. Samuel Johnson, *A Dictionary of the English Language: A Digital Edition of the 1755 Classic* by Samuel Johnson, <http://johnsonsdictionaryonline.com/> (last visited Sept. 22, 2015).

8. *Id.* at 1369 (http://johnsonsdictionaryonline.com/?page_id=7070&i=1369).

form. Johnson's third entry for the verb bears upon the instant case, "To entrust; to commit to another's power and jurisdiction."⁹ The definition of the noun-form is also instructive: "A deputy; a commissioner; a vicar; any one that is sent to act for, or represent another."¹⁰ The adjective form likewise elucidates upon the verb-form, "deputed, sent to act for, or represent another."¹¹ Lastly, the definition of the noun "delegation" is "a putting in commission."¹² Thus, the definition of "delegation" becomes clear—it is a commission of power and jurisdiction whereby someone is sent to act for or represent another person. Non-delegation, it follows, is the negative of "delegation", the absence or prohibition of a fiduciary trust.

Cunningham's *General Abridgement of the Law* does not provide as clear a definition as Johnson's dictionary, but is nonetheless instructive, as it is one of the earliest legal dictionaries.¹³ It defines only the plural noun "delegates" as follows: "commissioners delegated or appointed by the King's commission, to sit upon an appeal to him in the court of Chancery."¹⁴ However, even this brief definition indicates that a delegation is a representation in the stead of another.

Noah Webster's 1828 *American Dictionary of the English Language* also agrees with the Johnson and Cunningham dictionaries.¹⁵ In Webster's dictionary, the verb "delegate" is defined as: "To entrust; to commit; to deliver to another's [sic] care and exercise; as, to *delegate* authority or power to an envoy, representative or judge."¹⁶ Predictably, the noun "delegate" in Webster's dictionary reflects the nature of the fiduciary relationship: "A person appointed and sent by another with powers to transact business as his representative; a deputy; a commissioner; a vicar. In the United States, a person elected or appointed to represent a state or a district, in the Congress, or in a Convention for forming or altering a constitution."¹⁷

It is in light of the three aforementioned definitions that the

9. *Id.* at 558 (http://johnsonsdictionaryonline.com/?page_id=7070&i=558).

10. *Id.*

11. *Id.*

12. *Id.*

13. TIMOTHY CUNNINGHAM, 1 A NEW AND COMPLETE LAW-DICTIONARY, OR, GENERAL ABRIDGEMENT OF THE LAW 1764, <http://www.llmcdigital.org/docdisplay.aspx?textid=11332811>.

14. *Id.* at 843.

15. See NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1828, <http://webstersdictionary1828.com/>.

16. *Id.*

17. *Id.*

reader should understand the Supreme Court's decision in *Wayman v. Southard*.¹⁸ The key issue in that case was whether the Process Act of 1792 granted an unconstitutional delegation of legislative power by authorizing the Judiciary to determine how suits should proceed. Chief Justice Marshall delivered the opinion of the court, emphasizing the bounds of legislative delegations of authority:

The constitution concludes its enumeration of granted powers, with a clause authorizing Congress to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment . . . That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer. The terms of the clause, neither require nor admit of elucidation. The Court, therefore, will only say, that no doubt whatever is entertained on the power of Congress over the subject. The only inquiry is, how far has this power been exercised?

Wayman v. Southard, 23 U.S. 1, 22 (1825) (emphasis added).

In the foregoing excerpt, the Chief Justice makes it clear that the delegation of power Congress granted to the Judiciary was pursuant to Congress' Article I, Section 8, clause 18 authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The Chief Justice clarified further: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."¹⁹

To clarify, Chief Justice Marshall stated that Congress has the authority to pass laws necessary and proper for the function of the Government of the United States, including the Judiciary. Congress cannot give away its inherently legislative "necessary and proper" au-

18 *Wayman v. Southard*, 23 U.S. 1, 20 (1825).

19. *Id.* at 42-43.

thority, i.e. the authority to determine what the Judiciary needs to fulfill its functions and charge it with carrying out that Congressional mandate.

Therefore, based on the holding in *Wayman* and the Johnson, Cunningham, and Webster founding-era dictionaries, the founding-era legal doctrine of non-delegation consists of a prohibition on exceeding the bounds of the necessary and proper clause. Congress is a fiduciary, a vicar, over the powers granted to it by the Constitution. Congress violates the necessary and proper clause by appointing or acquiescing to another “Department or Officer” to act in that fiduciary capacity, instead of making the specific determination as to what is necessary for the department and enabling them to carry out their express or implied duties under the Constitution. To do otherwise is what constitutes a delegation of “strictly and exclusively legislative” powers.²⁰

Thus, the foundational principle of separation of powers rests upon the bedrock of the proper execution of the necessary and proper clause: non-delegation. The founding-era political philosophies of both Locke and Montesquieu support this conclusion.

III. ENLIGHTENMENT PHILOSOPHY REGARDING SEPARATION OF POWERS

This section provides a brief overview of Locke’s *An Essay Concerning the True Original Extent and End of Civil Government* and Montesquieu’s *The Spirit of Laws* with the purpose of providing a look into the Framers’ mindset as they formed the Constitution. While Locke and Montesquieu provide an important backdrop for any Originalist argument, their theories on separation of powers are indispensable for this analysis of the non-delegation doctrine. Though their political utility may be debated on a qualitative level, the following chart displays quantitatively how often they were cited in founding-era writings and how influential they were on the Framers:

20. The Executive and Judicial branches would likewise violate this principle by assuming powers that strictly and exclusively pertain to another branch.

Table 1: Frequency of Citation²¹

1.	Montesquieu	8.3%
2.	Blackstone	7.9
3.	Locke	2.9
4.	Hume	2.7
5.	Plutarch	1.5
6.	Beccaria	1.5
7.	Trenchard & Gordon (Cato)	1.4
8.	De Lolme	1.4
9.	Pufendorf	1.3
10.	Coke	1.3
11.	Cicero	1.2
12.	Hobbes	1.0

A. An Essay Concerning the True Original Extent and End of Civil Government

Locke posited that three powers exist in government: the legislative, the executive, and the federative.²² I will address these three in turn.

Locke described the legislative power as the “supreme power of the commonwealth” and “sacred and unalterable in the hands where the community have once placed it.”²³ Its powers consist of “a right to direct how the force of the commonwealth shall be employed for preserving the community.”²⁴ In other words, the legislative power has the power of lawmaking—the force of the state—to achieve the end of the state, and that end is “the enjoyment of their properties in

21. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 142 (1988).

22. John Locke, *An Essay Concerning the True Original Extent and End of Civil Government: Chapter 12. The Legislative, Executive, and Federative Power of the Commonwealth*, AMERICAN HISTORY: FROM REVOLUTION TO RECONSTRUCTION AND BEYOND, <http://www.let.rug.nl/usa/documents/1651-1700/john-locke-essay-on-government/> (last visited Sept. 14, 2015) [hereinafter *Chapter 12*].

23. John Locke, *An Essay Concerning the True Original Extent and End of Civil Government: Chapter 11. Of the Extent of the Legislative Power*, AMERICAN HISTORY: FROM REVOLUTION TO RECONSTRUCTION AND BEYOND, <http://www.let.rug.nl/usa/documents/1651-1700/john-locke-essay-on-government/> (last visited Sept. 14, 2015) [hereinafter *Chapter 11*].

24. Locke, *Chapter 12*, *supra* note 22.

peace and safety.”²⁵

The authority of the legislative power is predicated upon the delegation of power from the people. As he stated, “for without this the law could not have that which is absolutely necessary to its being a law, the consent of society,”²⁶ in another place “the essence and union of the society consisting in having one will, the legislative,”²⁷ and also “the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative.”²⁸ This is a crucial premise for Locke’s theory of the non-delegation of powers that preserve separation of powers. “For nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another.”²⁹ To borrow from the Latin maxim often used in the setting of property law, *nemo dat quod non habet*.³⁰

Thus, it follows that the legislative power is constrained by these two maxims: (1) it may only exercise those powers that persons in a state of nature once possessed, and (2) it may only consist of those fiduciaries representing the will of the people. In fact, Locke goes so far to state that “[w]hen any one, or more, shall take upon them to make laws whom the people have not appointed so to do, they make laws without authority, which the people are not therefore bound to obey.”³¹

With these implicit maxims, Locke expressly states that the legislative has no power to “rule by extemporary arbitrary decrees.”³² This follows logically from the first maxim mentioned above. No person in a state of nature has the right to rule by arbitrary decree, and therefore it cannot be given to the legislative authority. Rather, there must

25. Locke, *Chapter 11*, *supra* note 23.

26. *Id.*

27. John Locke, *An Essay Concerning the True Original Extent and End of Civil Government: Chapter 19. Of the Dissolution of Government*, AMERICAN HISTORY: FROM REVOLUTION TO RECONSTRUCTION AND BEYOND, <http://www.let.rug.nl/usa/documents/1651-1700/john-locke-essay-on-government/> (last visited Sept. 14, 2015) [hereinafter *Chapter 19*].

28. John Locke, *An Essay Concerning the True Original Extent and End of Civil Government: Chapter 13. Of the Subordination of the Powers of the Commonwealth*, AMERICAN HISTORY: FROM REVOLUTION TO RECONSTRUCTION AND BEYOND, <http://www.let.rug.nl/usa/documents/1651-1700/john-locke-essay-on-government/> (last visited Sept. 14, 2015) [hereinafter *Chapter 13*].

29. Locke, *Chapter 11*, *supra* note 23.

30. One cannot give that which one does not have.

31. Locke, *Chapter 19*, *supra* note 27.

32. Locke, *Chapter 11*, *supra* note 23.

be uniformity in justice—a rule of law—as applied by an established judge. Again, deriving from the first maxim, Locke specifically states that the legislative power “cannot take from any man any part of his property without his own consent . . . [f]or the preservation of property being the end of government.”³³

Locke subdivides our modern understanding of the executive power into the execution of municipal law and the execution of relations between states, which he calls the federative power.³⁴ The municipal executive exists because of the need for “perpetual execution, or attendance thereunto” of the laws passed by the legislative power.³⁵ The federative derives from natural, or original, powers of the people “because it is that which answers to the power of every man naturally had before he entered into society” and “contains the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth.”³⁶ Locke concedes that the municipal executive and the federative executive are often embodied in one person because to have two executives “whereby the force of the public would be under different commands . . . would be apt some time or other to cause disorder and ruin.”³⁷

Finally, Locke gives the explanation as to why each of these three powers must be exercised by separate individuals, i.e. why there must be separation of powers:

And because it may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government.³⁸

Were there to be a unification of these powers, or as Locke states when “any one, or more, shall take upon them to make laws whom the people have not appointed so to do,” the people have “full liberty

33. *Id.*

34. Locke, *Chapter 12, supra* note 22.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

to resist the force of those who, without authority, would impose anything upon them.”³⁹ Therefore, if the legislative or executive violate their fiduciary trust, the people have the right to revolution. It was precisely this reasoning that made Locke so appealing in the 1760s and 1770s, as Americans contemplated their relationship with Great Britain.⁴⁰ This is most convincingly shown in Table 2 below.

Table 2: Most Cited Secular Thinkers⁴¹

	1760s	1770s	1780s	1790s	1800-1805	% of Total N
Montesquieu	8%	7%	14%	4%	1%	8.3%
Blackstone	1	3	7	11	15	7.9
Locke	11	7	1	1	1	2.9
Hume	1	1	1	6	5	2.7
Plutarch	1	3	1	2	0	1.5
Beccarta	0	1	3	0	0	1.5
Cato*	1	1	3	0	0	1.4
De Lolme	0	0	3	1	0	1.4
Pufendorf	4	0	1	0	5	1.3
Coke	5	0	1	2	4	1.3
Cicero	1	1	1	2	1	1.2
Hobbes	0	1	1	0	0	1.0
Subtotal	33%	25%	37%	29%	32%	32.4%
Others	67	75	63	71	68	67.6
	100%	100%	100%	100%	100%	100%
	n = 216	n = 544	n = 1,306	n = 674	n = 414	N = 3,154
The list contains more than 180 names. The last column allows more precise recovery of the number of citations over the era, but all other percentages are rounded off to the nearest whole number. The use of 0% indicates less than .5% of the citations for a given decade rather than no citations whatsoever.						
**“Cato” refers to a series of pamphlets together known as <i>Cato’s Letters</i> , written by the English Whigs John Trenchard and Thomas Gordon.						

39. Locke, *Chapter 19*, *supra* note 27.

40. See LUTZ, *supra* note 21, at 143.

41. *Id.*

B. Spirit of the Laws

As shown in Table 2, Montesquieu grew in importance in the state and federal constitution drafting decade—the 1770s. Montesquieu described the powers of government in much the same way as Locke. Indeed, he states, “In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.”⁴² However, he defines their respective responsibilities differently. The legislative “enacts temporary or perpetual laws.”⁴³ The first executive is akin to Locke’s federative power dealing with foreign affairs, and Montesquieu calls the second executive calls the judiciary power, which has the responsibility to “punish criminals, or determine the disputes that arise between individuals.”⁴⁴

Montesquieu’s theory of separation of powers is derived from his definition of political liberty, which is “a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.”⁴⁵ The unification of the legislative and executive powers in one person violates Montesquieu’s theory of liberty “[b]ecause apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”⁴⁶

Likewise, the combination of the judiciary power with the legislative and executive destroys liberty. It would expose the life and liberty of the subject to “[a]rbitrary control; for the judge would be then the legislator,” and “[w]ere it joined to the executive power, the judge might behave with violence and oppression.”⁴⁷

Montesquieu goes so far as to lament:

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers In what a situation must the poor subject be in

42. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS*, 113 (Thomas Nugent, trans., 2005).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

those republics! The same body of magistrates are possessed, as executors of the laws, of the whole power they have given themselves in quality of legislators. They may plunder the state by their general determinations; and as they have likewise the judiciary power in their hands, every private citizen may be ruined by their particular decisions.⁴⁸

Specifically, he warns against the executive power gaining the ability to tax because “liberty would be at an end . . . it would become legislative in the most important point of legislation.”⁴⁹ Conversely, he also warned against encroachments of the legislative upon the executive.⁵⁰

Thus, the purpose of separation of powers for Montesquieu is the preservation of liberty from the dangers that accompany the conglomeration of legislative, executive, and judicial powers. The Framers had experienced firsthand the evils that accompany the concentration of all three powers in their dealings with King George III.⁵¹

With this philosophical backdrop I now turn to Adams’ *Thoughts on Government*. This builds upon Locke and Montesquieu and further informed the formation of the first state constitutions and the Framers of the Federal Constitution.

IV. STATE CONSTITUTION-MAKING

*A. Thoughts on Government*⁵²

The purpose of this section is not to provide a comprehensive analysis of Adams’ work, but rather to mention those portions that bear on separation of powers in order to show how the non-delegation doctrine was understood in the founding era.

Much like Locke and Montesquieu, Adams’ theory of political freedom is based on the form of government that best secures the happiness of the individual. However, since not all can be pleased, he takes a more utilitarian approach by admitting that “[t]he form of government which communicates ease, comfort, security, or, in one word, happiness to the greatest number of persons and in the greatest

48. *Id.* at 113–14.

49. *Id.* at 119.

50. *Id.* at 118–19.

51. *E.g.*, THE DECLARATION OF INDEPENDENCE (U.S. 1776).

52. JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), *reprinted in* THE POLITICAL WRITINGS OF JOHN ADAMS: REPRESENTATIVE SELECTIONS 83 (George A. Peek, Jr. ed., 1954).

degree is the best.”⁵³ With that goal in mind, he concludes that a republic is the best form of government because it is “[a]n empire of laws, and not of men.’ That, as a republic is the best of governments, so that particular arrangement of the powers of society . . . is best contrived to secure an impartial and exact execution of the laws”⁵⁴

Adams observes that direct democracy is impossible and that the “first necessary step, then, is to depute power from the many to a few of the most wise and good”—a representative assembly.⁵⁵ Next, he addresses the apportionment of powers, asking “whether all the powers of government—legislative, executive, and judicial—shall be left in [that] body?”⁵⁶ However, unlike Locke and Montesquieu, who do not address the constitution of the representative assembly, he concludes that “a people cannot be long free, nor ever happy, whose government is in one assembly.”⁵⁷

To ensure freedom from such a concentration of power, he recommends that the defects of “flights of enthusiasm, partialities, or prejudice—and consequently productive of hasty results and absurd judgments . . . ought to be corrected and defects supplied by some controlling power.”⁵⁸ For those reasons he argues that the “legislative power ought to be more complex.”⁵⁹

While Adams argued for an executive elected by the legislature and “made also an integral part of the legislature,”⁶⁰ he eloquently voiced the need for an independent judiciary:

The dignity and stability of government in all its branches, the morals of the people and every blessing of society, depends so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.⁶¹

Thoughts on Government was written by Adams at the request of Mr. Wythe of Virginia and later reproduced and sent to the legisla-

53. *Id.* at 85.

54. *Id.* at 86.

55. *Id.*

56. *Id.* at 87.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 88.

61. *Id.* at 90.

ture of North Carolina as a response to the question of how best to constitute the government of a new and independent state.⁶² In fact, it was Adams that first called for the states to form their own constitutions in the Continental Congress on June 2, 1775.⁶³ It is to those first state constitutions that we now turn.

B. State Constitutions

The purpose of this section is to inform the reader on forms of government of the individual state constitutions at the time of the Federal Convention, which may serve to inform our understanding of what the writers considered to be separation of powers. Table 3 supports the author's assertion that separation of powers implies the non-delegation doctrine.

Table 3: State Constitution Provisions at the Time of the Federal Convention of 1789 addressing Separation of Powers and Non-delegation⁶⁴

Year	State	Text
1776	North Carolina	"IV. That the legislative, executive, and supreme judicial powers of government,

62. *Id.* at 83–84.

63. *Adams Family Papers: An Electronic Archive*, MASSACHUSETTS HISTORICAL SOCIETY, http://www.masshist.org/digitaladams/archive/doc?id=A1_28 (last visited Oct. 19, 2015). "These Efforts could not be made without Government, and as I supposed no Man would think of consolidating this vast Continent under one national Government, We should probably after the Example of the Greeks, the Dutch and the Swiss, form a Confederacy of States, each of which must have a seperate [sic] Government. That the Case of Massachusetts was the most urgent, but that it could not be long before every other Colony must follow her Example. That with a View to this Subject I had looked into the Ancient and modern Confederacies for Examples: but they all appeared to me to have been huddled up in a hurry by a few Chiefs. But We had a People of more Intelligence, Curiosity and Enterprize, who must be all consulted, and We must realize [sic] the Theories of the Wisest Writers and invite the People, to erect the whole Building with their own hands upon the broadest foundation. That this could be done only by Conventions of Representatives chosen by the People in the several Colonies, in the most exact proportions. That it was my Opinion, that Congress ought now to recommend to the People of every Colony to call such Conventions immediately and set up Governments of their own, under their own Authority: for the People were the Source of all Authority and Original of all Power. These were new, strange and terrible Doctrines, to the greatest Part of the Members, but not a very small Number heard them with apparent Pleasure, and none more than Mr. John Rutledge of South Carolina and Mr. John Sullivan of New Hampshire."

64. Linda Alchin, *State Constitutions: Congress advises all the colonies to form governments for themselves* (Dec. 10, 2014), <http://www.landofthebrave.info/state-constitutions.htm>.

		ought to be forever separate and distinct from each other.” ⁶⁵
1776	Delaware	“Art. 7. [M]ay exercise all the other executive powers of government' limited and restrained as by this constitution is mentioned, and according to the laws of the State.” ⁶⁶
1776	Pennsylvania	<p>§ 2 “The supreme legislative power shall be vested in a house of representatives of the freemen of the commonwealth or state of Pennsylvania.</p> <p>§ 3 The supreme executive power shall be vested in a president and council.”</p> <p>§ 47 “[C]OUNCIL OF CENSORS; who shall meet together on the second Monday of November next ensuing their election; the majority of whom shall be a quorum in every case, except as to calling a convention, in which two-thirds of the whole number elected shall agree: And whose duty it shall be to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are intitled [sic] to by the constitution.”⁶⁷</p>
1776	Maryland	“VI. That the legislative, executive and judicial powers of government, ought to

65. N.C. CONST. art. IV (1776), <http://www.landofthebrave.info/constitution-of-north-carolina.htm>.

66. DEL. CONST. art. 7 (1776), <http://www.landofthebrave.info/constitution-of-delaware.htm>.

67. PA. CONST. §2-3, 47 (1776), <http://www.landofthebrave.info/constitution-of-pennsylvania.htm>.

		be forever separate and distinct from each other.” ⁶⁸
1780	Massachusetts	“XXX.--In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.” ⁶⁹
1776	New Hampshire	[Nothing on separation of powers. This was the first constitution framed by an American commonwealth.] ⁷⁰
1784	New Hampshire	Art. 37 “In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.” ⁷¹
1776	New Jersey	“I. That the government of this Province shall be vested in a Governor, Legislative Council, and General Assembly. II. That the Legislative Council, and General Assembly, shall be chosen, for the first time, on the second Tuesday in August next; the members whereof shall

68. MD. CONST. art. VI (1776), <http://www.landofthebrave.info/constitution-of-maryland.htm>.

69. MASS. CONST. art. XXX (1780), <http://www.landofthebrave.info/constitution-of-massachusetts.htm>.

70. See N.H. CONST. (1776), <http://www.landofthebrave.info/constitution-of-new-hampshire.htm>.

71. N.H. CONST. art. 37 (1884), <http://www.nh.gov/constitution/billofrights.html>.

		<p>be the same in number and qualifications as are herein after mentioned; and shall be and remain vested with all the powers and authority to be held by any future Legislative Council and Assembly of this Colony, until the second Tuesday in October, which shall be in the year of our Lord one thousand seven hundred and seventy-seven.”</p> <p>“VIII. That the Governor, or, in his absence, the Vice-President of the Council, shall have the supreme executive power . . .”⁷²</p>
1776	South Carolina	<p>“II. That the general assembly shall, out of their own body, elect by ballot a legislative council, to consist of thirteen members, (seven of whom shall be a quorum,) and to continue for the same time as the general assembly.</p> <p>III. That the general assembly and the said legislative council shall jointly choose by ballot from among themselves, or from the people at large, a president and commander-in-chief and a vice-president of the colony.”⁷³</p>
1778	South Carolina	<p>Art. II. “That the legislative authority be vested in a general assembly, to consist of two distinct bodies, a senate and house of representatives”</p> <p>III. “That as soon as may be after the first meeting of the senate and house of representatives, and at every first meeting of the senate and house of representatives thereafter, to be elected by virtue of this</p>

72. N.J. CONST. art. I, II, VIII (1776) , <http://www.landofthebrave.info/constitution-of-new-jersey.htm>.

73. S.C. CONST. art. II, III (1776) , <http://www.landofthebrave.info/constitution-of-south-carolina.htm>.

		constitution, they shall jointly in the house of representatives choose by ballot from among themselves or from the people at large a governor and commander-in-chief, a lieutenant-governor, both to continue for two years.” ⁷⁴
1776	Virginia	§ 3 “That the legislative and executive powers of the State should be separate and distinct from the judiciary.” Constitution: “The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of [more] than one of them, at the same time; except that the Justices of the County (courts shall be eligible to either House of Assembly[)].” ⁷⁵
1777	Georgia	Art I. “The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.” ⁷⁶
1777	New York	“II. This convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that the supreme legislative power within this State shall be vested in two separate and distinct bodies of men; the one to be called the assembly of the State of New York, the other to be called the senate of the State of New York; who together shall form the legislature, and meet once at least in every year for the despatch [sic] of business. III. And whereas laws inconsistent with

74. S.C. CONST. Art. II, III (1778), http://avalon.law.yale.edu/18th_century/sc02.asp.

75. VA. CONST. §3 (1776), <http://www.landofthebrave.info/constitution-of-virginia.htm>.

76. GA. CONST. art. I (1777), <http://www.landofthebrave.info/constitution-of-georgia.htm>.

		the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed: Be it ordained, that the governor for the time being, the chancellor, and the judges of the supreme court, or any two of them, together with the governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the legislature; and for that purpose shall assemble themselves from time to time, when the legislature shall be convened” ⁷⁷
1663	Rhode Island	[Did not adopt a new constitution until 1843. Instead, that state continued to operate based on their royal charter issued by King Charles II in 1663] ⁷⁸
1662	Connecticut	[Did not adopt a new constitution until 1818. Instead that state continued to operate on the Fundamental Orders of 1639] ⁷⁹

Table 3 is summarized by Table 4 below. Express non-delegation provisions contained very similar language, e.g. Georgia’s branches of government “shall be separate and distinct so that neither exercise the powers properly belonging to the other.”⁸⁰ Strong separation of powers clauses, though falling short of express non-delegation provisions, were also worded similarly, e.g., Maryland “That the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other.”⁸¹ Eight out of the eleven states that wrote state constitutions prior to the Federal Convention

77. N.Y. CONST. art. I, III (1777), <http://www.landofthebrave.info/constitution-of-new-york.htm>.

78. Secretary of State of Rhode Island, *Rhode Island Royal Charter of 1663* (Dec. 10, 2014), <http://sos.ri.gov/library/history/charter/>.

79. Meghan Reilly, *Connecticut Constitutional Conventions* (Dec. 10, 2014), <http://www.cga.ct.gov/2008/rpt/2008-r-0296.htm>.

80. GA. CONST. art. I (1777), *supra* note 75.

81. MD. CONST. art VI (1776), *supra* note 67.

contained either express non-delegation provisions or very strong separation of powers provisions.

Table 4: Categories of Separation of Power in Original State Constitutions

Type of Separation of Powers in State Constitution	State(s)
Express non-delegation	Massachusetts, Georgia, Virginia
Strong separation of powers	North Carolina, Delaware, Pennsylvania, Maryland, New Hampshire
Weak or combined powers	New York, New Jersey, South Carolina
Not applicable	Rhode Island, Connecticut

V. THE FEDERAL CONVENTION

Such was the state of mind of the Framers and the state of their state constitutions when they met in Philadelphia during the summer of 1787. There is only one debate recorded in James Madison's notes that directly pertains to the non-delegation doctrine. It took place on June 1, 1787.⁸²

On that day the Committee of the whole had been addressing Virginia Resolution 7 concerning the Executive powers: "that a national Executive be instituted, to be chosen by the national Legislature—for the term of [____] years &c to be ineligible thereafter, to possess the executive powers of Congress &c."⁸³ Madison interrupted the debate to suggest that the Committee first decide what powers the Executive should exercise before determining its composition, i.e. unitary or plural.⁸⁴

He accordingly moved that so much of the clause before the Committee as related to the powers of the Executive should be struck out & that after the words "that a national Executive ought to be instituted" there be inserted the words following viz. "with power to carry into effect national laws, to appoint to offices in cases not oth-

82. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (1966).

83. *Id.* at 45.

84. *Id.* at 47.

erwise provided for, and to execute such other powers ‘not Legislative nor Judiciary in their nature,’ as may from time to time be delegated by the national Legislature.” The words “not legislative nor judiciary in their nature” were added to the proposed amendment in consequence of a suggestion by General Pinckney that improper powers might otherwise be delegated.⁸⁵

This was a critical moment. Both Madison—the Father of the Constitution—and General Pinckney had put forward an express non-delegation limitation to prevent the Executive from exercising powers that the future Congress might grant improperly. The motion was seconded by James Wilson,⁸⁶ an individual whose contributions to the Federal Convention cannot be exaggerated.

Young Charles Pinckney objected to his second-cousin’s addition of “‘and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated.’ He said they were unnecessary, the object of them being included in the ‘power’ to carry into effect the national laws[,]”⁸⁷—i.e. included in the necessary and proper power.

Madison, always the cool head, recorded his response:

Mr. Madison did not know that the words were absolutely necessary, or even the preceding words—“to appoint to offices &c. the whole being perhaps included in the first member of the proposition. He did not however see any inconveniency” in retaining them, and cases might happen in which they might serve to prevent doubts and misconstructions.⁸⁸

The younger Pinckney ought to have erred on the side of clarity and sided with wiser heads, for as a result of his motion “the question on Mr. Madison’s motion was divided; and the words objected to by Mr. Pinckney struck out . . .”⁸⁹ Yet, we are left with the unanimous record that, whether for the language or not, all believed the exercise of non-executive power improperly delegated by the legislature to be prohibited.

While Madison did not succeed in including an express non-delegation provision in the Constitution itself, he was undeterred and included an even more strict provision as its own amendment to the

85. *Id.*

86. *Id.*

87. *Id.* (footnote omitted).

88. *Id.* at 48.

89. *Id.*

nascent Constitution when he presented his draft Bill of Rights to the First Congress on June 8, 1789.⁹⁰

VI. THE BILL OF RIGHTS AND THE FORGOTTEN AMENDMENT

James Madison's draft Bill of Rights originally consisted of seventeen amendments.⁹¹ The proposed Sixteenth Amendment read as follows:

The powers delegated by the Constitution to the government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.⁹²

All seventeen proposed amendments passed in the House on August 21, 1789⁹³ and were transmitted to the Senate the following Tuesday, August 25.⁹⁴ They were read and it was ordered that the following Monday they would be taken under consideration.⁹⁵ The Senate began consideration the following Wednesday,⁹⁶ and arrived at the non-delegation amendment by Monday, September 7. All that the Senate Journal recorded was "It passed in the negative."⁹⁷

The Senate only passed twelve of the seventeen amendments.⁹⁸ Even the Conference Committee report is silent as to the reason why the Sixteenth Amendment did not pass.⁹⁹

VII. CONCLUSION

Regardless of the reasons why the non-delegation amendment did not pass the Senate nor bear mentioning in the Conference

90. 1 ANNALS OF CONG. 453 (1789) (Joseph Gales ed., 1834).

91. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, March 4, 1789–March 3, 1791, 35 (1986).

92. *Id.* at 39.

93. H.R. JOURNAL, 1st Cong., 1st Sess. 797–800 (1789).

94. S. JOURNAL, 1st Cong., 1st Sess. 73–74 (1789).

95. *Id.*

96. *Id.* at 75–76.

97. *Id.* at 72–73.

98. DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 91 at 47. The Senate's revisions to the House-passed amendments are included as Appendix A.

99. *Id.* at 47–48. The *Annals of Congress* are also silent on the issue. This is shown in Appendix B.

Committee Report, Madison and at least two-thirds of the House thought it important enough to pass the House. During the Federal Convention the only argument against the inclusion of Madison's express non-delegation provision was that it was unnecessary because the Executive was already *limited* by his obligation to carry into effect the national laws and that the provision would be redundant. Technically, this is correct. Under a theory of limited domestic powers, the branches of government could only exercise that which was committed to them.

With the philosophical backdrop of strict separation and non-delegation of powers from Locke, Montesquieu, Adams, and their respective state constitutions ringing in their ears, it is highly unlikely that the members of the Senate rejected the non-delegation amendment out of disagreement with its content. Rather, like the young Charles Pinckney, it is highly likely they dismissed it as redundant and already implied in their understanding of separation of powers. This understanding was reflected in Chief Justice Marshall's decision in *Wayman*. However, *Wayman* has long been eclipsed by the "intelligible principle" doctrine of *J.W. Hampton*. This paper has shown that holding to violate the Framers' original intent.

Without the bright line rule on non-delegation from the founding age—as manifest in *Wayman*—delegations of legislative power have run amok. There are now over five hundred federal departments and agencies.¹⁰⁰ The only meaningful limitations on delegations of power since *Wayman* have been in *Panama Refining*,¹⁰¹ *Schechter Poultry*,¹⁰² and *Whitman v. Am. Trucking Associations*.¹⁰³

Panama Refining and *Schechter Poultry* only set a ceiling—a very high ceiling—on delegations of legislative power of the Necessary and Proper Clause. Congress can't expressly give the Executive control of sections of the United States economy "without standard[s] or rule[s]."¹⁰⁴ *Whitman* limited delegations of power by establishing a

100. *A-Z Index of U.S. Government Departments and Agencies*, *supra* note 2.

101. *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 408 (1935).

102. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 520 (1935).

103. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

104. *Ryan*, 293 U.S. at 419; *A. L. A. Schechter Poultry Corp.*, 295 U.S. at 529. In *Schechter Poultry*, the Court stated what has been concluded through research here. "The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art I, § 1. And the Congress is authorized 'To make all laws which shall be necessary and proper for carrying into execution' its general powers.' Art. I, § 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have re-

canon of statutory interpretation—the Court won’t construe large delegations of regulatory authority from vague terms or ancillary provisions—it won’t find elephants in mouseholes.¹⁰⁵ But these are very weak protections against the improper exercise or abdication of the necessary and proper clause. It makes one wish for a time before there were mouseholes—before textualism was the only meaningful defense of separation of powers and before the modern administrative state.

*Joel Hood, J.D. Candidate 2015**

peatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the Panama Company case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.”

105. Whitman, *supra* note 1, at 468.

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APPENDIX A¹⁰⁶

106. DRAFT OF THE BILL OF RIGHTS (photo. reprint) (1789).

[3]

10th and 11th incorporated.

ARTICLE THE ELEVENTH.

No appeal to the Supreme Court of the United States, shall be allowed, where the value in controversy shall not amount to one thousand dollars, nor shall any fact, triable by a Jury according to the course of the common law, be otherwise re-examinable, than according to the rules of common law.

ARTICLE THE TWELFTH.

In suits at common law, the right of trial by Jury shall be preserved.

ARTICLE THE THIRTEENTH.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE THE FOURTEENTH.

No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.

ARTICLE THE FIFTEENTH.

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE THE SIXTEENTH.

The powers delegated by the Constitution to the government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.

ARTICLE THE SEVENTEENTH.

The powers not delegated by the Constitution, nor prohibited by it, to the States, are reserved to the States respectively, or to the People.

Tesle,

JOHN BECKLEY, CLERK.

In SENATE, August 25, 1789.

Read and ordered to be printed for the consideration of the Senate.

Attest, SAMUEL A. OTIS, SECRETARY.

APPENDIX B¹⁰⁷

947

OF DEBATES IN CONGRESS.

948

SEPTEMBER 24, 1789.]

Amendments to the Constitution.

[H. OF R.]

It was ordered, that leave be given to bring in a bill, to explain and amend the act for registering and clearing vessels, and regulating the coasting trade; Messrs. BLAND, BENSON, and GOODHUE were appointed to prepare and bring in the same. Adjourned.

WEDNESDAY, Sept. 23.

The engrossed bill for recognising and adapting to the constitution of the United States the establishment of the troops raised under the resolves of the United States in Congress assembled, was read the third time and passed the House.

The House resolved itself into a committee of the whole on the bill making appropriations for the service of the present year; Mr. BOUDINOT in the Chair; and after some time spent in considering the same, the committee rose and reported that they had, according to order, had the said bill under consideration, and made an amendment thereto; which being twice read, was agreed to by the House; and the bill was ordered to be engrossed, with the amendment, and read the third time to-morrow.

Mr. BLAND, from the committee appointed for the purpose, presented a bill to explain and amend the act for registering and clearing vessels and regulating the coasting trade, which was read the first and second time, and ordered to be engrossed and read the third time to-morrow.

The House resolved itself into a Committee of the whole on the bill to alter the time for the annual meeting of Congress, Mr. BOUDINOT in the Chair; and after some time being spent in considering the same, the Committee reported, that they had had the said bill under consideration, gone through the same, and made several amendments thereto; which were twice read, and agreed to by the House.

The said bill, with the amendments, were ordered to be engrossed and read the third time to-morrow.

The House then resolved itself into a Committee of the whole House on the bill to regulate processes in the courts of the United States, Mr. BOUDINOT in the Chair; and after some time spent therein, the committee rose and reported progress. Adjourned.

THURSDAY, Sept. 24.

The two following engrossed bills were read the third time and passed, to wit, the bill to explain and amend an act for registering and clearing vessels, and regulating the coasting trade, and the bill to alter the time for the annual meeting of Congress.

The engrossed bill making appropriations for the service of the present year being read the third time, was ordered to be recommitted to a Committee of the whole House this day.

A committee was appointed to ascertain the amount of the compensations due to the members of this House respectively, and of the sev-

eral officers thereof, together with the contingent expenses of the session; consisting of Messrs. FITZSIMONS, SMITH (of Maryland) and BALDWIN.

Mr. GERRY, from the committee to whom it was referred to prepare an estimate of the gross amount and net produce of the Impost and Tonnage duties for one year, made a report, which was read and ordered to lie on the table.

AMENDMENTS TO THE CONSTITUTION.

The House proceeded to consider the report of a Committee of Conference, on the subject matter of the amendments depending between the two Houses to the several articles of amendment to the Constitution of the United States, as proposed by this House; whereupon, it was resolved, that they recede from their disagreement to all the amendments; provided that the two articles, which, by the amendments of the Senate, are now proposed to be inserted as the third and eighth articles, shall be amended to read as follows:

ART. 3. Congress shall make no law respecting an establishment of religion, or prohibiting a free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ART. 8. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation—to be confronted with the witnesses against him—to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

And provided also, that the first article be amended, by striking out the word "less" in the last place of the said article, and inserting, in lieu thereof, "more."

On the question that the House agree to the alteration of the eighth article, in the manner aforesaid, the yeas and nays were called, and are as follow:

YEAS—Messrs. Ames, Baldwin, Benson, Boudinot, Brown, Cadwalader, Carroll, Clymer, Contee, Fitzsimons, Foster, Gale, Gilman, Goodhue, Griffin, Hartley, Lee, Leonard, Madison, Moore, Muhlenberg, Parker, Partridge, Schureman, Scott, Soney, Sherman, Sylvester, Sinnickson, Smith, (of Maryland,) Smith, (of South Carolina,) Stone, Thatcher, Trumbull, Vining, White, and Wynkoop.—37.

NAYS—Messrs. Bland, Burke, Coles, Floyd, Gerry, Grout, Hathorn, Jackson, Livermore, Matthews, Page, Van Rensselaer, Sumter, and Tucker.—14.

On motion, it was resolved, that the President of the United States be requested to transmit to the Executives of the several States which have ratified the Constitution, copies of the amendments proposed by Congress; to be added thereto, and like copies to the Executives of the States of Rhode Island and North Carolina.