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Consolidation of Powers Doctrine: A Look into the Current Viability of the Modern Delegation Doctrine

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Table of Contents

Introduction

Part I – Madison’s Philosophy

Part II – Moldering Principles

A. The Principle of Non-delegation
   i) Textual Argument
   ii) Denial Argument
   iii) Pragmatic Argument

B. Judicial History of Non-delegation

Part III – Modern Phenomenon

Part IV – Conclusion
Abstract

This Article attempts to clarify the constitutional validity of the legislative non-delegation doctrine. First is a brief exposition of the philosophical underpinnings of both non-delegation and separation of powers concepts. Then follows a systematic debunking of three major arguments against the historical understanding of non-delegation. The “textual” argument is shown to be textually incongruous with the Constitution both negatively, by the lack of an express grant of this power, and positively, by a solitary instance of constitutional congressional delegation. The “denial” argument ignores the fundamental principles that give governmental legislation any force in a civilized society. The “pragmatic” argument fails to pass muster as well because it focuses only on maintaining the status quo without first determining the correctness of the status quo.

The Article continues with a thoughtful look at the American Recovery and Reinvestment Act of 2009 in the light of the preceding discussion. The Article concludes by observing that a new constitutional doctrine seems to be at work, namely, consolidation of powers. What our country needs is a massive return to the principle of legislative non-delegation.
Consolidation of Powers Doctrine:

A Look into the Current Viability of the Delegation Doctrine

Apprehension. Insecurity. Government. In times like these, headlines are an absorbing passion. Wall Street is peering anxiously ahead, most companies are scrambling to survive, and the rest of us are just looking for the exit. A suppressed sort of panic has developed into an undertow that threatens the current economic system in America, and possibly the world.¹ We see our savings evaporating.² We see our investments failing. We think we see writing on the wall. Apathy begins to set in.

Into this darkness of societal doom, a light has shone forth. The Congress of the United States has put forth its hand and produced a document that will reverse the trend of disaster that was beginning to spiral out of control. Everyone can breathe a sigh of relief and get back to their daily routine. We now have the American Recovery and Reinvestment Act of 2009 (ARRA).³ In the days leading up to the passage of the Act, President Obama stated, “What we can’t do is drag our feet or allow the same partisan differences to get in our way. We must move swiftly and boldly to put Americans back to work.”⁴ For the most part, Americans seemed to be in favor of the stimulus package.⁵ It was thought that something needed to be done, even if there was disagreement on what

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³ Throughout this paper, we will call it “ARRA,” the “Act,” or the “Stimulus Package.”
that “something” actually was. Nevertheless, many doubts were expressed about the way the current administration handled the issue and those concerns have not gone away with the passage of time.⁶ As an indicator of this undercurrent, an $819 billion version of the bill passed out of the U.S. House without a single Republican vote.⁷ Maybe it was childish stubbornness that guided those U.S. Representatives. Or maybe they had a sense that widespread economic recession needs more than just a green band-aid printed by the Federal Reserve.

As we approach the first anniversary of ARRA, much of the doom that was present at its inception is still lurking in the shadows. Somehow, the bright hopes that were placed in the Act have lost some of their luster. Even the Congressional Budget Office posted an entry in November that was guardedly optimistic about the positive effects of the Act.⁸ In the nine months since the President transformed the stimulus bill into law by placing his signature thereon,⁹ the official budget office of our national Congress is content to speak in words of gentle praise¹⁰ for this piece of sweeping legislation.¹¹ This is revealing. Either it was good or it was bad—it could not be indifferent. Its sheer size negates such a proposition.¹² That 787 billion dollars’ worth of furious legislative activity could have evaporated without producing any significant effects seems utterly implausible. So what is the matter? Why has our economy

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⁶ Page, supra note 5.
⁷ Calmes, supra note 4.
¹⁰ Elmendorf, supra note 8.
¹² Id.
continued to struggle with each passing quarter?\textsuperscript{13} I submit that the reason for this impotent response is largely due to a fundamental inability of government to permanently revitalize an economy. I believe that government is the referee of prosperity, not its author. But when emergency situations threaten to shake our sense of confidence, there is a tendency for our government to assume more power. As the Supreme Court itself said, “[e]xtraordinary conditions do not create or enlarge constitutional power.”\textsuperscript{14} Perhaps we have reached the place when it is appropriate to reevaluate our national priorities in light of constitutional concerns. To properly approach this topic, we will first examine the tenets of our country’s unique governmental philosophy as advanced by Madison and others. Next, we will explore the constitutionality of the moldering principle of legislative delegation. Finally, we will discuss the Act itself as representative of the modern phenomena surrounding what I call the emerging “consolidation of powers” doctrine.

\textbf{I. Madison’s Philosophy}

\textit{a. Background}

The American form of government is premised on the flawed nature of man. Madison said it well, “If men were angels, no government would be necessary.”\textsuperscript{15} Angels are somehow above the common failings that plague humanity. If we participated fully in this higher nature, I would not be writing this paper. In fact, life as we know it today would not exist. The depredations of war would not touch our landscape. Conflict

\textsuperscript{13} Cristi Allen, \textit{U.S. Economy Struggling to Gain Traction; Decision Analyst’s September Economic Index Points to Low Growth or No Growth}, \textsc{decision analyst}, October 6, 2009, available at \url{http://www.decisionanalyst.com/publ_data/2009/EconomicIndex092009.dai}.


would be an entirely academic study. But this is not our reality. No one is perfect, and the law is a clinic that constantly interfaces this imperfection. The author of Federalist number 49 referred to this as the interplay between “passion” and “reason.” “But it is the reason, alone, of the public, that ought to control and regulate the government.”

We see then that we are often living a paradox. On the one hand, human nature is constantly pulling us down and inevitably tends to produce conflict between ourselves and others. Yet on the other, there is a voice in us that calls us to rise above the strife and seek a dimension of peace so that we may enjoy our existence more fully. And as immortalized in the Declaration of Independence, our government was dedicated to securing “the blessings of peace to ourselves and to our posterity” so we could individually pursue our own destiny.

But there are dangers here as well. Any human imperfection on a small scale necessarily becomes exponentially greater when placed in a position of power and influence. “But what is government itself,” questioned Madison, “but the greatest of all reflections on human nature?” “The great difficulty lies in this,” he said, “you must first enable the government to control the governed; and in the next place, oblige it to control itself.” But the natural tendencies of human nature seek to thwart this at every turn. So Madison responds that, “[a]mbition must be made to counteract ambition.” In other words, you have to fight fire with fire. To adequately protect liberty, government

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16 Madison or Hamilton, *Federalist 49*, 331 (Palladium).
17 Id.
18 Preamble to the U.S. Const. See also, Thomas Jefferson, *U.S. Declaration of Independence*: “That to secure these rights, governments are instituted among men."
19 Madison, supra note 15, at 337.
20 Id.
21 Id.
must have an internal system whereby the various offices review each other by opposing any usurpations of power. Thus was born the doctrine of separation of powers.

Madison viewed the citizens of the country as the primary check on government usurpations of power.\textsuperscript{22} This oversight is exercised every time we visit the ballot box. But simple votes every few years were not thought sufficient. Madison continued, “experience has taught mankind the necessity of auxiliary precaution.”\textsuperscript{23} This “auxiliary” protection comes in the form of a balance of powers. Taking the pattern from human nature, the Founders separated the three basic powers of government and gave each a measure of power to exert over the others. The legislative power to impeach, the Presidential veto, and judicial review are three clear examples of this organization. Each branch is responsible for its own sphere of duties. However, they are also responsible to the American people for ensuring that none of the other branches improperly encroach on their authority. To blindly follow our constitutional forms would be naïve. But the reasoning behind this intentional separation is critical to our freedom. Once too much power is consolidated into one branch, the other branches, even if combined, will be unable to check its further aggrandizement. Madison foresaw this possibility. He considered that if the separation of power in our government ever becomes nominal, the entire purpose of our form of government is defeated.\textsuperscript{24} We might as well throw away the Constitution and start up a new kind of nation.

A proper understanding of the integration of Madison’s philosophy into our government is critical in these days of change. Such ideas are not old fashioned merely

\begin{footnotes}
\item[22] Madison, \textit{supra} note 15, at 337.
\item[23] \textit{Id.}
\end{footnotes}
because the author has been dead for 173 years. Certain aspects of human nature never change and it is these traits that continue to confuse our national counsels to this day.

II. Moldering Principles

A. The Principle of Non-delegation

Delegata potestas non potest delegari - A delegated authority cannot be delegated\(^{25}\)

No longer in America does a single individual set policy and establish laws. Experience taught us early that such a system tended naturally toward tyranny.\(^{26}\) Instead, our forebears chose to build a system of government that was based on individual liberty and maximum freedom. To achieve this, they identified and employed a fundamental principle that inheres within the concept of personal liberty: delegation. This was immortalized in the opening lines of the U.S. Constitution with the words, “We the People of the United States.”\(^{27}\) The Founders realized that no good government could properly rule over unwilling subjects, so its very existence depended upon the continued will of the people. So here is where the delegation comes in.

A pure democracy is too cumbersome, as all the voting inhabitants of the state or country must personally participate in the machinations of the government. Every time we needed a new law, we would all have to travel to Washington D.C., find a hotel, and personally participate in the legislative process until the new law was officially “on the books.” This is a bad option. No one wants to drop what they are doing several times a year and join with 300 million other people in a legal symposium. Besides, it would be


\(^{26}\) U.S. Decl. of Independ. (1776).

\(^{27}\) Preamble to the U.S. Const. (1787).
physically impossible to gather everyone together into one place for a proper deliberation of the law. A fortiori, it would utterly impossible to hear each person’s opinion on the law. Some other system of law-making would have to be chosen.

The Founders could have chosen a monarchy. This would be infinitely more efficient than a straight democracy, but it tends to consolidate too much power in one person, leading to tyranny.\textsuperscript{28} Besides, the colonies had just thrown off the power of the King of England and to advocate a parallel system in those days might have provoked another bloody revolt.

The principle of delegation enabled the Founders to strike the happy medium by crafting a limited-powers republic. Simply put, delegation is a prolonged grant of power to govern. From the natural store of individual liberty that we each possess, we have chosen to transmit a small portion to a centralized government. Thus, the power that our government functions upon is delegated power. It does not inhere within the government itself, but is conferred from without.

Attendant upon this fact is the observation that such delegations tend toward the weakening of individual liberty. Initially, this may be seen by observing that delegations incrementally diminish the sum of authority from which the delegation was drawn. This fact may be compared to the rules of subtraction in the field of mathematics. In the absence of government, each individual is possessed of their maximum portion of natural liberty. Upon the advent of government, this individual fund of liberty is diminished by the proportionate amount of power given to the government. The central government, then, exists solely upon the aggregate of each individual’s personal delegation of authority. This interplay is also observed by constructing a spectrum with total

\textsuperscript{28} U.S. Decl. of Independence (1776).
government at one extreme and total freedom at the other. The perfect balance of power between the individual and the state should be somewhere in the middle. Too much liberty leads to anarchy. Yet, the converse of this must be true, namely, that too much government leads to oppression. Delegation is, thus, shown to be the delta between personal independence and government control.

Assuming that maximum freedom is the preferred state, our best interests dictate that delegated power be confined within strict bounds. This has been called the principle of least authority. Only enough power is delegated to the government to accomplish the needed end. This is why the Constitution was advertised by the Founders as an “express powers” document. The powers that were granted to the federal government were carefully spelled out, and the balance of power was retained by the states or by the people respectively. This distinction is the foundation for the non-delegation doctrine.

Our government was formed with a one-time grant of a certain sum of power. For that same government to aggrandize itself by acquiring more power without our consent would be tyranny. In the same way, for one branch of our government to acquire more power over the other branches is simply one more tentacle growing from the hydra of tyranny. Consolidation of powers is a dangerous thing. Yet over time, our national government is voluntarily choosing to move in this direction. The principal agent in this revolution is the U.S. Congress. Instead of recognizing and appreciating its precious

29 The Founders were cognizant of this converse truth by their recital of a “long train of abuses” against King George III of England. U.S. Decl. of Independence (1776).
32 Id., at 36.
33 U.S. Const., Amend. IX, X (ratified on December 15, 1791).
legislative power, Congress has abdicated many of its duties by relegating them to the growing constellation of federal executive agencies.

Opposition to this shift in legislative power may be divided into three categories. First, many assert that the text of the Constitution does not support it. I refer to this category as the “textual” argument. Second, others seek to classify most delegations as mere “execution” of the laws under the powers given to the executive branch. I refer to this category as the “denial” argument. Finally, many scholars object to the doctrine on the grounds that it is not practical in this modern world of infinite complexity. I refer to this category as the “pragmatic” argument. Let us take up each of these arguments in turn.

i) Textual Argument

The Constitution does not directly pass on the issue before us. Many have explored this omission and concluded that in the absence of an express prohibition, we may authorize delegations under the general concept of federal legislative power. But such an answer seems not to adequately examine the Constitution as a whole. Our discussion in this essay will focus on three phrases that support my proposition either negatively or affirmatively.

The first negative support is found in the opening lines of the first Article: “All legislative Powers herein granted shall be vested in a Congress of the United States.” The sum total of legislative power that was granted to our national government is to reside squarely within the halls of Congress. Conversely, no legislative authority is to be exercised outside the ambit of the national legislature. If the Founders had intended for other bodies to exercise federal legislative power, they could have clarified this by

appending this simple phrase to the text above, “...and in such other executive bodies or agencies as the Congress shall from time to time think proper.” The power to legislate is the broadest power granted to our national government, and as such, it should fall under the closest scrutiny. Without a clear statement that federal legislative power is delegable, we must view all delegations with suspicion.

Some scholars urge that the power to legislate as granted by Article I, section 1, contains the inherent authority to delegate that power. But unless the authority to delegate is itself delegated to the national legislature, for that body to assume it would fly in the face of original grant of authority. The legislative power is the authority to make and alter laws. If this was the only power granted to our national government, our situation would hearken back to the days under the Articles of Confederation. But this is not the case. Articles II and III continue the theme of delegation—Americans choose carefully to part with some of their liberty to achieve a stable, central government. Each power is separate and distinct. A power to speak the law into existence is different in kind than a power to enforce it. The one creates a thing, while the other gives it muscle. Let us also consider the dynamic of government in this relation. Our government is entirely dependent upon delegated authority. Without the consent of the people, our government would never have come into being, and it would very shortly cease to be if we pulled the plug on it. We delegated the power to make laws to the national Congress.

35 Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097 (2004); Eric Posner and Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1729 (2002).
37 I do not intend to entirely ignore the judiciary in this exposition, but the primary field of inquiry lies between the legislative and executive branches, for that is where the largest share of the debate takes place. Black’s Law Dictionary affirms this. In its definition of “legislative power,” it states that, “a legislative body may not delegate its authority to the judicial branch, and the judicial branch may not encroach on legislative duties” Id.
In doing so, we subjected legislative power to delegative power. In other words, by exercising the power of delegation, the power of legislation was created. Legislative power is, thus, dependent upon delegative power. The latter is intrinsically greater than the former. Thus, the assertion that legislative power inherently subsumes delegative power is naïve. It is much like assuming that the lesser authority may wield the greater.

The second phrase that bears on the question is the Necessary and Proper Clause:

“[the power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”\(^{38}\) Many have urged that this clause lays an adequate textual foundation for the doctrine of legislative delegation.\(^{39}\) I disagree. The necessary and proper clause only pertains to the powers already granted.\(^{40}\) The power to delegate legislative authority is not contained in that grant. What we find in Article I, section 8, is a laundry list of miscellaneous powers that the American people were delegating to the national congress. Among others, the clause contains the power to tax, pay debts, provide for the common defense, borrow money, regulate commerce, naturalize foreigners, oversee bankruptcies, coin money, establish post offices and roads, protect patents, institute inferior tribunals, define piracy, declare war, raise armies, maintain a navy, oversee the military, call forth the militia, train and arm the militia, and build forts and arsenals.\(^{41}\) At the end of that barrage of powers lies the humble Necessary and Proper Clause. Congress shall have the power “to make all Laws which shall be


\(^{40}\) This situation is similar to a question presented in bankruptcy law. Under Title 11 § 105, the bankruptcy court is granted wide latitude to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” The court is not, by this section, empowered to exceed the scope of the bankruptcy code. It is merely given the attendant power to enforce the law as written.

\(^{41}\) *U.S. Const.*, Art. I, § 8.
necessary and proper for carrying in Execution the foregoing powers…” Some have argued that this clause empowers Congress to provide broad statutory grants of authority to the various executive agencies and let them promulgate rules consistent with the statute. However, the clause does not favor such a construction. The Congress is the body entrusted with enacting all the laws necessary to execute the foregoing list of powers. The clause does not say, “Congress shall have the power to form agencies and bureaus which shall make all laws that are necessary and proper to carry into execution the foregoing powers.” If any governmental body aspires to make laws that help the executive to carry out its powers, then the Necessary and Proper clause has been violated. Thus, this clause also tends to negatively support the proposition that legislative delegation is not constitutionally permissible.

The third phrase that bears on the question is found in Article II, section 2, paragraph 2, “but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” This phrase is found in the section that outlines the executive power to make treaties and to nominate ambassadors and other public officials. There are two systems of nomination established by this section. The first is the default system. If Congress does nothing, then all ambassadors, officials, and judges must be first nominated by the President, and then confirmed by the Senate. However, in an unusual twist of power, the Congress was given the right to trump this default system. If Congress got too busy to confirm the President’s nominations, it could simply enact a law that would vest the President alone with the power to nominate officials. Once the President signed it, he could dispense with all those pesky Senate confirmation hearings.

42 U.S. Const., Art. I, § 8, last paragraph.
If Congress did not like the President’s nominations for ambassador to Russia, and it wanted to toughen up its relations with that country, then it could statutorily empower the secretary of defense to nominate the next ambassador to Russia. The President probably would not like such an arrangement, but the Congress could override his veto. To carry this even further, if Congress did not want the President to choose the next Supreme Court justice, it could apparently delegate that task to the Supreme Court!

This constitutional provision has serious implications for the delegation doctrine. Most importantly, it dissolves the contention that the Constitution is silent on the issue of delegation. It also shows that the Founders did not treat the concept of delegation lightly. The fact that the Constitution only mentions this one instance of direct delegation says quite a lot. It is the only example of legislative delegation in the document. The first two phrases we examined lent a small amount of negative support to the proposition that the Constitution disfavors legislative delegations. This third phrase by its solitary existence provides positive support to my proposition. If Congress had general authority to delegate its power, then we should find a provision in the Constitution to that effect. Conversely, if the Constitution never mentioned congressional delegation of anything, then it would be difficult to prove by this negative evidence that the Founders did not intend for Congress to delegate any of its power. However, since the Constitution expressly grants Congress the authority to delegate away the nominative power of the President, we may reasonably conclude that Congress is not granted the authority to delegate anything else.

In a powerful critique of the philosophical inconsistencies of the current state of delegation doctrine, constitutional scholars Laurence Alexander and Saikrishna Prakash
explore the limits of unconventional delegations. Their comments ramble from one end of the Constitution to the other, but they make several good points. If delegation is constitutional, then why are we shy about delegating the power to impeach federal officers? How about the senatorial power to confirm treaties—can Congress delegate that to a National Treaty-Making Agency? If we delegate the power to lay and collect taxes to the IRS, how is that intrinsically different from Congress empowering the currently-nonexistent Constitutional Amendment Agency to propose and pass constitutional amendments? Right now, we are somewhere in the middle. Current thought generally accepts the proposition of legislative delegation, but it hesitates to carry it to its logical extremity. Contrary to Alexander and Prakash’s own assertions, this is a classic example of a “slippery slope” argument. The only way to prove any argument is to tease out its logical conclusion. In doing this to the current doctrine of delegation, we find that it is spiraling out of control. Justice Benjamin Cardozo presciently styled this trend as “delegation running riot.” That was in 1935. By now, it has exploded out of all proportion.

But aside from any “slippery slope” arguments against delegation, the text of the Constitution simply does not support it. The exact wording used by the Founders places all legislative powers “herein granted” in the Congress, not in any number of executive

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43 Alexander & Prakash, supra note 39, 1036 (June 2007).
44 Alexander & Prakash, supra note 39, at 1060, 1062.
45 Id., at 1077.
46 Id., at 1059.
47 Id., at 1054. See also, Black’s Law Dictionary 911 (7th ed. 1999).
48 Id., at 1078.
49 Id.
50 Schechter, supra note 14, 553 (Cardozo, J., concurring).
agencies.\textsuperscript{51} Further, contrary to many scholarly opinions,\textsuperscript{52} the Necessary and Proper clause does not actually support current delegation doctrine. Finally, the fact that Congress is empowered to delegate the President’s nominative power proves by its singular existence that the Founders did not intend to place plenary delegative power in the hands of our national legislature.\textsuperscript{53} Any other position falls little short of scholarly gymnastics.

ii) Denial Argument

Others deny that legislative authority is actually being delegated at all.\textsuperscript{54} They refer to this conduct as part of the execution process. While not directly advocating this argument, Alexander and Prakash style it the “formalist account” because it turns on the form of the legislative action.\textsuperscript{55} Under this theory, a grant of power to a regulatory agency is not a delegation of legislative authority. Instead, it is thought to be the means of executing the laws.\textsuperscript{56} In this context, Eric Posner and Adrian Vermeule use the term “rulemaking” authority, not “legislative delegation.”\textsuperscript{57} They argue strenuously that “[c]reating rules pursuant to valid statutory authority isn’t lawmaking, but law execution.”\textsuperscript{58} The only way to exceed this principle would be for Congress to pass a law

\begin{footnotes}
\textsuperscript{51} This was not meant to be in total derogation of state legislatures’ legislative power. The word “all” is modified by the phrase “herein granted.” The Congress was only given power to legislate consistently with the necessary ends of government as outlined in the Constitution.
\textsuperscript{52} Merrill, supra note 35; Posner & Vermeule, supra note 35.
\textsuperscript{53} Such a result would tend to consolidate power in a single branch of government. Madison argued against this vigorously in Federalist 51, 337 (Palladium Press 2000) (1788).
\textsuperscript{54} Posner & Vermeule, supra note 35, at 1726.
\textsuperscript{55} Alexander & Prakash, supra note 39, at 1048.
\textsuperscript{56} Id.
\textsuperscript{57} Posner & Vermeule, supra note 35, at 1725-27.
\textsuperscript{58} Id., at 1726.
\end{footnotes}
granting an executive agency broad rulemaking powers, but at the same time failing to
directly and adequately direct those powers.\textsuperscript{59}

The argument asserts that so long as the rulemaking authority is kept strictly
within the boundaries that Congress prescribes, whatever power the agency exerts is
intrinsically \textit{not} legislative power. It is thought that the laws coming from Congress
should be general directives, and that the executive branch should be granted wide
leeway in its enforcement capacity. Even the Supreme Court has tentatively followed
this line of reasoning in several cases.\textsuperscript{60} On one occasion the Court said that,
“[n]ecessity…fixes a point beyond which it is unreasonable and impracticable to compel
Congress to prescribe detailed rules.”\textsuperscript{61} One district court, in following this precedent,
ruled that the President could constitutionally adjust foreign importation of petroleum via
applicable license fees.\textsuperscript{62} It asserted that such a scenario presented no “looming problem
of improper delegation.”\textsuperscript{63} But for almost 75 years, the Supreme Court has not gathered
the courage to strike down a single law on the basis of an unconstitutional delegation of
legislative authority.\textsuperscript{64}

But these distinctions are little more than shadow boxing with semantics. Every
time our national legislature empowers any other body to promulgate rules that carry the
force of law, an unconstitutional legislative delegation has taken place. Legislation is the

\begin{itemize}
\item \textsuperscript{59} \textit{Id.} The phrase “intelligible principle” is the current standard.
\item \textsuperscript{60} There is a long line of case law on point, starting with the year 1935. \textit{See e.g., Loving v. U.S., 517 U.S. 748 (1996) (holding that President has power to prescribe aggravating factors in cases of court martial for murder); and Whitman v. Am. Trucking Ass’n, 531 U.S. 457 (2001) (holding that Clean Air Act did not unconstitutionally delegate legislative power to Environment Protection Agency).}
\item \textsuperscript{61} \textit{American Power & Light Co. v. SEC, 329 U.S. 90, 105, 67 S.Ct. 133, 142 (1946).}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} Two of the last cases producing such a result were: \textit{Schechter, supra note 14; and Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).}
\end{itemize}
method by which the authority speaks the law. And if Congress empowers another body to speak the law within any given framework, then the conclusion that legislative authority has passed from the one to the other is inescapable. If we posit that any such inferior rulemaking bodies are not legislating, then it follows that any rules they may produce are not binding as law. Yet the swarms of executive agencies that populate our nation’s capital are not generally advisory boards. They are regulatory bodies that wield incredible amounts of power. If their instructions were given in a detailed format that admitted only of simple performance, then those agencies would appear to be constitutional. Yet, Congress has fallen into the habit of sending general directives to these agencies and then letting them work out the details. This is a clear form of legislative delegation.

It appears that the advocates of the formalist argument are simply in denial of reality, so we will leave them to build imaginary castles in their wordsmithing sand boxes while we explore yet another obstacle to the modern application of the non-delegation doctrine.

iii) Pragmatic Argument

Many scholars ignore the constitutional concerns and focus only on the reality of our present situation. They urge that Congress should delegate the minutiae of administration to executive agencies so that it can focus on more pressing national issues. One proponent noted that the executive Office of Management and Budget

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65 As used here, the word “speak” refers not simply to the communication of the law (which action the executive branch is constitutionally permitted to engage in), but to the creation of the law out of the policy framework that the legislature possesses.

66 Exploring the full constitutional ramifications of executive agencies is beyond the scope of this article.

alone considers over 2,000 proposed rule changes each year.\footnote{Richard Pierce, \textit{Political Accountability and Delegated Power}, 36 Am. U.L. Rev. 391, 404, footnote 79 (winter 1987).} This would be a daunting task for Congress to undertake with its already hectic schedule.

Additionally, to summarily dissolve even a small percentage of all the agencies would cause a minor earthquake in the American job market. Things are already bad enough. Turning them loose all at once would only make the current unemployment situation worse. Besides, we could not get along very well without all those federal agencies owing to their significant contributions to our modern society. They are hard at work improving our workplaces, protecting our environment, conserving our natural resources, managing our international relations, safeguarding our food supply, and many other important tasks that might otherwise be left undone.

Congress is, no doubt, sensible of the benefits that the present system of federal bureaucracy confers upon it. But a cost-benefit analysis does not decide constitutional questions. Pragmatic scholars assert that there is no conceivable way for the 535 members of Congress to adequately cope with all the issues that the executive agencies deal with on a daily basis. They urge further that Congress should focus its time on the most pressing national issues and leave all the small decisions to the various regulatory agencies.\footnote{Steward, \textit{supra} note 67, at 341-342.} While it is true that Congress has a limited amount of time to devote to national business, it does not follow that this state of affairs should necessarily force the conclusion that legislative delegations are proper. Constitutional doctrines like this may not be adduced from thin air.

The fundamental problem with this ends-justifying-the-means philosophy is that it elevates perception over principle. It pretends that the specific forms contained in the
Constitution are less relevant than the opinions of the governing elite. With all this talk concerning the currency of the doctrine of legislative delegation, one might think that the Constitution was replete with references to it, or at least that there is some clear mention of the concept somewhere in its text. However, this is simply not the case. While the word “delegation” does not appear in the Constitution, there are several close matches. The ninth Amendment uses the word “delegated” to refer to the powers not delegated to the federal government, but which are retained by the states respectively or by the people. The words “vest” or “vested” are used five times total, but never in the sense of granting general permission to indiscriminately delegate—or re-vest—constitutional grants of authority. Absent such authority, Congress simply may not act.

B. History of Non-delegation

So where does the non-delegation doctrine fit in? Have we lost it somewhere along the way? Is it merely one of those quaint concepts you hear about in law school or debate around the table in small talk with other lawyers as you discuss modern trends in the law? Let us undertake a brief exploration of its history. The delegation doctrine was first broached by the Supreme Court in the case of United States v. Hudson and Goodwin. The year was 1812. The Court, per Justice Johnson, declared that Congress could not empower lower courts to decide questions of common law over which Congress itself had no legislative authority. In other words, the Congress could not create a court with more power than Congress itself could delegate to it. 70 years later,

70 The word “vested” is used in the opening sections of the first three articles to indicate that the people were vesting the federal government with legislative, executive, and judicial authority respectively. It is also used in the Necessary and Proper Clause of Art. I, § 8, to describe the powers already vested in the federal government. The only time the word “vest” is used is in Art. II, § 2, ¶ 2, to grant Congress the power to re-vest appointment authority of inferior government officers. Supra, Part II, a.

the Court revisited the doctrine in a case called *Morrill v. Jones*.\(^{72}\) The issue before the court was a statute enacted by Congress that empowered the Secretary of the Treasury to issue regulations concerning the importation of breeding animals into the United States. The Secretary was given authority to admit certain breeds of animals, free of duty, “under such regulations as he may prescribe.”\(^{73}\) Pursuant to this authority, the Secretary promulgated a regulation that duties were to be imposed upon animals that were not of a “superior stock.” The Court struck down the Secretary’s rule, stating that the Secretary, “cannot by his regulations alter or amend a revenue law.”\(^{74}\) Congress was not permitted to relegate such unfettered authority to an executive official.

The story goes on. Ten years later, the Court was faced with another executive regulation in the case of *United States v. Eaton*.\(^{75}\) Congress passed a statute that laid a tax on oleomargarine and required its manufacturers to keep accurate books of accounting so federal inspectors could insure that the tax was being properly collected. But the Secretary of the Treasury decided to impose a similar duty on all wholesalers of the product. The wholesalers brought suit on non-delegation grounds. Quoting *Morrill*, the Court declared again that the Secretary could not “by his regulations alter or amend a revenue law.”\(^{76}\) The Court further held that it was a “very dangerous principle” that a federal regulation could be augmented with criminal penalties without Congress’ express authorization.\(^{77}\) If Congress had wanted to impose such a regulation upon both manufacturers and wholesalers, it could have done so.

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\(^{73}\) *Id.*
\(^{74}\) *Id.*, at 467.
\(^{75}\) *U.S. v. Eaton*, 144 U.S. 677 (1892).
\(^{76}\) *Id.*, at 687.
\(^{77}\) *Id.*, at 688.
Then, in 1928, the Court announced a legal test for acts of Congress in the area of non-delegation. The case was *Hampton and Co. v. United States.* In upholding an executive proclamation that increased the import duty on barium dioxide, the Court held that such actions by the executive were constitutional, so long as Congress articulated an “intelligible principle” to which the executive could conform its conduct. The distinction the Court sought to make was between actual law-making authority on the one hand, and mere rule-making authority on the other. Making rules to enforce the law is not inherently a legislative function. If the executive branch was not permitted any discretion in its efforts to enforce the laws, it is doubtful if Congress’ desires could ever be fully realized. Thus, under *Hampton*, the executive branch may constitutionally promulgate rules, but only if those rules are within the boundaries that Congress specifically lays out.

The next marker in our brief history is found in the year 1935. Two cases were decided that year on non-delegation grounds, *Panama Refining Co. v. Ryan,* and *A.L.A. Schechter Poultry Corp. v. United States.* Both cases involved the National Industrial Recovery Act (NIRA). In *Panama,* the President acted under the NIRA to ban interstate shipments of oil in excess of established quotas to protect the struggling oil industry in America. The Court struck down the ban because the President went beyond the authority conferred upon him by the NIRA. There was no “primary standard” imposed that would guide the President’s conduct. In *Schechter,* the President was again faulted for exceeding the scope of his authority. Under the auspices of the NIRA, the President expanded the applicable rules regarding unfair competition beyond the existing

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79 *Panama,* supra note 64.
80 *Schechter,* supra note 14.
81 *Panama,* supra note 64, at 426-27.
understanding of the term. Under the common law, “unfair competition” related “to the palming off of one's goods as those of a rival trader.” The Court noted that more modernly, the term also applied to misrepresentations and misappropriations of another traders goods or equitable rights. In striking down the President’s regulations, the Court noted that the executive had expanded the standards of unfair competition beyond the “widest range” of current law. Congress alone may do this. Not the President.

From that day to this, the Court has largely avoided the doctrine of non-delegation. Today, many Congressional grants of power would be in violation of non-delegation principles if Panama or Schechter had anything to say about it. Interestingly, it is indisputable that neither case has been overruled on their non-delegation grounds. Certain other aspects of their rulings have been limited or reversed, but the non-delegation principles that they stand for remain untouched.

III. Modern Phenomenon

We will turn now to the American Recovery and Reinvestment Act of 2009 to if it comports with the principles of non-delegation. Without a doubt it ranks as one of the most expensive single bills ever devised by Congress. The official copy of the bill runs to 407 pages. This masterpiece of compromise covers nearly as wide a gamut as is

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82 Shechter, supra note 80, at 531.
83 Id., at 532.
84 Id.
88 ARRA, supra note 86, at 1.
conceivably imaginable within a single document. It speaks to agriculture, nutrition, rural development, commerce, justice, science, defense, energy, water, financial services, general government, homeland security, interior issues, environment, labor, health and human services, education, military construction, veterans affairs, department of state, transportation, housing and urban development, state fiscal stabilization, taxes, unemployment assistance, health insurance, health information technology, Medicaid provisions, broadband communications, and energy.\textsuperscript{89} With all this verbiage, it would seem hard to miss the mark. Let’s look a little closer. Based on the views presented already in this paper, I am opposed to the Act. It is unconstitutional on both delegation and separation grounds. There will be two themes running parallel through this section. First, the Act is a prime example of the gymnastics that constitutional scholars must perform to justify the state of modern delegation doctrine. Second, ARRA actively advances the counter-constitutional doctrine of consolidation of powers.

We will start at the beginning. This bill got off to a rough start, constitutionally speaking. It appears that the Senate actually proposed the first version of this bill on January 6, 2009.\textsuperscript{90} This was precisely 20 days before the House proposed its first version.\textsuperscript{91} According to the rules of the U.S. House of Representatives, appropriations must originate in the House.\textsuperscript{92} Although the Senate version that was introduced early in January was merely a shell bill, its introduction and subsequent readings in the Senate cast a lurid glow over the reputation of the Congress.

\textsuperscript{89} ARRA, supra note 86, at 1.
\textsuperscript{90} OpenCongress.org (the official site of the U.S. Congress for bill tracking), http://www.opencongress.org/bill/111-s1/show.
\textsuperscript{91} OpenCongress.org, available at, http://www.opencongress.org/bill/111-h1/show.
Now, we will look at the text of the Act itself. Section three states five specific purposes: 1) to preserve and create jobs and promote economic recovery, 2) to assist those most impacted by the recession, 3) to provide investments needed to spur technological advances in science and health, 4) to invest in national infrastructure, and 5) to stabilize state and local government budgets.\textsuperscript{93} The very first two goals are not really within the ambit of congressional power. No constitutional provision speaks of Congress having the power to promote job growth, stimulate economic recovery, or assist those who were impacted by a recession. The General Welfare clause\textsuperscript{94} is the most likely candidate for a moot court battle on the topic. However, any benefits that are doled out to the unfortunate victims of the present economic crisis are fueled entirely by tax revenue. Thus, the government is effectively playing the Good Samaritan with the contents of my wallet. This does not promote my general welfare.\textsuperscript{95}

But enough of policy considerations for now. Reading the very next subsection, we find an item that falls squarely within the scope of this paper. The Act purports to vest the various executive agencies with authority to spend money as outlined in the bill. Something just doesn’t seem quite right.

**GENERAL PRINCIPLES CONCERNING USE OF FUNDS.**—The President and the heads of Federal departments and agencies shall manage and expend the funds made available in this Act so as to achieve the purposes specified in subsection (a), including commencing expenditures and activities as quickly as possible consistent with prudent management.\textsuperscript{96}

\textsuperscript{93} ARRA, supra note 86, 1-2.
\textsuperscript{94} U.S. Const., Art. I, § 8.
\textsuperscript{95} If the general welfare is the deciding factor in this equation, both mathematical principles and philosophic arguments should be adduced in support. If the Act were to benefit more than 50% of the population, this would seem to be advancing the general welfare. However, the sheer magnitude of ARRA’s impact does not decide the question. The issue is the specific type of welfare that is being manufactured. If the welfare is within the proper bounds of government, then even if the Act only directly benefited a few, it would still be constitutional as promoting the general welfare.
\textsuperscript{96} ARRA, supra note 86, at 2, § 3(b).
Is this all that the Constitution requires of Congress? A general carte blanche and a full bank account in the hands of a department head? Such a law would have been struck down before 1936 as a blatant violation of the non-delegation doctrine and the separation of powers doctrine.\(^\text{97}\) In reality, legislation like this is not really a law in the classic sense; it is a massive spending project with the form and power of a law. As an unknown philosopher once said, “A democracy…can only exist until the voters discover that they can vote themselves largesse from the public treasury.”\(^\text{98}\) In this case, the voters are not the general public—they are the members of Congress.

Moving to section 5 of the Act, we find another troubling provision—the emergency designation.\(^\text{99}\) The Act was passed in record time\(^\text{100}\) and was advertised as an emergency measure to protect Americans and restore confidence in our economy.\(^\text{101}\) Yet as of September 2009, only $241.9 billion stimulus dollars have been spent.\(^\text{102}\) If the emergency was so dire that the Democrats steamrollered the Republicans to push the measure through, then why is the money still in the bank? Perhaps the executive agencies have fallen down on the job. Perhaps the President is failing to adequately oversee the appropriate disbursement of the stimulus money. Perhaps there were too many projects in the Act and some are being delayed. Perhaps. Or could it be that Congress is constitutionally out of bounds by assigning the President the responsibility to spend all this money?

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\(^{97}\) See, e.g., Schechter, supra note 14, and Panama, supra note 64.  
\(^{99}\) ARRA, supra note 86, at 2.  
\(^{100}\) 22 days according to [http://www.opencongress.org/bill/111-h1/show](http://www.opencongress.org/bill/111-h1/show).  
\(^{101}\) Calmes, supra note 4.  
\(^{102}\) Recovery.gov, the official website tracking ARRA’s impact, [http://www.recovery.gov/Pages/home.aspx](http://www.recovery.gov/Pages/home.aspx).
The power of the purse is the power to rule. As we have already established, the legislative power is the highest in our tripartite hierarchy. The Founders wisely invested the power of the purse chiefly in the hands of the U.S. House of Representatives.\textsuperscript{103} This was done because the representatives are the closest to the people.\textsuperscript{104} With elections every two years, the representatives are the government officials most directly accountable to their constituents. So for Congress to authorize any executive agency to spend money under the broad grant mentioned just above seems little short of constitutional lunacy. It ignores the safeguards on the power to spend, and glibly transfers significant authority to agencies and officials that never stand for reelection.

Skipping ahead, we find more troubling text in the section of general provisions under Title XVI. “In using funds made available in this Act for infrastructure investment, recipients shall give preference to activities that can be started and completed expeditiously.”\textsuperscript{105} Now in cases of infrastructure development, we are speaking of roads, critical community services, and other long-term installations. Constitutionally speaking, it would seem that Congress would need to exercise some specific oversight in this area to ensure that national funds are not squandered. But there is no mention of quality control. Faster is better. “Expeditiously” is the key word. What happened to Congressional oversight? What if the more expeditious way of spending the money produces a less stable job economy in the near future? What if the money that is spent produces sub-par infrastructure that does not adequately serve its purpose? Such a result should not be blindly reached in the interest of “expeditious” job selection. While it is

\textsuperscript{103} Madison, Federalist No. 58, supra note 15, at 380-82.
\textsuperscript{104} Szabo, supra note 30, at 12.
\textsuperscript{105} ARRA, supra note 86, at 188. The recipients here are the government agencies that are receiving the appropriation money, and which are charged with distributing it.
theoretically possible that Congress should be allowed to grant a wholesale permission like this, the result it produced in this case is far from sound.

The very next section actively confirms this abstinential trend on the part of our national legislature. The text states that, “None of the funds appropriated or otherwise made available in this Act may be used for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool.”106 It must be remembered that we are in the area of general provisions where broad rules of construction are used to avoid the necessity of repeating this language ad nauseam throughout the document. But if this be the purpose, the language was not well crafted. Apparently, if Secretary Salazar wanted to repair the swimming pools in Yellowstone National Park to attract more crowds for the summer season, he would be precluded from doing so. However, it appears that he could build a theme park if it would fit within the general parameters of the Department of the Interior. Also, are casinos so bad that they are the only business that make the legislative headlines in this light? What about adult bookstores, tattoo shops, and illegal pharmaceutical outlets? I am not saying the Congress can be prevented from giving directives without also granting some leeway. But I see a Congress that is steadily plodding away from its legislative duties and granting wider and wider latitude to executive agencies. The habit of delegating authority is becoming so natural to Congress that it has grown sloppy in the way it expresses its intentions.

This pattern carries on throughout the entire document. Steering back to page six, we find a grant for a food program in Puerto Rico and American Samoa. But are food programs the most appropriate means for Congress to put Americans back to work? And is the food condition so dire in Puerto Rico and American Samoa that the Northern

106 ARRA, supra note 86, at 189.
Mariana Islands and the Virgin Islands somehow don’t deserve any like funding?
Continuing on, we find grants for aqua-farmers who become eligible for federal funds merely by experiencing a certain price increase in aquaculture feed.\textsuperscript{107} Congress ignores the economic viability of the farmers. Apparently, it does not matter whether they were making huge profits, or on the verge of bankruptcy. In any case, they get the money.
One page later, we come across a $1 billion check to the Federal Bureau of the Census.\textsuperscript{108} In these times of economic difficulty, one would think that of all the industries in America that don’t need extra funds, the Bureau of the Census has to rank among the highest. And the Act simply goes on and on.

Congress littered the pages of the Act with dollar signs in almost every conceivable aspect of life, and directed that the money be spent as “expeditiously” as possible.\textsuperscript{109} But there is a larger force at work here, and we as Americans need to take it seriously. Power is steadily, inexorably being extracted from each of three separate branches of our government to be deposited in the coffers of the newest branch of our national government: the executive agency. No longer does Congress hold the only key to the federal purse. The constitutional locksmith of “change” and “progress” has cut a multitude of copies and distributed them to many of the various executive agencies. No longer does the sole power of executing the laws reside in the oval office of the President. Instead, he shares it with a wide array of regulatory agencies that most people have never even heard about. There are 15 of these agencies under the direct supervision of the

\textsuperscript{107} \textit{ARRA, supra} note 86, at 11-12. The increase required is a substantial increase over a recent 5-year average.

\textsuperscript{108} \textit{Id.}, at 13.

\textsuperscript{109} \textit{Id.}, at 188.
President, and these 15 are, in turn, responsible for dozens of other internal bureaus, administrations, and services. I call this the consolidation of power doctrine.

In sum, this colossal pile of paper known as the “Stimulus Package,” “the Act,” or simply, “ARRA,” is a large scale funding package that continues the trend away from traditional legislative non-delegation. In effect, it is the tool of an entirely new concept in constitutional jurisprudence: the consolidation doctrine. This doctrine opposes the principle of separation of powers in favor of a government stocked with panels of experts. Representation under the new doctrine of “consolidation” is largely ignored or forgotten. In its desire to improve the lives of Americans, consolidation doctrine is deliberately and methodically sweeping our liberties into the lap of a single “branch” of our national government. Only it isn’t the government that we thought we were paying for. It is a governmental proxy. What we are witnessing is the large-scale abdication of legislative duty on the national level. Since the existing government was too busy focusing on all the “important” things, a large portion of our national power has defaulted into the offices of the executive agencies.

IV. Conclusion

But this is not the end of the story. The non-delegation doctrine is not yet dead, and the consolidation doctrine is not set in stone. The inroads that already exist are both expansive and fundamental, but they are reversible. I admit that the authority structures that we now live under will not go away overnight. Indeed, some of them, perhaps, should stay. However, the current method of Congress mandating a general principle and

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leaving the agency to work out the details has produced a lopsided statutory scheme that has complicated matters to significant degree.\textsuperscript{111} As mentioned earlier, “[e]xtraordinary conditions do not create or enlarge constitutional power.”\textsuperscript{112} The recent recession in our economy should not taken as an excuse to expand the scope of federal bureaucracy. Besides, all the regulations in America are slowly stifling our creativity. No longer do we have the clear competitive edge in the global market. Our companies are required to comply with multitudinous regulations that more and more of them are expanding their legal departments to handle the onslaught of issues.\textsuperscript{113} Many companies see foreign markets as their only hope.

We have explored various aspects of current delegation doctrine, and its historical forebear, the non-delegation doctrine. By ignoring the principles of non-delegation, Congress has offended many constitutional values, including separation of powers, presentment, and bi-cameralism. Further, subsequent events show the growth and development of a foreign concept in our governmental philosophy: consolidation. Congressional abdication of duty has inexorably tended to consolidate power within a single arm of government. This has thrown the entire government out of balance and presents a serious threat to the liberties of the American people.

We need to stop the emperor’s parade and gets his clothes back on. We need to replace the invisible threads of the doctrine of delegation with the time-tested fabric of constitutional separation of powers. We need to dust of the principle of non-delegation and put it back to work. If Congress finds a compelling reason to continue the type of

\begin{itemize}
  \item \textsuperscript{111} There are over 50 volumes of federal regulations. This is at least 10 times the volume of federal statutes.
  \item \textsuperscript{112} Schechter, supra note 14, at 528.
\end{itemize}
work that the discontinued agencies were performing, then it should pass detailed laws to this effect. This would abrogate and replace the current colossus of federal regulations. If any agencies pass constitutional muster, then Congress must reexamine its grants of authority to ensure that no excess power is conveyed. There would no longer broad grants of authority. There would no longer be indiscriminate appropriations of money. There would no longer be categorical abdications of legislative duty. Maybe the Congress would actually have to work a little bit harder. But then, that might not be such a bad thing after all.

The course I have charted would conclude the present era of constitutional jurisprudence, and usher in a new one. Actually, we would be reviving the old way. But I think such a course is amply justified. The philosophies of our Founders, the moldering principles of our Constitution, and the modern problems we are all facing swell into one mighty current of common sense. We need to check the growth of the consolidation doctrine, and go back to a balanced position of separate powers. What we want here in America is a government that is “of the people, by the people, and for the people.” That’s what I call a new “ARRA” in constitutional jurisprudence.