IN SUPPORT OF STRICTER APPLICATION OF THE NON-DELEGATION DOCTRINE

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I. INTRODUCTION

Separation of powers is an essential element of the design of the Constitution of the United States.[1] Both the drafters of the Constitution and founding era commentators focused much of their energies on devising the most effective system of government with regard to preventing the consolidation of power in a single person or office—something they had

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[1] *See, e.g.*, THE FEDERALIST NO. 51 (James Madison).

experienced first-hand to their detriment.[2] The debates prior to the Constitution's ratification considered whether the executive should be an individual or a council; how the legislators should be elected; what, if any, overlap should exist between the legislature and the executive; and numerous other questions about how the government should be structured to prevent it from subverting the will of the people.[3] Eventually, the ratified Constitution would include the three branches we know today—legislative, executive, and judicial—with a bicameral legislature to make the laws and an individual executive to enforce the laws.[4] Since the founding, the exercise of the governmental powers outlined in the Constitution has shifted in ways that are antithetical to the goals of the original structure of the government—in particular, the delegation of legislative power from Congress to the executive branch and the subsequent expansion of the administrative state.[5] This shift has resulted in an impotent Congress divesting itself of broad powers and granting them to executive agencies where countless federal regulations originate. The solution to this problem is adherence to an idea which has long existed, but which has been rendered toothless since the New Deal era—the non-delegation doctrine.[6] This Article will (i) explain the non-delegation doctrine's origins and its historical application, (ii) examine the current state of delegation of legislative power to executive agencies, and (iii) argue for understanding the Constitution in a way that supports applying the non-delegation doctrine more strictly to preserve the structure put in place to secure and maintain the balance of power within the federal government.

II. OVERVIEW OF THE NON-DELEGATION DOCTRINE

A. Definition

The non-delegation doctrine is derived from Article I of the Constitution of the United States. It is also rooted in the separation of powers idea that is fundamental to the whole system of government created by the Constitution.[7] The essential idea of the doctrine is that Congress does not have the power under the Constitution to delegate any of its legislative power to either of the other branches of the federal government or to any

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[2] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., Yale University Press rev. ed. 1937) (1911).

[3] *Id.*

[4] U.S. CONST., arts. I–III.

[5] William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, 3 AM. CONST. SOC'Y SUP. CT. REV. 211 (2019).

[6] Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 621 (2017).

[7] *See, e.g.*, THE FEDERALIST NO. 47 (James Madison).

private party.[8] Article I Section 1 of the Constitution says that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[9] Whether and to what degree this grant of power allows Congress to delegate powers to other branches of the federal government has been debated since the earliest days of the nation's existence and continues to be debated today.[10] Even among adherents to the non-delegation doctrine, there is not a consensus as to what powers Congress may or may not delegate to the executive or judicial branches. The debate largely centers around what constitutes legislation as opposed to other powers of Congress or applying discretion in the execution of legislation that Congress has enacted.[11] Some have argued that it is, or should be, within the scope of authority granted to Congress by Article I to delegate legislation as it sees fit, but this is a minority opinion.[12] For most, there is a general agreement that Congress can delegate some authority to the executive or judicial branches, but only within certain limits. Where the disagreement comes in in this camp is where the line should be drawn that indicates when a congressional delegation of power is impermissible.[13]

B. Early Application of Non-Delegation Up to the New Deal Era

As early as 1813, the United States Supreme Court issued opinions regarding the distinction between Congress delegating its lawmaking power and Congress making laws that give the executive some degree of latitude in their execution.[14] This distinction was the crux of the Court's

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[8] *See, e.g.*, Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 388–92 (2017).

[9] U.S. CONST. art. I, § 1.

[10] *See, e.g.*, Cargo of Brig Aurora v. United States, 11 U.S. (7 Cranch) 382; Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (arguing against the historical existence of a non-delegation doctrine).

[11] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (noting the key "constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion.").

[12] Mortenson & Bagley, *supra* note 10.

[13] *See, e.g.*, Jenny Neeley, *Over the Line: Homeland Security's Unconstitutional Authority to Waive All Legal Requirements for the Purpose of Building Border Infrastructure*, 1 ARIZ. J. ENV'T L. & POL'Y 139, 154–61 (2011) (arguing that § 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is a clear example of what goes too far, containing no requirement to provide even cursory explanations of decisions made under the waiver authority granted, and including a provision barring judicial review of all claims not made on constitutional grounds).

[14] *See Aurora*, 11 U.S. (7 Cranch) 382.

1813 *Aurora* decision, which noted that the latter was within the scope of Congress's authority.[15] The cargo of the brig Aurora had been seized because it was illegally imported from Great Britain under a non-intercourse act passed by Congress in 1809.[16] The act was set to expire unless the President delivered a proclamation that Great Britain had not ceased to "violate the neutral commerce of the United States," in which case the prohibition on imports from Great Britain was to continue.[17] The Court found that the legislature had not unconstitutionally delegated power to the executive but had merely dictated that a certain law should be revived based upon the proclamation of a certain fact by the President.[18] The President's exercise of discretion affected the application of the law, but the President did not exercise any legislative authority.[19]

Later, in the *Wayman v. Southard* decision, the Court clarified that what Congress may not delegate are "powers which are strictly and exclusively legislative" but that they may delegate "powers which the legislature may rightfully exercise itself."[20] In this case, the Court determined both that Congress had authority to direct the processes of federal courts and that it could, within the bounds of the Constitution, delegate the same authority to the courts themselves without having delegated its legislative power.[21] The distinction here requires observing that the legislature is given all legislative power, but that it is also given other powers which are not strictly legislative. The latter powers the legislature may delegate to another body so long as it retains all of its legislative powers.

Near the end of the nineteenth century, the Court in *Marshall Field & Co. v. Clark* continued to uphold the distinction between granting actual lawmaking power and granting discretionary power to the executive branch.[22] Here, The Tariff Act of 1890 gave the President the power to suspend tariffs in response to detrimental tariffs imposed by other countries.[23] Specifically, the Act told the President what actions he could take, and under what general circumstances, but gave the President the authority

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[15] *Id.*

[16] *Id.* at 382.

[17] *Id.* at 383.

[18] *Id.* at 387–88.

[19] *See id.*

[20] 23 U.S. (10 Wheat.) 1, 42–43 (1825).

[21] *See id.*

[22] *See* 143 U.S. 649 (1892).

[23] *Id.* at 680.

to determine when to take such action.[24] The Court ruled that such authority was not legislative but discretionary.[25]

C. Non-Delegation's New Deal High-Water Mark

While the Court considered questions and made rulings on the extent of the legislature's power to delegate rulemaking authority from the earliest days of the country's existence, it wasn't until well into the twentieth century that the Court laid out a guiding principle by which to make future decisions. The current test for what constitutes a permissible congressional delegation began with the Supreme Court's 1928 opinion in *J.W. Hampton, Jr. & Co. v. United States*.[26] In *J.W. Hampton*, the Court said that a "legislative action is not a forbidden delegation of legislative power" so long as "Congress shall lay down by legislative act an intelligible principle" to direct the delegee.[27] The Court today still uses the "intelligible principle" test when called upon to determine the constitutionality of congressional delegations.[28]

In only two cases, *A.L.A. Schechter Poultry Corp. v. United States*[29] and *Panama Refining Co. v. Ryan*[30], both decided in short succession in the mid-1930s, has the Court struck down congressional delegations of legislative power using the "intelligible principle" test. In these cases, both of which involved Congress delegating rule-making authority to the President, the Court determined that the laws in question provided no standard or policy by which the executive's regulations could be guided.[31]

In *Panama Refining*, Congress, through the National Industrial Recovery Act (NIRA) of 1933, gave the President the authority to prohibit the interstate transportation of petroleum and petroleum byproducts that were in excess of state allowances.[32] The text of the relevant section of the Act authorized the President to:

> prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the

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[24] *Id.*

[25] *Id.* at 692–93.

[26] *See* 276 U.S. 394 (1928).

[27] *Id.* at 409.

[28] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); Mistretta v. United States, 488 U.S. 361 (1989).

[29] 295. U.S. 495 (1935).

[30] 293 U.S. 388 (1935).

[31] *Id.* at 415; *Schechter Poultry*, 295 U.S. at 541.

[32] *Panama Refining*, 293 U.S. at 406.

> amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State.[33]

The Court looked at this section of the Act in the context of the entire NIRA and found that the Act "establishe[d] no criterion to govern the President's course" and did not "prescribe any limitation of the grant of authority" given to the President.[34]

Two years after the *Panama Refining* decision, the Court in *Schechter Poultry* again struck down a provision of the National Industrial Recovery Act as being beyond the scope of permitted legislative delegations.[35] The relevant section of the NIRA in *Schechter Poultry* was the "Live Poultry Codes," which permitted the President to approve "codes of fair competition" for trades or industries.[36] The Court in *Schechter Poultry* noted that, while the section at issue in *Panama Refining* was at least limited to interstate transport of petroleum products, the "codes of fair competition" could apply to any trade or industry of the President's choosing.[37] Justice Cardozo, whose dissent in *Panama Refining* indicated that the relevant section was sufficiently narrow, called the delegation at issue in *Schechter Poultry* "a roving commission to inquire into evils and, upon discovery, correct them."[38] Thus, in at least these two cases, the Court created precedent that it would, in some circumstances, strike down as unconstitutional delegations of legislative authority that are overbroad and do not provide the delegee with some limiting principle.

D. Non-Delegation's Watered Down Contemporary Era

Apart from the decisions in *Schechter Poultry* and *Panama Refining*, however, the Court in the past century has been much more amenable to broad grants of power from the legislative to the executive branch.[39] In 1932, the Supreme Court upheld a congressional delegation of authority to the Interstate Commerce Commission in *New York Central Securities Corp. v. United States*.[40] In this case, the appellants were challenging the authority of the Interstate Commerce Commission to order the New York Central Railroad Company to acquire control of five major railroad lines

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[33] *Id.*

[34] *Id.* at 415, 420.

[35] *Schechter Poultry*, 295 U.S. at 495.

[36] *Id.* at 521–23.

[37] *Id.* at 530–31.

[38] *Id.* at 551 (Cardozo, J., concurring).

[39] *See, e.g.*, N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12 (1932); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943); Mistretta v. United States, 488 U.S. 361 (1989).

[40] 287 U.S. at 24–26.

by leasing them.[41] Congress gave the Interstate Commerce Commission the authority to order such an acquisition in the Interstate Commerce Act of 1887.[42] In addressing the validity of the delegation of authority to the Commission, the Court said that "public interest" as a criterion was sufficiently limiting.[43] The opinion explained that in the context of the Act granting authority to the Commission, "public interest" was limited to the purpose of the Act which was "to assure adequacy in transportation service" through "prevention of abuses, particularly those arising from excessive or discriminatory rates[.]"[44] According to the Court, the determination and implementation of regulations based on the public's interest in adequate transportation are thus not legislative acts and do not require the input of the individuals elected to represent said public.[45]

The Court similarly upheld a delegation of authority to the Federal Communications Commission (the "FCC") for regulating the distribution of broadcast licenses in *National Broadcasting Co. v. United States*.[46] The FCC was created by the Communications Act of 1934.[47] The particular purpose of the Act regarding radio broadcasting was "to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority . . . ."[48] The FCC was created and given regulatory powers to maintain this purpose according to the "public convenience, interest, or necessity."[49] In *National Broadcasting*, the FCC, subsequent to conducting an industry wide investigation, enacted several regulations limiting the use of chain broadcasting or simultaneous broadcasting of an identical program by two or more connected stations.[50] The appellants in this case argued that the FCC had exceeded its authority and that if it had not exceeded its authority then the grant of such authority was unconstitutional.[51] The Court in its opinion stated that, more than just authorizing the FCC to police the radio waves

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[41] *Id.* at 22.

[42] *Id.* at 20.

[43] *Id.* at 24.

[44] *Id.*

[45] *Id.*

[46] 319 U.S. 190, 216–17 (1943).

[47] *Id.* at 193.

[48] *Id.* at 214.

[49] *Id.*

[50] *Id.* at 193–210, 238 n.1.

[51] *Id.* at 209.

> It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.[52]

Again, the Court analyzed the "public interest" standard as being limited by the Communications Act's focus on communications and radio, determined that it was a sufficiently limiting standard to guide the FCC, and held that enacting the regulations was both not legislation and within the scope of authority granted to the FCC by Congress.[53] According to the Court, rules that determine what is in the public's interest regarding what is played over the radio or, put more broadly, that determine the best way for scarce resources to be distributed, are not legislative acts and do not require direct input from those elected to represent the public.[54]

More recently, the Supreme Court in *Mistretta v. United States* upheld the creation of, and grant of authority to, the United States Sentencing Commission as a constitutionally permissible delegation of congressional authority.[55] The Sentencing Reform Act of 1984 created the United States Sentencing Commission and tasked it with creating sentencing guidelines for all federal offenses.[56] Federal courts would then be required, with some discretion, to follow these guidelines in making sentencing decisions.[57] The purpose of the Act and the creation of the Commission was to remedy historical disparities in sentences handed down for similar convictions.[58] The Court held this was a matter of discretion granted to the judiciary, not a grant of authority to make law.[59] In its opinion, the Court explained that the sentencing process had long been divided between the three branches of government in the form of setting statutory sentencing ranges (legislative), handing down sentences for convictions (judicial), and authorizing the eventual release of prisoners (executive).[60] One might argue this looks a lot like a microcosm of the division of responsibilities applicable to the entire law. Justice Antonin Scalia issued a dissent in this case which took issue not with the authority that Congress had delegated, but with the entity to whom the authority was delegated.[61] Justice Scalia said the issue

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[52] *Id.* at 216.

[53] *Id.* at 216–17.

[54] *Id.* at 224.

[55] 488 U.S. 361, 374 (1989).

[56] *Id.* at 362.

[57] *Id.* at 367.

[58] *Id.* at 366.

[59] *Id.* at 363.

[60] *Id.* at 364–65.

[61] *Id.* at 420 (Scalia, J., dissenting).

was not, as it often is, with the degree of discretion delegated by the legislature (even if only because of adherence to the principle of *stare decisis*[62]), but that the Act granted a permissible degree of legislative power to an "independent agency."[63] While the law nominally placed the Sentencing Commission in the judicial branch, Justice Scalia noted that just saying it was part of the judiciary did not make it so, and the Commission had no judicial authority that made it clearly part of the judiciary.[64] Ultimately, the distinction that Justice Scalia made was that while the delegation of some degree of legislative discretion may be necessary, such delegation is only permissible when it is inherent to the core executive or judicial authority being exercised, and the authority given to the Sentencing Commission as part of the judiciary was the power to make laws independent of any other judicial authority.[65]

III. SUPPORT FOR STRICTER APPLICATION OF NON-DELEGATION

The historic view of the Court as explained by Justice Scalia in his *Mistretta* dissent, that "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be,"[66] is well taken. As applied, however, the Court's "intelligible principle"[67] standard hardly sets outer boundaries on the degree of discretion the legislature can grant and requires little to no consideration on the part of the legislature regarding when its laws can leave to the delegee the task of assessing what is in the "public interest."[68] The text of the Constitution, along with the ideas that influenced its drafting and the debate that surrounded its ratification, suggest that stricter application of the non-delegation doctrine would be the more constitutionally-faithful approach as compared to the broad, lenient understanding of the doctrine that has been applied to date. Strict non-delegation is supported by focusing on the text

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[62] *Id.* at 416 ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?").

[63] *Id.* at 425.

[64] *Id.* at 420.

[65] *Id.*

[66] *Id.* at 417.

[67] *See id.* at 372 (majority opinion).

[68] *See id.* at 416 (Scalia, J., dissenting).

of the Constitution and the principle of separation of powers upon which much of the governmental structure is based.

The writings of John Locke in his Second Treatise of Government are among the foremost influences on the American Revolution and, subsequently, the Constitution. The supremacy of the legislative power, the governed as the source of authority to govern, and the necessity of separating the legislative and executive authorities are ideas espoused in Locke's Second Treatise that are foundational to the non-delegation doctrine.[69]

Further, a significant point of debate surrounding the ratification of the Constitution was the need to further curtail the power of Congress.[70] Locke's ideas of separation of the legislative and executive powers were readily accepted as necessary for the new government, but many in the founding generation believed that the legislative branch needed further internal checks to prevent its being so powerful as to threaten the rights of the several state governments and the people thereof.[71] Eventually, bicameralism, along with the checks given to the other branches of the government, became the agreed upon solution to problems of legislative power; this further supports a stricter application of the non-delegation doctrine.[72]

A. Natural Rights and the Social Contract

John Locke was an adherent to the idea of a natural law—a set of universal moral truths and rights that apply to all people throughout time.[73] This is the source of the "among these are life, liberty, and the pursuit of happiness" part of the Declaration of Independence.[74] In addition, Locke argues that societies exist to protect these natural rights.[75] In a state of nature, the natural rights are at risk of being invaded by others; therefore, people enter into a social contract whereby they agree to be governed by the laws of a society in exchange for the protection of their fundamental rights.[76] This social contract idea informed the founding generation in seeking independence from the British monarchy and in seeking to create a new form of government that would be best suited to strike the balance

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[69] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., The New Am. Libr. 1965) (1690).

[70] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2.

[71] *See id.*

[72] *See* U.S. CONST. arts. I–III.

[73] *See* LOCKE, *supra* note 69, at 309–18.

[74] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[75] *See* LOCKE, *supra* note 69, at 367.

[76] *Id.* at 374–75.

between limiting the absolute freedom of the state of nature and preserving the rights fundamental to all people. Thus, the power to make the laws which protect the rights of the people is supreme among the powers to be wielded by the government of the society.[77]

The power of making the laws of the society, Locke thereby reasons, can be derived only from the will of those consenting to be governed by those laws.[78] The Constitution is the embodiment of the social contract of the people of the United States. It represents the consent of the people to be governed by the government of the United States. The express consent of the governed therein is to vest "all legislative powers" in the Congress and does not then permit Congress to delegate the law-making power granted to it by the people to any other body.[79] This too explicitly follows Locke's conclusions about the extent of the legislative power.[80] To do so would be to bypass the consent of the governed or to usurp the power of the people to grant governmental authority.

B. Separation of Powers

Another essential idea presented in Locke's Second Treatise that made its way into the United States government is separation of powers. This idea boils down to the need to prevent all of the powers granted to the government from being consolidated and wielded by one individual or entity. The founders had experienced this first-hand under the British monarchy, and Locke wrote specifically about monarchy being antithetical to the civil society created by the social contract under the natural law.[81]

To prevent the consolidation of power that would tend to threaten the rights of the people being governed, it is imperative that the legislative and executive powers be vested in distinct parties. The separation of powers is necessary because, where the power to make and execute laws is concentrated in one person, there is no means to judge the actions of that person or hold him accountable. This state of monarchy, Locke argues, is worse than the natural state of nature where a man is at least free to defend his rights as he sees fit.[82] The Constitution of the United States, thus, takes care to keep the legislative and executive functions separate, and the

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[77] *Id.* at 399–400.

[78] *Id.* at 401.

[79] *See* U.S. CONST. art. I.

[80] *See* LOCKE, *supra* note 69, at 401–09.

[81] *Id.* at 360–61, 369.

[82] *Id.* at 369.

delegation of legislative authority to the executive branch is antithetical to this design and the philosophies in which the design is rooted.

C. Checks on Legislative Authority

With the above ideas in mind, the ratified Constitution contained two explicit checks on the legislative authority granted to Congress and, it was later determined, one major implicit check. The executive branch was given one of the explicit checks and the other is built into the structure of Congress itself. The implicit check rests with the judicial branch. The executive check is the power to veto laws passed by Congress.[83] The check built into Congress itself is bicameralism.[84] The judicial check is that of judicial review or judging whether the law has violated the supreme law of the Constitution.[85] These checks exist both to slow the progress of impassioned factions and to maintain the separation of powers that keep the branches of government co-dependent on one another for the administration of the federal government.[86]

The power given to the executive to veto bills passed by Congress was widely accepted by the founders as a necessary measure to prevent the passage of hasty or improper laws and to prevent the encroachment of the legislature on the other two branches of the government.[87] Less time was spent debating the prudence of a negative on legislative action than was spent debating the form and extent of such a negative.[88] Some felt that the veto power should not be vested in one individual, but perhaps shared between the executive and judiciary, or that the executive should be a committee.[89] Others felt that, as would eventually become the case, the veto power should be qualified rather than absolute as it had been with the British monarch.[90] Few, however, felt that an executive check on the exercise of legislative authority was not necessary to inhibit legislative abuses.[91]

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[83] U.S. CONST. art. I, § 7, cls. 2–3.

[84] U.S. CONST. art. I, § 1.

[85] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

[86] Emery. G. Lee III, *The Federalist in an Age of Faction: Rethinking Federalist No. 76 on the Senate's Role in the Judicial Confirmations Process*, 30 OHIO N. U. L. REV. 235, 254, 256–57 (2004) (discussing the use of checks and balances and separation of powers to control factions).

[87] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 94.

[88] *See id.* at 21.

[89] *Id.* at 98, 105.

[90] *Id.* at 139.

[91] *Id.* at 98.

Additionally, the Constitution divides Congress into a Senate and a House of Representatives.[92] Bills presented to Congress must be passed in identical form by both chambers before they are sent to the President to become laws.[93] There was also some debate as to the necessity of dividing the Congress.[94] Those in favor of a single body pointed to the inefficacy of Congress under the Articles of Confederation as a reason for a more streamlined method of legislation under the new government.[95] Others argued, for various reasons, that a Congress with two branches was necessary.[96] James Wilson argued that one house should represent the will of the people and one should represent the several states, as the states and the people thereof would not necessarily have the same interests and should both be represented in Congress.[97] James Madison explained in Federalist 51 that the legislative authority is so powerful that it should not only be vested in a body of representatives elected by the people, but that that body should then be divided in two with each of the houses overlapping as little as possible in their manner of operation.[98] The latter party had its way, and Congress, thus, checks its own power by being divided into two separate chambers which must both agree on identical versions of a bill before it may be enacted as law.[99]

The third major check on the legislative authority, judicial review, is not explicitly stated in the Constitution but was found to be an implicit power of the judicial branch of the federal government.[100] This is the power of the judiciary to check laws passed by Congress against the supreme law of the Constitution and strike down those that are found offensive to the Constitution.[101] In *Marbury v. Madison*, the case that established the idea of judicial review, Chief Justice John Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[102] He continued, "if then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the

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[92] U.S. CONST. art. I, § 1.

[93] U.S. CONST. art. I, § 7, cls. 2–3.

[94] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 2, at 350.

[95] *Id.*

[96] *Id.* at 349.

[97] *Id.* at 416–17.

[98] *See* THE FEDERALIST NO. 51, *supra* note 1.

[99] U.S. CONST. art. I, §§ 1, 7.

[100] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[101] *Id.*

[102] *Id.* at 177.

case to which they both apply."[103] This has been the principle, implicit in the constitutional structure, that has since guided the courts in checking the legislature against violating the Constitution.[104] The courts thus use judicial review to check the power of the legislature when an act of Congress evades the first two checks of bicameralism and the executive veto.[105]

The above checks on the legislative authority built into the structure of the government provide further support for strict application of the non-delegation doctrine. When Congress delegates to executive agencies its power to create laws, the checks of the executive veto and bicameralism are eliminated, and only judicial review of the executive orders remains. Judicial review can be a powerful check, but consider that the justices of the Supreme Court are appointed by the executive who is creating the laws being reviewed.[106] Additionally, as a matter of course, the Court will generally give deference to an agency's reasonable interpretation of a statute that the agency itself created.[107] An executive who makes the laws, enforces the laws, and adjudicates the validity of the laws it creates and executes is exactly what the founders hoped to avoid.[108] The structure of the government should thus be maintained in a manner that preserves these checks and prevents the consolidation of power that tends to lead to monarchy and despotism.

IV. TOWARD A BRIGHTER FUTURE FOR THE NON-DELEGATION DOCTRINE?

The current Court, in the 2022 *West Virginia v. EPA* case, revived somewhat the application of the non-delegation doctrine as applied to EPA emissions standards by implementing what is known as the "major questions doctrine."[109] The major questions doctrine is the idea that when Congress intends to make an especially broad grant of power, it will do so with very clear language and not leave the question of the extent of its delegation open for interpretation.[110] This decision, however, did not get at the

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[103] *Id.* at 178.

[104] *See* Stephen R. Alton, *From* Marbury v. Madison *to* Bush v. Gore*: 200 Years of Judicial Review in the United States*, TEX. WESLEYAN L. REV. 7 (2001) (discussing the historical development of the power of judicial review).

[105] *See id.*

[106] U.S. CONST. art. II, § 2, cls. 2–3.

[107] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[108] THE FEDERALIST NO. 47, *supra* note 7 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

[109] 142 S. Ct. 2587, 2609 (2022).

[110] *Id.*

delegation of authority from Congress, but at the exercise of authority by the executive agency which the Court considered as beyond the scope of what Congress had authorized.[111] Indeed, this is the nature of the major questions doctrine—to prevent agencies from exercising authority in excess of that granted to them by Congress rather than to strike down legislation that the Court believes contains excessive delegations of legislative power. In this case, the Court ruled that the EPA had acted outside the authority granted to it by Congress but did not take issue with the scope of authority it believed had been granted to the EPA by the Act.[112] The major questions doctrine, as applied here, is a product of canons of statutory interpretation and not a constitutionally based idea.[113] It may, however, as it did in this case, have the desirable effect of limiting the scope of agency rulemaking by more narrowly interpreting congressional delegations of power.[114] Commentators have suggested that the majority of members of the current Court may favor a stricter application of the non-delegation doctrine moving forward, and that the decision in *West Virginia v. EPA* was only the opening salvo of a larger non-delegation renaissance.

Some lower courts have also stoked the non-delegation embers in recent decisions by application of the major questions doctrine.[115] In 2022, a federal district judge in the Northern District of Texas enjoined the Biden Administration's student debt relief program because it exceeded the authority given to the executive branch by the legislature.[116] The Biden Administration created the student debt relief program under the HEROES Act.[117] The HEROES Act gave the executive the power to provide loan assistance to military personnel, and the Biden Administration relied on this grant to put into effect the student debt relief program which would forgive a portion of student debt owed by any qualifying holders of federal student loans.[118] After several other plaintiffs tried unsuccessfully to gain standing to challenge the program, the plaintiff in this case brought a claim against the administration citing their ineligibility for the loan forgiveness and claiming (1) that the administration did not properly follow the notice-and-comment procedures under the Administrative Procedures Act, and

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[111] *See id.* at 2615–16.

[112] *Id.*

[113] *Id.* at 2609.

[114] *Id.* at 2608–09.

[115] *See* Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644 (N.D. Tex. 2022), *vacated*, 600 U.S. 551 (2023).

[116] *Id.* at 667.

[117] *Id.* at 654–55.

[118] *Id.*

(2) that the debt relief program was outside the scope of authority granted to the executive by the HEROES Act—an act which was specifically intended to benefit servicemembers and veterans.[119] The district judge, the Honorable Mark T. Pittman, agreed with the plaintiffs and ruled that the Biden Administration had exceeded its authority in enacting the student debt relief program under the HEROES Act.[120] Applying the major questions doctrine, the Supreme Court in *Biden v. Nebraska* held the Secretary of Education did not have authority under the HEROES act to implement the student-loan relief program.[121] *West Virginia v. EPA* and *Biden v. Nebraska* seem to indicate that the current Supreme Court may be amenable to reining in executive action by narrowly interpreting the grants of authority from the legislature by use of the major questions doctrine.

These recent cases show a willingness on the part of judges today to read grants of executive authority narrowly in a way that limits seemingly very broad delegations of legislative power. This may also indicate a willingness in the future to strike down congressional delegations that are too broad or vague and do not sufficiently limit the executive. However, real change in the way the courts apply the non-delegation doctrine on the front end is made exceedingly difficult by the long history of applying an "intelligible principle" or similar standard. It is clear that to some degree delegations of legislative authority will be permissible. It is less clear at this point how to rein in the not-very-limiting standards that courts have historically applied, although the major questions doctrine is a good start.

V. CONCLUSION

Contemporary commentators and indeed justices of the Supreme Court have noted that in modern times it would be "unreasonable and impracticable" to expect Congress to create every federal law, rule, and regulation.[122] The question is where to draw the line. It should not be understood that the executive may have no say in the legislative process or that those elected to Congress may seek no advice or counsel from outside their respective chambers on crafting their proposed laws. It is the duty and responsibility of each congressperson to be as informed as possible before drafting or voting on legislation. It may well be prudent to have

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[119] *Id.* at 655.

[120] *Id.* at 688 (the author might argue a slight but substantive distinction from the assertion in Judge Pittman's opinion that "Article I of the Constitution allows Congress to 'delegate' some of its legislative powers to administrative agencies" and argue that, historically, judges have interpreted the Constitution as allowing—or not disallowing—Congress to delegate some of its legislative powers to administrative agencies.).

[121] 133 S. Ct. 2355, 2375 (2023).

[122] *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2642 (2022) (Kagan, J., dissenting).

Departments of Agriculture, Transportation, and Labor to provide expertise to those congresspeople considering, creating, advocating, or preparing to vote on legislation. It may even be prudent that such departments exist under the executive so that they may also serve to execute the laws once enacted. But any new rules promulgated with the force of law should be subject to approval by the legislature. Perhaps, in practice, the legislature has nothing to do with crafting the legislation except for reading it, understanding what it says and its likely effects, and voting on it. Such a system would not offend the balance of power as do congressional delegations of broad, vague authority to the executive branch.

The non-delegation doctrine, at least nominally, guides the federal courts in deciding when the line between the legislative and executive branches has been overstepped. In reality, however, for the better part of the last century, it seems the guiding principle would more aptly be called the limited-delegation doctrine. But "non-delegation" should be applied as strictly some today insist "shall not be infringed" should be applied. The philosophies that guided the American founding insist that the power to make laws should come directly from the people whose liberties will be protected and restrained by those laws. The supreme law of the nation directs that the powers to make the laws and execute the laws are to be vested in separate branches of the government. This idea preserves the checks on legislative power that restrain the legislative process from following close at heel to the whims of impassioned factions and protect minority factions from any would-be tyrannical majority. The structure of the government of the United States is central to its design as a bastion of liberty, and the enumerated powers of one branch should not be handed over to another any more than they should be wrenched from one by another.