

U.S. Constitutional Law I(D)

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UNIVERSITY
OF MIAMI



Non-Delegation Doctrine: Background

Nondelegation

Suppose Congress authorized the federal Securities and Exchange Commission (SEC) to “regulate cryptocurrency futures in the public interest, convenience and necessity.”

Is it consistent with the Constitution for Congress to do this?

Nondelegation

Current doctrine:

- In theory, the applicable test is set out in a 1928 case, *Hampton* (CB 377):
 - Has Congress laid “down by legislative act an **intelligible principle** to which the person or body authorized to take is directed to conform.”
- Delegation upheld in *Hampton*.
- But ...

Nondelegation

- In fact, the last time the Supreme Court ruled statutes unconstitutional for under the non-delegation doctrine was in 1935:
 - Panama Refining Co. (CB 377)
 - ALA Schechter Poultry Corp (CB 377-78)
- These cases concerned the National Industrial Recovery Act, a key New Deal/Depression statute

Nondelegation

Context:

- In 1935 the Court also held the NIRA unconstitutional under the Commerce Clause
- They were decided before the Court's "[switch in time](#)" in 1937 when it recognized Congressional power in New Deal legislation to regulate more extensively under the Commerce Clause than the Court had previously viewed as constitutional

Nondelegation

Context:

- One additional concern in those cases might have been the idea of having the standards formulated as a **code** *by industry trade groups*, which was then adopted by the Executive Branch.
- In the abstract, this might seem worrisome, or an abdication of government power to private groups. But consider the context ...

Nondelegation doctrine/What's at stake:

A.L.A. Schechter Poultry Corp. v. United States & Pandemics/Epidemics

- **The code**
 - Prohibited sale of diseased chickens
 - Required “run of the coop”
- Context:
 - “[Wet market](#)”: live poultry being sold; chickens had tuberculosis; could be passed on to humans
 - Determination by Congress that cut-throat competition needed to be reined in to stop deflation, as a means of fighting the Depression; and also to deal with pressure to sell sick chickens
- How deferential should courts be to a Congressional judgment that best way to deal with this problem was through voluntarily negotiated trade/industry codes backed up by federal enforcement?

Nondelegation

- As noted earlier:
 - Panama Refining's and Schechter's holdings on non-delegation have not been overturned.
 - No decision of the Court has found a statute unconstitutional on non-delegation grounds since then.
- So why has nondelegation doctrine not been applied?

Nondelegation

Consider the problem facing a court trying to apply nondelegation doctrine.

- The theory: Article I gives Congress the power to legislate. Then the executive branch implements / executes the legislation. Under nondelegation doctrine, the court polices the border between legislation (policy making) and execution.
- *But* in fact ...

Nondelegation

The underlying problem:

- Legislation can vary in breadth and specificity.
- In theory, the broader or more general the language of a statute is, the more it might seem like Congress is just handing over its legislative power to the executive branch.
- But in fact, there are at least two reasons why Congress might think broad delegations are the only way to go ...

Nondelegation

- *On the one hand*, Congress might be making a considered decision that there are some policy determinations best left to implementation by the executive branch, guided by a broad principle in the statute:
 1. Congress might determine that there are matters (e.g., specific facts) that are best determined “on the ground,” by the executive branch, which is tasked with implementing the legislation; OR
 2. Congress might find it useful to delegation certain narrow, policy decisions in a relatively specific area
- And how good are judges, who are neither legislators nor executives, at deciding where to draw the line between acceptable and unacceptable delegations of power?

Nondelegation

Consider the Jerusalem Embassy Act of 1995

- Required moving US Embassy in Israel to Jerusalem
- Presidential waiver: the President may suspend this requirement for six months “if he determines and reports to Congress in advance that such suspension is necessary to protect the national security interests of the United States.”

Intelligible principle? (Also, is it constitutional under *Zivotofsky v. Kerry*? (CB 347))

Nondelegation

- *On the other hand*, and cause for concern, there is a danger that Congress might act irresponsibly, even turning over one of its most basic powers – control of spending – to the executive. This has happened in other [countries](#).

Nondelegation

- What should we make of the following instances? Do they show Congress being utterly irresponsible? Or Congress crafting legislation that, while reasonable people might disagree over its terms, is no abdication of its power?
 - The 2008 bailout
 - The National Emergency Act

Nondelegation: The Bailout

2008 White House [proposed legislation](#) on bailout:

- § 1: Treasury Department could spend \$700 billion, “on such terms and conditions as determined by the Secretary,” to purchase mortgage-related assets.
- § 3: Secretary to take into account the means for:
 - “(1) providing stability or preventing disruption to the financial markets or banking system; and
 - “(2) protecting the taxpayer.”
- **Intelligible principle?**
 - Adequate guidance?
 - Does it matter that it’s \$700 billion (a trillion in today’s dollars)?

Nondelegation: The Bailout

The actual [bill](#) approved by Congress imposed 9 requirements:

§ 103: In exercising the authorities granted in this Act, the Secretary shall take into consideration--

- (1)** protecting the interests of taxpayers by maximizing overall returns and minimizing the impact on the national debt;
- (2)** providing stability and preventing disruption to financial markets in order to limit the impact on the economy and protect American jobs, savings, and retirement security;
- (3)** the need to help families keep their homes and to stabilize communities;

Nondelegation: The Bailout

The 9 requirements (cont.)

§ 103: In exercising the authorities granted in this Act, the Secretary shall take into consideration--

(4) in determining whether to engage in a direct purchase from an individual financial institution, the long-term viability of the financial institution in determining whether the purchase represents the most efficient use of funds under this Act;

(5) ensuring that all financial institutions are eligible to participate in the program, without discrimination based on size, geography, form of organization, or the size, type, and number of assets eligible for purchase under this Act;

Nondelegation: The Bailout

The 9 requirements (cont.):

§ 103: In exercising the authorities granted in this Act, the Secretary shall take into consideration--

(6) providing financial assistance to financial institutions, including those serving low- and moderate-income populations and other underserved communities, and that have assets less than \$1,000,000,000, that were well or adequately capitalized as of June 30, 2008, and that as a result of the devaluation of the preferred government-sponsored enterprises stock will drop one or more capital levels, in a manner sufficient to restore the financial institutions to at least an adequately capitalized level;

(7) the need to ensure stability for United States public instrumentalities, such as counties and cities, that may have suffered significant increased costs or losses in the current market turmoil;

Nondelegation: The Bailout

The 9 requirements (cont.):

§ 103: In exercising the authorities granted in this Act, the Secretary shall take into consideration--

(8) protecting the retirement security of Americans by purchasing troubled assets held by or on behalf of an eligible retirement plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B) of the Internal Revenue Code of 1986, except that such authority shall not extend to any compensation arrangements subject to section 409A of such Code; and

(9) the utility of purchasing other real estate owned and instruments backed by mortgages on multifamily properties.

Nondelegation: The Bailout

What to make of this example?

- If there is a danger that the political branches will act irresponsibly, with Congress turning over one of its most basic powers – spending – to the executive, then:
 - *Courts* need to enforce some delegation limits, in order to ensure that a basic feature of the constitutional order (Congress legislates; the President faithfully executes) is respected?
- Or ...

Nondelegation: The Bailout

What to make of this example? (cont.)

- The political branches *do* attend to this danger and address it.
 - How detailed legislation should be is something the political branches are best suited to handle: they are the legislators, not judges. Note concerns that without relatively quick legislation, there might be a financial collapse and depression.
 - Judges are not well suited to making these kinds of determinations.
 - Deference?
 - Is it like political question doctrine – lack of judicially manageable standards?

Nondelegation: The National Emergencies Act of 1976, 50 U.S.C. § 1621:

(a) With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency....

Nondelegation: The National Emergencies Act of 1976, 50 U.S.C. § 1621:

- There is *no* principle laid down for what a national emergency is.
- Constitutional?

Nondelegation: The National Emergencies Act of 1976, 50 U.S.C. § 1621:

- **First:** A process-based approach:
 - When approved in 1976, the Act provided that the House and Senate could overturn a Presidential determination under the Act by a *concurrent resolution*.

Nondelegation: The National Emergencies Act of 1976, 50 U.S.C. § 1621:

“Concurrent Resolution”: passed by House and Senate; not presented to President for signing/veto

- “Joint Resolution”:
 - another term for legislation
 - Passed by House and Senate and *is* presented to President for signing/veto

Nondelegation: The National Emergencies Act of 1976, 50 U.S.C. § 1621:

- So Congress may have judged that it's too hard to define "national emergencies"
 - Definition too broad: what's the point of a definition
 - Definition too narrow: overly constraining, unforeseen circumstances may be left out
- Instead, provide that Congress can make a judgment on each Presidential declaration, if it so chooses, unimpeded by Presidential veto

Nondelegation: The National Emergencies Act of 1976, 50 U.S.C. § 1621:

Problem:

- Court, in *Chadha* (1983) (CB 380) (to be covered soon), declared “legislative veto” unconstitutional.

Nondelegation: The National Emergencies Act of 1976, 50 U.S.C. § 1621:

Response:

- Congress decided to amend National Emergencies Act of 1976 so that Congress could overturn the presidential declaration of national emergency only by a Joint Resolution (i.e., subject to veto).
- Now, a presidential declaration will stand even if (say) 450 Representatives and 66 Senators *oppose* it (because that would not be the 2/3 vote in each house to override the veto if the full membership were voting)

Nondelegation: The National Emergencies Act of 1976, 50 U.S.C. § 1621:

- **Second**: A legislative-text based approach:
 - Declaring a national emergency has no practical effect under the NEA
 - The practical effect comes from other statutes that delegate power to the president when he or she determines and declares there is a national emergency.
 - Example: **10 USC § 2808** ...

Nondelegation: The National Emergencies Act of 1976, 50 U.S.C. § 1621:

10 USC § 2808:

(a) In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

Nondelegation: The National Emergencies Act of 1976, 50 U.S.C. § 1621:

- Is there sufficient specificity in 10 U.S.C. § 2808?

Nondelegation: Nat'l Emergencies Act

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Nondelegation: Gundy (CB 378)

Sex Offender Registration and Notification Act (SORNA)

- Sex offenders must register in national registry
- Does this statute apply to those convicted of a sex offense before SORNA was enacted in 2006
- Underlying concern:
 - Is registration punishment? If so, would likely violate the Ex Post Facto clause [Art. I § 9 cl 3]
 - If not punishment, not an Ex Post Facto clause violation, but there are still policy questions about making it retroactive

Nondelegation: Gundy (CB 378)

Sex Offender Registration and Notification Act (SORNA)

- How did Congress handle this?
- “[The] Attorney General shall have the authority to specify the applicability of the [registration requirements] to sex offenders convicted before the enactment of this chapter.” (CB 378)
- What does this mean? Here are three takes on it:

Nondelegation: Gundy (CB 378)

Sex Offender Registration and Notification Act (SORNA)

- **Take 1:** Congress dodged a basic policy issue (retroactivity) and handed the decision over to the AG without guidance; **OR ...**
- **Take 2:** Congress determined that this particular question was the kind of specification that is best left to determination as part of the executive branch's implementation of the Act.
 - For example, how many registrations would a retroactive approach add?
 - How would it be enforced? (e.g., how to find long ago prior sex offenders)

Nondelegation: Gundy (CB 378)

Sex Offender Registration and Notification Act (SORNA)

- **Take 3:** The majority opinion in *Gundy*:
 - The Court earlier read SORNA to be retroactive (*Reynolds*, 2012) (cited at CB 379)
 - SORNA calls for comprehensive registry
 - “Sex offenders” defined in the statute in a way that includes those convicted pre-SORNA
 - In this context, the contested provision simply gives the AG control over how quickly to put the register (including pre-SORNA offenders) in place. This would depend on executive branch capabilities.

Nondelegation – Gorsuch dissent in Gundy (CB 379)

Concerns underlying non-delegation doctrine

1. Tyranny if too much executive power
2. Accountability – voters don't know whom to blame for bad legislation

Nondelegation – Gorsuch dissent in Gundy (CB 379) – Three parts of his proposed test to determine constitutionality:

- ✓ Congress makes policy; the executive fills in details
- ✓ Application of statute is conditional upon executive fact-finding
- ✓ The statute assigns the executive non-legislative responsibilities

Nondelegation – Gorsuch dissent in Gundy (CB 379)

Justice Gorsuch’s vision of the proper role of federal regulation -- laws should should:

- Be few in number
- Be the product of widespread social consensus
- Be likely to protect minority interests
- Provide stability
- Provide fair notice

Revival of Nondelegation? Arguments for & against

- Suppose you were asked to give your considered opinion whether the Court should revive the nondelegation doctrine.
 - What arguments might be made in favor of reviving it?
 - What arguments might be made against reviving it?
 - Which arguments are most persuasive, in your view?

Revival of Nondelegation? Arguments against (and for judicial deference):

- Better that political branches work out certain constitutional issues, e.g., how to balance (a) avoiding too much power in executive, or unclear accountability, and (b) dealing with need in post-New Deal state for lots of regulation, and significant delegations by Congress to executive branch
- No judicially manageable standards for courts on how to strike that balance
 - Note: sounds like political question doctrine, but doesn't have to go by that rubric
- Cases to think about; no binding precedent, but relevant:
 - *Nixon v. United States* (judge case): some matters better left to political branches
 - *McCulloch*: some degree of deference to political branches on issue of consistency of national bank with Congress's Art. I § 8 powers.
 - White dissent in *Chadha*; majority in *Morrison v. Olson*
- Practice –e.g.,
 - How the pay issue for Congress-to-Executive branch appointees is worked out (Art. I § 6 cl. 2)
 - Congress's frequent resort to legislative veto provisions even after *Chadha*

Revival of Nondelegation? Arguments for (and against judicial deference):

It's the Court's job to interpret the constitution. *Marbury*.

- Constitutional text may be clear in some instances, and go against what the political branches do.
- Framers were acquainted with executive tyranny (colonial governors, British Crown) and devised rules to deal with it; if rules thought to be archaic now, proper approach is to amend the Constitution
- Cases to think about; no directly binding precedent, but relevant:
 - *United States v. Nixon* (tapes case)
 - *Chadha / Morrison v. Olson*
 - *Seila Law*
 - *Major Questions Doctrine*

Revival of Nondelegation? Arguments for & against

- Which arguments are most persuasive, in your view?