The BEACON SpotLight

A Study of Constitutional Issues by Topic

Issue 15: The Non-Delegation Doctrine—A Fresh Perspective

In its June 20, 2019 *Gundy v. U. S.* decision, the U.S. supreme Court upheld the delegation—to executive officers—legislative powers that are otherwise nominally within the domain of Congress.[1]

Writing for the majority, Associate Justice Elena Kagan began by noting that "[t]he nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."[2]

She also wrote that "[a]ccompanying that assignment of [legislative] power to Congress is a bar on its further delegation."[3]

Then, she wrote about all the ways this fundamental principle may easily be set aside.

For instance, she wrote that the standards for delegating legislative powers "are not demanding" and noted that the Court has "over and over" upheld "even very broad delegations."[4] In fact, she observed that "[o]nly twice in this country's history…have we found a delegation excessive."[5]

No wonder so many Americans are confused about constitutional matters, given contrary statements such as these, even in the same opinion.

Since our Republic's fundamental principles cannot be broken by government servants who must swear an oath to support the Constitution, something beyond our comprehension is necessarily occurring, to allow such circuitous Doublespeak.

The stakes involving the non-delegation doctrine are very high. Indeed, Kagan admits that if the current delegation does not pass constitutional muster, "then most of Government is unconstitutional."[6]

Like masterful magicians who won't disclose their secrets, officials looking forward to a long and illustrious federal career won't voluntarily disclose how important constitutional constraints may be ignored or bypassed with impunity.

It is thus up to liberty-minded Americans to discover this truth. And, that quest begins with the realization that not all clauses of the U.S. Constitution are alike—that there exists within that Constitution a highly unusual exception to all its normal rules.

Applied to the case at hand, that means that *two* different and even opposing standards apply in any given situation, depending upon the circumstances involved (whether the case is normal or atypical).

1. In all pertinent constitutional matters, including capitalization, this author follows the Constitution (and thus, "supreme Court" is written here as it is there).

2. *Gundy v. United States*, No. 17-6086 (U.S. Jun. 20, 2019), Page 5.

3. *Ibid.*, Page 8.

4. *Ibid.*, Page 20.

5. *Ibid.*

6. *Ibid.*, Page 21.

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The normal case (even as it is no longer common) involves the enumerated powers delegated by all the States of the Union, by their ratification of the U.S. Constitution and amendments. These powers cannot be delegated (and thus, the citation of the inviolable rules Kagan first noted above).

The "exception" (even if it is now commonplace) provides for an alternative case where unconventional legislative powers may be readily delegated, without issue. Witness Kagan's later "standards," which aren't really standards at all, but instead inherent discretion practiced at the arbitrary whim of people never elected to represent We The People of the several States.

The *Gundy* decision appears so convoluted because Kagan switched from the first standard to the alternate, without informing her readers of the switch. It was but a clever legal sleight of hand, to keep Americans in perpetual awe of the Court's seemingly-magical powers. Indeed, the case (like most every other case decided contrary to strict construction of the Constitution) was decided necessarily only in the alternative setting, because that is the only one that allows sufficient discretion to reach the desired conclusion.

Let me explain, from the beginning.

The exception to all the normal rules of the Constitution is found in Article I, Section 8, Clause 17. This is the clause which allows "particular" States to cede defined parcels of land to Congress and the U.S. Government, for the District Seat (and for "Forts, Magazines, Arsenals, dock-Yards and other needful Buildings," scattered throughout the Union).

These special geographical areas are different from all other parcels of land, because after cession by an individual State and acceptance by Congress, members of Congress thereafter hold all legislative powers *exclusively*, "in all Cases whatsoever."

Whereas government power is normally *divided* into federal and State authority throughout the Union—by the Constitution—in the District of Columbia, however, all governmental power is *united* in Congress. Not only do members of Congress hold their enumerated powers the same as they do for the Union, but they also may enact (local) laws in the place of a State, since no State may any longer govern therein.

Since State constitutions bind only their own State legislatures and State officials, then the respective State constitutions do not bind Congress once members accept the lands for exclusive federal use. Indeed, the explicit purpose for these exclusive lands was specifically to allow Congress and the U.S. Government to control all matters federally, without interference by any State of the Union.

It is therefore up to members of Congress to establish their own (local) rules how they see fit, needing only to avoid a few express prohibitions (such as those found in the Bill of Rights).

And, since the "District" of Columbia is not a "State," then even the express prohibitions the U.S. Constitution directly imposes upon "States" do not apply in the District Seat (to Congress [even as members otherwise enact local law, like a State]).

Under Clause 17, members of Congress may freely delegate *these* exclusive legislative powers, as they see fit.

After all, since Article I of the Constitution allows only "States" to elect U.S. Representatives and U.S. Senators to Congress, then "District" residents are not and cannot be represented in Congress.

Without legislative representation in the District of Columbia, then there is no crime or foul if members of Congress delegate these exclusive legislative powers not only to a local city council, but also federal bureaucrats and judges (the latter who may thereafter "legislate from the bench," without issue).

When making new laws and regulations under Clause 17, nothing prevents Congress or judges from taking words found in the Constitution (meant for the Union) and redefining them, differently, for exclusive use in the District Seat.

When laws are enacted under Clause 17 on every imaginable topic, it can hardly be said that any of them are "unconstitutional," for one clause, strictly construed, allows them, "in all Cases whatsoever."

The Administrative State which Americans face today is simply the delegation, by Congress (under the District Seat power), to federal officials "in all Cases whatsoever." That is how the Court could rule in *Gundy* as it did, without being "unconstitutional" (since one clause of the Constitution allows the action).

And, when Government servants long ago found a way to extend this inherent discretion far beyond the District's borders, they effectively became our political masters. It is that simple.

The source of unlimited federal discretion has been found—the only thing that remains is to discover how this omnipotent power was ever extended beyond its rightful geographic confines to infect the Union.

The government *apart* from the people, *separated* from the people and *against* the people, found official court sanction in the supreme Court's 1821 *Cohens v. Virginia* opinion, when and where the Court ruled—

> "The clause which gives exclusive legislation is, unquestionably, a part of the Constitution, and, as such, binds all the United States."[7]

To overrule the Constitution's spirit, the Court merely upheld its strictest letter. To bind all the United States, the Court only needed to hold that Article I, Section 8, Clause 17 was a part of "This Constitution" which Article VI, Clause 2 expressly declares is the "supreme Law of the Land." Thus, even laws enacted by Congress (or regulations issued by officials) in pursuance of Clause 17 "bind all the United States," by the Constitution's strictest words.

To close this devious loophole, I recommend a two-pronged approach.

First, urge Congress to propose an amendment to expressly exempt Clause 17 from being any part of the supreme Law of the Land under Article VI. No local law of any State legislature binds the nation—neither should laws enacted under Clause 17 (since that clause was meant merely to provide local government for D.C. and exclusive federal lands).

Ratifying this new amendment would overturn *Cohens v. Virginia*, by providing the definitive answer (which does not currently exist) to Chief Justice John Marshall's 1821 challenge, where he wrote:

> "Those who contend that Acts of Congress, made in pursuance of this power, do not, like Acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which supports their contention."[8]

Since members of Congress won't likely end their discretionary reign willingly, Part 2 of the strategy provides the "hammer" to induce them to act (to avoid the far-harsher-acting of two possible amendments).

And, that hammer consists of calling for a convention to propose an amendment *to repeal* Clause 17.

The first proposal would "contain" allowed tyranny to Clause 17 grounds (like everyone [perhaps understandably] already thinks is the case, but isn't). All federal laws and regulations beyond the strictest construction of the whole Constitution would finally be strictly-curtailed to D.C. (and other exclusive legislative grounds).

The second proposal would "repeal" Clause 17, thereby prohibiting tyranny from every square foot of American soil. If repealed, then all existing laws beyond strict construction of the Constitution would be immediately terminated and never again could any member of Congress do anything except use necessary and proper means to implement their enumerated powers, strictly construed.

There is only one means for exercising inherent discretion—no matter how it is camouflaged—everything else is mere smoke and mirrors.

Inherent discretion allowing for arbitrary government action must be either directly contained (to exclusive legislative grounds) or directly prohibited, everywhere.

History easily shows this arbitrary power is so powerful that all indirect attempts to contain it fail horribly.

Patriots must discover how the deception subverts our founding principles; they must expose that deception; and they should begin the process of restoring our Republic, directly, by the recommended amendments.

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7. *Cohens v. Virginia,* 19 U.S. 264 @ 424 (1821).

8. *Ibid.*