DELEGATION OF LEGISLATIVE POWER

Overview of the Doctrine of Nondelegability

The Supreme Court has sometimes declared categorically that "the legislative power of Congress cannot be delegated." [52] On other occasions, however, it has recognized more forthrightly, as did Chief Justice Marshall in 1825, that while Congress may not delegate powers that "are strictly and exclusively legislative," it can delegate certain "powers which [it] may [have] rightfully exercise[d] itself." [53] In reality, a categorical limitation on legislative delegation has never been literally true, as evidenced by the Court having upheld the delegation at issue in the very case in which the statement was made.[54] The reason is that the Court has long recognized that administration of the law requires exercise of discretion [55] and that, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." [56] The real issue is where to draw the line.

Chief Justice Marshall recognized "that there is some difficulty in discerning the exact limits," and that "the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." [57] Accordingly, the Court's solution has been to reject delegation challenges in all but the most extreme cases, and to accept delegations of vast powers to the President or to administrative agencies. With the exception of a brief period in the 1930s when the Court was striking down New Deal legislation on a variety of grounds, the Court has consistently upheld grants of authority that have been challenged as invalid delegations of legislative power.

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[52] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932). *See also* Field v. Clark, 143 U.S. 649, 692 (1892).

[53] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41 (1825) (Marshall, C.J.).

[54] The Court in *Shreveport Grain & Elevator* upheld a delegation of authority to the Food and Drug Administration (FDA) to allow reasonable variations, tolerances, and exemptions from misbranding prohibitions that were backed by criminal penalties. It was "not open to reasonable dispute" that such a delegation was permissible to fill in details "impracticable for Congress to prescribe."

[55] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928) ("In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination").

[56] Mistretta v. United States, 488 U.S. 361, 372 (1989). *See also* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility").

[57] Wayman v. Southard, 23 U.S. (10 Wheat.) at 42. For particularly useful discussions of delegations, *see* 1 K. Davis, Administrative Law Treatise Ch. 3 (2d ed., 1978); L. Jaffe, Judicial Control of Administrative Action ch. 2 (1965).