

REDISCOVERING THE NONDELEGATION DOCTRINE THROUGH A UNIFIED SEPARATION OF POWERS THEORY

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ABSTRACT

The nondelegation doctrine has proven a seemingly unlimited topic for scholarly comment. In the last decade, no fewer than fifty articles have been published on the subject, though this figure is probably an understatement. Such scholarly attention is curious given the remarkable stability of the doctrine. Perhaps this is because of the courts' reluctance to invoke the nondelegation doctrine as a meaningful check on legislative or executive power.

In the history of the Republic, the Supreme Court has only invoked the nondelegation doctrine on two occasions to invalidate a statute. Despite its lack of use, the nondelegation doctrine remains an acknowledged limit on legislative power flowing from the principles of separation of powers. Despite its special importance in the modern administrative state, the importance of nondelegation doctrine as a limit has been minimal.

This Note argues that the nondelegation doctrine's lack of importance within broader separation of powers principles is a result of the intelligible principle test. This is so because the intelligible principle test itself is divorced from other separation of powers principles, such as those found in the political question doctrine, the limits on independent executive power, and bicameralism, which focus on whether the actions of one branch impermissibly aggrandize that branch at the expense of another. The intelligible principle test's isolated development resulted in an incomplete examination of Congress's ability to delegate lawmaking power by framing the entire separation of powers problem in terms of Congress's Article I's powers.

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The greatest weakness is the intelligible principle test's myopic attention to Congress's Article I powers is its failure to recognize the independent bases of power in the Executive and Judiciary. To remedy this weakness, this Note argues that the intelligible principle test should be abandoned and replaced by a new test, the ancillary powers test, for measuring the limits to the nondelegation doctrine. The ancillary powers test is derived from the broader principles of separation of powers, looking not only to Congress's power to delegate, but to independent powers of the Executive and Judiciary to delimit the full scope of constitutionally permissible delegatoin. By placing the nondelegation doctrine firmly within the broader context of separation of powers, the ancillary powers test strikes the proper balance between deference and structural limits on the various branches of government.