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Nondelegation and Originalism

Jack M. Beermann

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Author : Jack Beermann

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Kurt Eggert, Originalism Isn't What it Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary, 24 **Chap. L. Rev.** 707 (2021).

Originalism certainly isn't what it used to be. From a fringe theory with few adherents it has, in recent decades, become the dominant conservative legal weapon deployed against nearly every liberal legal development since the dawn of the twentieth century, particularly the acceptance of the administrative state and the delegation of rulemaking power to agencies. Professor Kurt Eggert's recent article adds to the mounting evidence that originalism is not a credible legal theory especially when deployed against Congress's choices concerning the proper structure of the regulatory state.

Eggert's opening salvo takes aim at the claim that the Framers of the Constitution adopted a theory of government embodied in John Locke's Second Treatise of Government of 1689, which includes what originalists characterize as a sweeping rejection of legislators' delegating lawmaking power. This is the basis of Professor Ilan Wurman's argument in Nondelegation at the Founding, and, as Eggert points out, Justices Gorsuch, Rehnquist and Thomas have all cited Locke as a source for their argument that the Constitution incorporates a strict nondelegation doctrine. Adding to the chorus of scholars who reject the conclusion that the Framers embodied a nondelegation principle based on Locke's Second Treatise, Eggert demonstrates convincingly that Locke's influence had largely disappeared before the Constitutional Convention of 1787 and that his only real influence was in favor of rebellion in the 1770s, not on the structure of the new government created in the 1780s. In fact, only Anti-Federalists opposed to the Constitution relied heavily on Locke and then only to cite his natural rights theories as a reason to reject a powerful central government.

Among the most convincing discussions in Eggert's fine article involves actual debates over nondelegation among the Framers, including James Madison's contributions on the subject. Here he wisely cites Professor Nicholas Parrillo's recent article on the subject, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s, and an older article by Professors Eric Posner and Adrian Vermeule, Interring the Nondelegation Doctrine. Both conclude, after exhaustive study, that delegation was not a significant issue at the convention. Eggert also relies on another important set of occurrences at the convention, that James Madison twice suggested including a ban on delegation in the Constitution. Both attempts were, of course, rejected, which to many legal minds indicates that the convention disagreed with Madison. While rejection of a proposed amendment does not always indicate agreement on a contrary view, it borders on the bizarre to offer Madison's rebuffed amendments as evidence that the convention agreed with his proposals, as some have done. Eggert convinced me that there is nowhere near enough evidence to support the view that the Framers silently but implicitly included a strong nondelegation principle in the Constitution.

Eggert refutes a litany of additional arguments for an originalist nondelegation principle including agency principles; the notion that the Constitution created a species of fiduciary relationships that prohibit delegation; and the textualist argument that the Vesting Clause of Article I, particularly because of its use of the word "all" which is unique among the Constitution's three Vesting Clauses, implicitly prohibits delegation. This is the foundation of Professor Philip Hamburger's originalist argument against delegation. One of Eggert's more entertaining discussions of this concerns the meaning of the word "vest." He notes that Professor Richard Epstein analogizes to vested property rights and points out that vested rights in property cannot be "undone by ordinary legislative action." Eggert counters by noting that in property law under some circumstances only vested rights can be alienated, and it is a commonplace that the holder of a vested right has the power to alienate the right.

Some readers may find this whole discussion disconcerting, for it appears that Eggert is, at least in part, deploying originalist arguments to reject originalism. Eggert agrees that he is no better equipped to discern whether the historical record supports a nondelegation doctrine than the lawyers and judges who disagree with his conclusions on the matter. But, as he points out more than once, the proponents of a strong nondelegation principle are urging courts to reject Congress's determinations concerning the optimal distribution of regulatory authority. Without clear text and unequivocal historical support, the Supreme Court should leave the decision over agency power to Congress and not arrogate to itself the powers of a Council of Revision, which Eggert notes was also unsuccessfully proposed by James Madison. Opponents of judicial activism under vague provisions like the due process clauses do not hesitate to point out problems with judges imposing their will on the political branches, and the exact same critique applies to their advocacy of a strict nondelegation doctrine.

The article concludes with an excellent critique of recent judicial opinions and scholarly work calling for an originalist revival of a strict nondelegation principle. Eggert's discussion is insightful and compelling. If the debate over nondelegation were not so ideologically fraught, Eggert's article together with Nicholas Parrillo's article would have a good chance of banishing the debate over nondelegation to the fringes the way that arguments over whether "separate but equal" was a correct reading of the Equal Protection Clause have vanished from mainstream scholarship. Alas, the likelihood of a future without originalist advocacy for a strict nondelegation principle seems remote indeed. But excellent, unbiased scholarship like Kurt Eggert's can provide solace to those committed to resisting ideologically-driven attempts to reshape American government for political ends.

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