The Nondelegation Doctrine and the Federal Income Tax: May Congress Grant the President the Authority to Set the Income Tax Rates?

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I. INTRODUCTION

This paper explores whether Congress may delegate its authority to set income tax rates to the President of the United States via the Treasury Department. May Congress rewrite the Internal Revenue Code (Code) to provide simply that "There shall be a tax on income, from whatever source derived. The Treasury Department shall prescribe rates of tax on income, which shall balance the federal budget and respect both vertical and horizontal equity. The Treasury Department shall have the authority to prescribe all needful regulations to implement a tax on income."? Would such a delegation of authority offend separation of powers, specifically the nondelegation doctrine, which holds that the Constitution forbids Congress from delegating its power to legislate?

Some would suggest we have a delegation doctrine, rather than a nondelegation doctrine, that Congress has always been permitted to grant large amounts of discretionary power, even so-called legislative power, to the President so long as there is an intelligible principle that Article III judges can use to determine whether the President's actions are consistent with the intent of Congress.1 This conception of delegation/nondelegation accepts that, if tri-partite government is to "work," the President's authority to prescribe rules necessary to execute the statute must be wide.2 Similarly,

1 In Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001), Justices Stevens, Scalia, and Thomas offered three distinct conceptions of the nondelegation doctrine. Justice Scalia offers the majority view, which holds that Congress may delegate policy judgments to the executive branch so long as the authorization to deprive citizens of their life, liberty, or property derives from a properly enacted statute and includes an intelligible principle that can facilitate judicial review of executive action under the statute. Id. at 472. Justice Stevens contends that some regulatory powers and policy judgments are legislative powers, but that the Constitution does not absolutely forbid their delegation to the executive branch. Id. at 489–90 (Stevens, J., concurring in part and concurring in judgment). Justice Thomas contends that there are regulatory powers and policy judgments which are legislative powers and that the Constitution forbids the delegation of any of them. Neither Justice Stevens nor Justice Thomas offers a framework for determining which regulatory powers or policy judgments are actually "core functions" of the legislature Id. at 487 (Thomas, J., concurring).

2 Am. Trucking Ass'n, 531 U.S. at 474–75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)) ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left
a formalistic version of the ‘delegation doctrine’ holds that, since the Constitution positively ascribes a certain procedure to the making of law, Congress cannot possibly do anything but pass laws and anything the President does is, by definition, not law but ‘regulation.’\(^3\) Others, however, encourage the Court to apply the nondelegation doctrine more frequently,\(^4\) and at least one commentator argues that the nondelegation doctrine should be applied more strictly in matters of taxation.\(^5\)

Ultimately, to satisfy the nondelegation doctrine, the Court requires merely that Congress write legislation with enough particularity so as to facilitate judicial review of the President when he exercises that statute’s grant of authority to deprive life, liberty, or property. The Court has long described the particularity necessary in terms of an “intelligible principle,” a standard by which a court can review and set aside an executive action to the extent it exceeds the authority granted by or is inconsistent with the intent of Congress.\(^6\) The Court has routinely approved legislation that grants large amounts of discretionary authority over extremely important civic matters under the principle that the President merely act in “the public interest” or “fair[ly] and equitably.”\(^7\) The Court has only twice found a statute lacking a sufficient guiding principle, in 1935, with respect to Franklin Delano Roosevelt’s New Deal.\(^8\)

Under this conception of separation of powers, our hypothetical statute likely passes the test because it gives not one, but three intelligible principles to guide judicial review: balancing the budget (revenue target), to those executing or applying the law:’

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\(^6\) Jack Beerman, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 492–93 (2011) (“Even with regard to such a fundamental element of separation of powers, because no particular clause prohibits delegation of discretion (and because the Vesting Clause of Article I is not understood as such a clause) the standard the Court applies to nondelegation disputes is incredibly forgiving, bordering on a determination that the doctrine is nonjusticiable. To avoid delegation of legislative power, Congress must legislate an ‘intelligible principle’ for agencies to follow when filling in gaps and making policy under the law.”)

\(^7\) *Am. Trucking Ass’ns*, 531 U.S. at 474.

vertical equity (progressive tax rates), and horizontal equity (administrative equal protection).

At least one member of the Supreme Court believes the delegation/nondelegation jurisprudence is far too weak, ultimately giving the President and his agents the authority to ‘make law.’ Justice Thomas complains that all legislative powers, core or otherwise, must be performed by the legislature and may not be delegated to the President even if an intelligible principle is supplied within the statute. From this viewpoint, there are some political agreements that are ‘law’ in their essence, regardless whether they are masked as ‘regulation.’ Justice Thomas is thus more likely than any other on the Court to hold a delegation to the President to set the income tax rates as unconstitutional.

The Court, however, has thus far rejected Justice Thomas’s view so far and maintains the sole requirement of an intelligible principle. Moreover, in Skinner v. Mid-America Pipeline, the Court specifically rejected the notion of taxation as an exceptional legal context where the nondelegation doctrine ought to have more force.

But would the Court hold fast to this one criterion if confronted with a statute that grants to the President the authority to determine how much money is specifically to be exacted from almost every United States citizen? Might the Court express the view that lack of an intelligible principle is but one way to violate the nondelegation doctrine, that there are some ‘core functions’ of the legislature that may not be delegated? If a majority of the Court were somehow convinced to take this new direction, the next step would be to define these ‘core functions,’ a task that implicates one of the most fundamental though unresolved philosophical questions, what is ‘law.’

For those who believe that the Constitution should forbid the

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10 Id. Others agree with Justice Thomas that the vesting clausess of the Constitution, which grant all legislative power to a Congress, the judicial power to a Supreme Court, and the executive power to the President, prevent any branch of government from exercising the powers designated to another. See, e.g., Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 Nw. U. L. Rev. 1377, 1390 (1994).
11 Apparently, Chief Justice John Roberts, while in private practice, wrote a failed petition for certiorari advancing a nondelegation challenge to the Indian Reorganization Act. However, it would be unfair to infer his judicial position from arguments made on behalf of a client. Petition for Writ of Certiorari, Roberts v. United States, 529 U.S. 1108 (2000) (No. 99-1174).
12 While the majority rejected a core functions analysis in Bowsher v. Synar, 478 U.S. 714, 726–27 (1986), Justice Thomas, who was not a member of the Court that decided Bowsher, sought to reinvigorate it in American Trucking Associations.
delegation of income tax rate setting power to the President, perhaps there is an end run around core functions and intelligible principles.\textsuperscript{14}

If the intelligible principle standard is the Court's way of ensuring that Congress writes a statute in a manner that facilitates judicial review, then facilitation of judicial review is the real standard, and perhaps the determination of income tax rates is an inherently political situation over which judges would be incapable of effectively reviewing to determine whether any particular rate or method for getting at that rate comports with legislative intentions. The Court might object on the basis that judicial review over tax rate determinations could not depend on anything but the political opinions of Article III judges, regardless whether the statute incorporates one intelligible principle or several, and is thusly impermissible.

Support for the facilitation of a judicial review meta-rule might be found in \textit{Schechter Poultry} where the Court noted the presence of not just one but myriad intelligible principles, such that the execution of the statute would be perfectly independent of any legislative intent, and by extension so would judicial review.\textsuperscript{15} Thus, \textit{Schechter Poultry} could stand for the proposition that facilitation of judicial review is the ultimate goal of the nondelegation doctrine, and, therefore, a statute authorizing the President to set income tax rates is unconstitutional because the President's actions thereafter would not be susceptible to meaningful judicial review. Moreover, Justice Rehnquist mentioned in the \textit{Benzene Case} that the Constitution forbids a Court from construing a statute so as to give the executive substantive rule making powers which cannot be reviewed.\textsuperscript{16} Extrapolated, the \textit{Benzene Case} would forbid any statute as constitutionally infirm if the executive can deprive life, liberty, and property under it without any meaningful judicial review.

Part II considers first whether it is even conceivable that Congress would delegate its authority to set the income tax rates to the President. Then, it examines the purposes behind and the development of the nondelegation doctrine. Ultimately, it concludes that, despite belief by some to the contrary, current Supreme Court jurisprudence, which merely requires that Congress provide an intelligible principle for the Executive to follow, permits Congress to grant the President the authority to set the

\textsuperscript{14} Cynthia Farina discusses the persistence of nondelegation challenges despite the Court's reluctance to embrace them. Cynthia R. Farina, \textit{Deconstructing Nondelegation}, 33 Harv. J.L. & Pub. Pol'y 87, 95–99, 101 (2010) ("Debates about whether Congress can delegate have crowded out debates about whether Congress ought to delegate.").


income tax rates. Part III examines arguments to extend the reach of the nondelegation doctrine and whether such arguments might be deployed to forbid Congress from granting the President authority to set the income tax rates. It asks whether taxation is an exceptional context in which the nondelegation doctrine should be applied with more force. It considers Justice Thomas's appeal to the core functions doctrine, which would forbid Congress from delegating any power properly considered legislative, regardless whether an intelligible principle is provided. It then offers an end run around both the intelligible principle and core functions doctrines by suggesting that the nondelegation doctrine's ultimate goal is justiciability and that any statute incapable of judicial review should fail the nondelegation doctrine. But such a stance is inconsistent with the principles contained in some basic Constitutional law cases, *Bi-Metallic Investment Co. v. State Board of Equalization*, 17 specifically. Part IV concludes that giving the President the power to set the income tax rates is probably a bad idea but not an unconstitutional one.

II. THE NONDELEGATION DOCTRINE

A. The Question

The United States federal government habitually spends more than it takes in. As a deficit spender, it is certainly not alone amongst so-called modern nations in this regard, and probably not the worst actor. This article neither takes a position on whether past, current, or future spending is justified, nor does it take a position on whether current tax rates should be lowered, raised, or remain the same. This article will not offer any opinion on what the so-called "2011 Congressional Supercommittee" should have done to reduce the federal budget deficit. 18

Instead, this article simply examines the legal consequences of Congress giving up and commanding the President to adjust income tax rates as necessary to balance the budget. No one in a position of power has yet put this option on the table. And at least one legal commentator, Professor Karla Simon, has remarked that such a system would be unconstitutional as against the nondelegation doctrine. 19 But, while it seems most people would agree that setting income tax rates is a job for Congress and not the President, it is not quite as clear that Supreme Court

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jurisprudence backs Professor Simon’s claim that the Constitution requires it.

Is it even realistic to contemplate such a scheme where the President would be permitted to set the income tax rates? Unusual things can happen and happen quickly in times of crisis. What if global investors threatened to boycott the United States financial markets unless the country got its financial house in order? Perhaps a presidential candidate garners tremendous public support upon the pledge that if she is given the authority to set tax rates, her administration will spend less than it takes in, impolitely referred to as ‘starving the beast.’ Or perhaps a presidential candidate wins the election in a landslide after promising that if he is given the authority to set tax rates his administration will raise enough revenue to pay for all the programs Congress has established, impolitely referred to as ‘soaking the rich.’ If a vast majority of the people came to believe that Congress is broken, and that the President is more trustworthy, efficient, effective, or some combination thereof, perhaps the People might want Congress to delegate the authority to set income tax rates to the President.

The Constitution, however, is meant to trump popular sentiment. It is meant to commit the United States to a certain form of government, representative democracy. The Constitution limits direct democracy by vesting law-making power in a legislature, the Congress.\textsuperscript{20} Individual citizens do not vote on which laws should be passed, but on a representative who joins the Congress and participates in the legislative process. Of course, citizens are directly involved again when an amendment to the Constitution is proposed. Thus, a federal law that gave the people the power to vote on the appropriate income tax rates would violate the Constitution (Presentment Clause, Tax Bills in the House, etc.).\textsuperscript{21} Ever since establishment of the modern federal income tax, Congress has accepted its role of setting the income tax rates, and no one has yet attempted to take that authority and give it to the people. But the question here is whether Congress can punt and delegate the responsibility for setting the rates to the President?

\textit{B. Separation of Powers and the Federal Income Tax}

Giving the President the authority to set the tax rates as a way of balancing the federal budget has not been offered as a serious proposal by anyone of substance. Yet, it is not out of the realm of contemplation. A Congress controlled by Democrats might give a Democratic President this

\textsuperscript{20} U.S. CONST. art. I, § 1.

authority with the hope that she will make the wealthy pay their fair share. A Congress controlled by Republicans might give a Republican President this authority with the hope that she will lessen the burden on the wealthy, who pay more than their fair share. Prudent minds should object in either case because this scheme will likely lead to wild swings in the income tax rates when Presidential administrations change. Another reason to reject such a proposal is that the President might be able to use this power to act tyrannically against his opponents. However, if the President used his authority to arbitrarily raise taxes on one group or another, an Equal Protection challenge would be available. Of course, other provisions in the Bill of Rights would be judicially enforceable as well.

But the issue of whether allowing the President to set the tax rates is a good or bad idea does not answer the question whether it is Constitutional for the legislature to grant the executive this type of authority. In Congress and Taxes: A Separation of Powers Analysis, Professor Karla Simon rebukes Congress for maintaining what she believes is excessive control over the implementation of federal income tax laws.22 Because “Congress’[s] behavior is schizophrenic”, they “would better serve the fundamental underpinnings of our democratic traditions by leaving more of the burden of administering tax laws to the executive branch.”23 The following words written in 1991 could surely apply to the 2011 Congress:

Looking at the recent past and the legislative morass that has developed in the tax area, it seems that we are in the precise state the Framers sought to avoid. Congress has in many situations seized control of the detail of the tax laws. This tendency has made the laws themselves hypertechnical and hence susceptible to frequent change, rendering them almost unadministrable. If Congress wrote simpler laws, the proper role of Treasury in the governmental process would be better preserved . . .

. . . In enacting detailed tax laws that contain their own interpretation and specific application and that are obviously written by its staff, Congress tends to deprive the Treasury of its constitutional role in government.24

But even Professor Simon believes that “Congress could not . . .

22 Simon, supra note 19 passim.
23 Id. at 1008.
24 Id. at 1028, 1034.
delegate the authority to set tax rates to the Treasury."25 For this proposition, however, she cites no authority. She concedes that the Court has allowed the Congress to delegate tariff rate-setting authority to the President, but does not explain why the income tax is distinguishable. To be fair, Professor Simon is writing at a time when the scope of the nondelegation doctrine was less clear than it is today, after Amalgamated Meat Cutters v. Connally,26 but before Whitman v. American Trucking Ass’ns. In Amalgamated Meat Cutters, the D.C. Circuit moved away from the requirement that Congress merely provide an intelligible principle, permitting the agency administering the statute to limit itself. The only thing left by the D.C. Circuit as a violation of the nondelegation doctrine was “delegation run riot.”27 Yet, even in Amalgamated Meat Cutters, the D.C. Circuit recognized that “fairness” and “equity” were standards by which the legislature can canalize executive discretion.28 After American Trucking Ass’ns clarified the doctrine, and now that it seems the nation is in a budgetary crisis which Congress may not take responsibility to fix, it seems fitting to analyze in more detail whether nondelegation cases support Professor Simon’s belief that Congress could not delegate its authority to set income tax rates to the President.

C. Select Nondelegation Cases


The Treasury, the federal agency that would likely set the income tax rates if the President were given such authority, is one of the oldest federal agencies and was established at the time of the U.S. Constitution. As early as 1825, Chief Justice Marshall, in Wayman v. Southard, approved of legislative delegations of authority to agencies such as the Treasury so long as the legislature provided principles that would ultimately subordinate the executive and the judiciary to the legislature.29 Moreover, the Court in Marshall Field, Co. v. Clark permitted the President to suspend favorable tariff rates relating to exports from a particular country if he found that the other country failed to reciprocate.30

25 Id. at 1044.
27 Id. at 763 (quoting Thomas Reed Powell, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 79 (2002)).
28 Id. at 757.
2. *J.W. Hampton v. United States*

*J.W. Hampton v. United States* was not only a tariff case, but is also considered the origin of the intelligible principle test.\(^{31}\) The Court held that:

[Congress’s] plan was to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties not only secure revenue, but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States. It may be that it is difficult to fix with exactness this difference, but the difference which is sought in the statute is perfectly clear and perfectly intelligible.\(^{32}\)

As Professor Simon conceded, tariff rates are very much like income tax rates.\(^{33}\) Tariffs are taxes, after all. And before the President was permitted to set the rates, the Tariff Commission in *J.W. Hampton* was required to hold what looks very much like today’s ‘notice and comment’ rulemaking hearing.\(^{34}\) Thus, it would seem at initial glance that, today, Congress could delegate its authority to set the income tax rates to the President so long as section 553 of the Administrative Procedure Act (APA), or some other legislatively created procedure, were followed.

But Professor Simon seems to concede only that setting tariff rates is analogous to setting income tax rates.\(^{35}\) Her position that Congress could not so delegate the setting of income tax rates to the President must rely on them being distinguishable. Perhaps the distinction is that income taxes are mainly imposed against U.S. citizens whereas tariffs are more directly aimed at foreign entities. One could argue that the intelligible principle’s slender protection against tyranny might be appropriate for the President in his powers to deal with foreign affairs but not appropriate for his dealings with U.S. citizens. Therefore, the cases after *J.W. Hampton* will be examined to determine whether there is anything exceptional about the income tax that would certify Professor Simon’s belief.

\(^{31}\) J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 404 (1928).

\(^{32}\) Id. at 404.

\(^{33}\) See Simon, *supra* note 19 at 1044.

\(^{34}\) *J. W. Hampton*, 276 U.S. at 402.

\(^{35}\) Simon, *supra* note 19, at 1044.
3. *Panama Refining, Schechter Poultry, and Amalgamated Meat Cutters*

In 1935, the Court struck down two laws as unconstitutional delegations of legislative power, but the decision in each case left some doubt as to whether the nondelegation doctrine rested simply on the presence of a legislatively provided intelligible principle. In *Panama Refining*, the Court would not permit the President to halt the shipping of 'hot oil' even though, as Justice Cardozo points out, the Court could have found intelligible principles in Congress's desire to 'eliminate unfair competitive practices,' 'to conserve natural resources,' and to 'promote the fullest possible utilization of the present productive capacity of industries.'  

Rather than a hard and fast rule requiring an intelligible principle, the Court seems to engage in a more amorphous type of consideration, whether the President has "unlimited authority."  

Neither in *Panama Refining* nor in *Schechter Poultry* did the Court restrict itself to a simple inquiry of whether Congress had provided an intelligible principle. Like in *Panama Refining*, the Court in *Schechter Poultry* examined whether the President's discretion was "virtually unfettered," considering all the facts and circumstances. One of the circumstances the Court in *Schechter Poultry* found to be objectionable was the heavy presence of decision-makers outside the government. *Schechter Poultry* seems to suggest that more than an intelligible principle is needed for delegations outside the three branches of government. By extension it could mean that there are other delegations for which an intelligible principle will not by itself satisfy the nondelegation doctrine.

Even if this is a sturdy deduction, it does not necessarily follow that federal income tax is one of those delegations for which *Schechter Poultry* would require more than an intelligible principle. However, later cases, particularly *Amalgamated Meat Cutters*, follow the lead of *Panama Refining* and *Schechter Poultry* and seek to prevent "delegation run riot" and "blank checks." Thus, at the time of Professor Simon's writing, the Court's nondelegation jurisprudence seemed to require an intelligible principle as only one criterion in determining whether there was delegation running riot, or that the President had a blank check, or unfettered discretion.

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37 *Id.* at 415, 431.
39 *Id.* at 537.
4. The Benzene Case

In 1980, Justice Rehnquist revitalized the nondelegation doctrine, and
in a way that added fuel to those who might look to escape the intelligible
principle test. In the Benzene Case, Industrial Union Department, AFL-CIO
v. American Petroleum Institute, Rehnquist stated in a concurring opinion
that the agency’s interpretation of its governing statute, that the act allowed
the agency to determine the permissible level of Benzene in the workplace
based on considerations made up by the agency itself, would render that
statute defective as against the nondelegation doctrine.\textsuperscript{41} His opinion sets
forth what he believes are the purposes behind the nondelegation doctrine.
If accepted by a majority, these purposes might justify extending the
nondelegation doctrine to strike down Congressional delegation to the
President to set the income tax rates.

Justice Rehnquist set forth three separate though interrelated concerns:
the primacy of Congress, cabining discretion of the President, and effective
judicial review.\textsuperscript{42} Although an intelligible principle cabins the discretion of
the President, it does not necessarily and in all cases provide for effective
judicial review, and does not always respect the Congress as superior in
matters of public law to the President and the Court. His vision gives
leeway to those who would hold unconstitutional as against the
nondelegation doctrine a Congressional grant of authority to the President
to set income tax rates, even if Congress provided that they must be set so
as to balance the budget and respect vertical and horizontal equity.

According to Justice Rehnquist, the nondelegation doctrine is designed
to “ensure... that important choices of social policy are made by
Congress.”\textsuperscript{43} This is an obvious reference to legislative supremacy. While
the Guaranty Clause of the Constitution does not guarantee what type of
democracy one can expect out of the United States, it is clear that the
Court’s jurisprudence in respect of public laws mandates that the executive
and judiciary recognize the superior of the legislature.\textsuperscript{44} Those who
would seek to prevent the President from having the authority to set income
tax rates could in 1991 rely on the Benzene Case to contend that setting
income tax rates is an ‘important choice of social policy’ which the
nondelegation doctrine commits to the legislature.

Another purpose of the nondelegation doctrine, according to Justice

\textsuperscript{41} Indus. Union Dep’t v. Am. Petroleum Inst. (Benzene Case), 448 U.S. 607, 657
\textsuperscript{42} Id. at 685–86.
\textsuperscript{43} Id. at 685.
\textsuperscript{44} Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43
Rehnquist, is to facilitate meaning judicial review.\textsuperscript{45} Rehnquist concedes that this facilitation of meaningful judicial review derives from the intelligible principle requirement. But he sets it off as an independent purpose, perhaps because one might imagine where the confluence of myriad intelligible principles could thwart rather than support effective judicial review of the President’s actions to determine whether they remained within boundaries set by the legislature. Perhaps the setting of income tax rates is an issue for which one intelligible principle or a set of principles could not provide a standard by which a judge might find the President’s actions arbitrary, capricious, or an abuse of discretion. Judicial review over the President’s determination of income tax rates, one might argue, could not take the form of anything else but a political debate.

One who believes that this important policy choice is committed to the legislature and that there are no standards that could provide for a nonpolitical review of the President’s determination could rely on \textit{Schechter Poultry} and Justice Rehnquist’s concurring opinion in the \textit{Benzene Case}. Against a Congressional “punt” with regard to income tax rates, Justice Rehnquist might say:

\begin{quote}
If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it. It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge.\textsuperscript{46}
\end{quote}

But three cases thereafter — \textit{Mid-America Pipeline, American Trucking Ass’ns}, and \textit{Mayo Foundation for Medical Education and Research v. United States} — militate in favor of those who might grant the President authority to set the income tax rates.\textsuperscript{47}

5. \textit{Mid-America Pipeline, American Trucking Ass’ns, and Mayo Foundation}

In \textit{Mid-America Pipeline}, the Court held that, even if a fee is considered a tax, federal taxation is not a unique legal context where the

\textsuperscript{45} \textit{Benzene Case}, 448 U.S. at 686 (Rehnquist, J., concurring).
\textsuperscript{46} \textit{Id.} at 687.
nondelegation doctrine, whatever its contours, has extra force.\textsuperscript{48} \textit{American Trucking Ass'ns} recertifies the intelligible principle test as the only hurdle presented by the nondelegation doctrine.\textsuperscript{49} And \textit{Mayo Foundation} is an actual income tax case in which the Court holds that federal income tax law, specifically, is not an exceptional jurisprudential or interpretive context.\textsuperscript{50}

In \textit{Mid-America Pipeline}, Congress gave the Department of Transportation the authority to establish a schedule of fees relating to natural gas and hazardous liquid pipelines.\textsuperscript{51} For the law of the case the Court turned to \textit{Mistretta}, which it decided during the same term, for the proposition that “so long as Congress provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed[,] no delegation of legislative authority trenching on the principle of separation of powers has occurred.”\textsuperscript{52} Later — in the second-to-last sentence — the Court holds that the Act “provides intelligible guidelines for these assessments.”\textsuperscript{53}

\textit{Mid-America Pipeline} is fairly clear about the unexceptional nature of federal tax law. First, in discussing the nondelegation doctrine with respect to taxes, the Court expressly included liquor taxes, stamp taxes, tariffs, and income taxes.\textsuperscript{54} Second, it noted that Congressional delegation of regulatory authority to the Treasury dates back at least to 1791.\textsuperscript{55} Third, the Court cited \textit{Bob Jones University v. United States} for the proposition that “[i]n an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems.”\textsuperscript{56} Thus, the Court found no support for the contention that “the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases . . . under its taxing power.”\textsuperscript{57} Although \textit{Mid-America Pipeline} holds that tax is not exceptional, it still left the scope of the doctrine at that time somewhat unclear.

\textit{American Trucking Ass'ns}, however, certified the intelligible principle standard as the only nondelegation doctrine requirement when Justice Scalia declared on behalf of the majority that:

\begin{itemize}
\item \textsuperscript{48} \textit{Mid-America Pipeline}, 490 U.S. at 221–23.
\item \textsuperscript{49} \textit{Am. Trucking Ass'ns}, 531 U.S. at 472, 474.
\item \textsuperscript{50} \textit{Mayo Foundation}, 131 S. Ct. at 713.
\item \textsuperscript{51} \textit{Mid-America Pipeline}, 490 U.S. at 214–15.
\item \textsuperscript{52} \textit{Id.} at 218 (citing \textit{Mistretta v. United States}, 488 U.S. 361 (1989)).
\item \textsuperscript{53} \textit{Id.} at 224.
\item \textsuperscript{54} \textit{Id.} at 220–22.
\item \textsuperscript{55} \textit{Id.} at 221.
\item \textsuperscript{56} \textit{Bob Jones Univ. v. United States}, 461 U.S. 574, 596 (1983).
\item \textsuperscript{57} \textit{Mid-America Pipeline}, 490 U.S. at 222–23.
\end{itemize}
In the history of the Court we have found the requisite intelligible principle lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the bases of no more precise a standard than stimulating the economy by assuring fair competition.58

Justice Thomas concurred by lamenting the Court’s sole requirement of an intelligible principle, “Although this Court since 1928 has treated the ‘intelligible principle requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of intelligible principles . . . .”59 If Justice Rehnquist’s concurring opinion in the Benzene Case could be interpreted to mean that the nondelegation doctrine could require more than an intelligible principle, if it could be interpreted to add a requirement that rights subject to legislative delegation be justiciable, if it could be interpreted that certain core functions or policy choices must be made by the legislature, American Trucking Ass’ns flatly rejects those interpretations.

Mayo Foundation adds only a small piece to the puzzle, in that it seems to reaffirm Mid-America Pipeline.60 Nothing in American Trucking Ass’ns contradicted the Court’s view that federal taxation is an unexceptional legal context. But Mid-America Pipeline did not in fact deal with taxes. The Court simply held that if the fees at issue were a tax the legal rules would remain unchanged. Thus, there is still no nondelegation case that deals with the federal income tax laws specifically. But, in Mayo Foundation, a case dealing specifically with the contours of executive administration of federal income tax law, the Court held the same as in Mid-America Pipeline: there is no reason to create different nondelegation jurisprudence around the issue of taxation.

III. ARGUMENTS AGAINST CONGRESSIONAL DELEGATION OF INCOME TAX RATE-SETTING AUTHORITY

A. Tax Exceptionalism?

Perhaps the nondelegation doctrine should extend beyond a mere intelligible principle in exceptional contexts, perhaps like taxation. According to Ronald Krotoszynski, taxing is just different: “Whatever the

59 Id. at 487 (Thomas, J., concurring).
merits of delegation in other context, one should view skeptically
deleagations of authority over the ability to raise and expend revenue.” To
support tax exceptionalism, Krotoszynski relies on the importance the
Founders placed on that power in the U.S. Constitution. He points to the
ubiquity of debates relating to the taxing power, as well as the unique
specificity of the Origination Clause, which requires revenue bills to
originate in the House of Representatives. Perhaps lending some support
to Krotoszynski’s argument is Calvin Johnson’s Righteous Anger at the
Wicked States: The Meaning of the Founders’ Constitution, in which
Johnson argues that the central issue facing the Constitutional Convention
was the power to tax.

And there is some wiggle room within the ‘intelligible principle’ line
of cases that might allow for greater scrutiny of income tax statutes. Despite
the fact that the Court in American Trucking Ass’ns admitted that they have
“almost never felt qualified to second-guess Congress regarding the
permissible degree of policy judgment that can be left to those executing or
applying the law,” Scalia, writing for the majority, concedes “the degree of
agency discretion that is acceptable varies according to the scope of the
power congressionally conferred.” On one hand, agencies cannot help but
make a ton of policy decisions which are far removed from the major
cens of that inspired Congress to act in the first place. There are a great
many relatively minor decisions which are committed to agency discretion
because, for one reason, Congress provided “no law to apply.” So if there
are agency decisions for which no intelligible principle is necessary, might
there be also agency decisions for which no intelligible principle is
sufficient? And if so, is tax one of them? Perhaps setting the income tax
rates is much more important than the typical regulatory scheme and should
require “determinate criterion.” If the amount of permissible discretion an
agency enjoys varies, what, then, would be the factors? Perhaps it would
matter whether the authority to set the income tax rates is limited in time,
whether it is granted to an executive or an independent agency.

The current trend, however, is towards rejecting so-called tax
exceptionalism. As early as 1994, Paul Caron argued against the notion

61 Ronald Krotoszynski, Reconsidering the Nondelegation Doctrine: Universal
Service, the Power to Tax, and the Ratification Doctrine, 80 IND. L.J. 239, 243 (2005).
62 CALVIN JOHNSON, RIGHTIOUS ANGER AT THE WICKED STATES: THE MEANING OF THE
63 Am. Trucking Ass’n, 531 U.S. at 474–75.
65 Am. Trucking Ass’n, 531 U.S. at 475.
66 See, e.g., Paul L. Caron, Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to
Be Tax Lawyers, 13 VA. TAX REV. 517 (1994) (arguing against tax exceptionalism); Kristin
that federal taxation was an exceptional legal context requiring unique jurisprudential rules and constructs. His article, Tax Myopia, or Mama Don’t Let Your Babies Grow Up to Be Tax Law Professors, followed fairly shortly after the Court in Mid-America Pipeline rejected the invitation to construe tax statutes more strictly than others. Thus, in the language of American Trucking Ass’ns, taxation is one of those “sweeping regulatory schemes [where] we have never demanded... that statutes provide a determinate criterion for saying how much is too much.” Furthermore, in 2011, the Court held in Mayo Foundation that federal taxation is not exceptional as it relates to the interpretation of federal statutes. There is probably little hope, then, that the Court would reject a statute giving the President the authority to set the income tax rates so long as Congress provides a guiding principle. In our hypothetical statute, “to balance the budget” and “to respect horizontal and vertical equity,” each, would likely satisfy the intelligible principle test. And if they couldn’t, it is probably not hard to come up with one that would.

Moreover, Mistretta v. United States militates against the idea that taxation is an exceptional context within separation of powers jurisprudence. In Mistretta, the Court approved of a scheme where an agency within the judiciary was permitted to set guidelines to determine criminal sentences relating to federal crimes. If Congress can authorize the deprivation of liberty by statute while leaving unto an agency the extent to which liberty is deprived, then Congress can authorize the deprivation of property through taxation, while it leaves unto an agency the extent to which an individual’s property is deprived. To the extent that the President’s tax rates might become oppressive or otherwise useless, Congress retains the authority to withdraw the tax.

B. Core Functions

In American Trucking Ass’ns, Justice Thomas maintained that the legislative function, as Congress’s core function, cannot be delegated even if it is accompanied by an intelligible principle. Consider Congress passing a statute that “gives the President the power to pass all the laws.” If this is forbidden, then so too is a statute that gives the President the power to pass a single law. And if this is forbidden, must not the same be forbidden when done under pretext. Thus, Thomas believes “that there are cases in which the principle is intelligible and yet the significance of the delegated decision

Hickman, Goodbye Tax Exceptionalism, ENGAGE, Nov. 2011, at 4.
67 Caron, supra note 66, at 518.
68 Am. Trucking Ass’ns, 531 U.S. at 475.
69 Mistretta, 488 U.S. at 380–81.
is simply too great for the decision to be called anything other than 'legislative.'\(^\text{70}\)

It would seem that this stance leaves Justice Thomas with the responsibility for articulating a standard for determining which decisions are legislative at their core. Yet, like in *Morrison v. Olson*, where the Court held prosecutorial discretion to be a purely executive function without committing to naming all of the core executive functions, perhaps the Court has the ability to identify a core function simply "when they see it," and that setting the income tax rates is one of them.\(^\text{71}\)

But, in matters relating to revenue raising, the core legislative function is likely the authorization to tax at all, with all other matters, including rate-setting, reduced to mere regulation. Whether the tax is authorized at all remains the prerogative of the legislature. Consider also that early nondelegation cases dealt with giving the President the authority to adjust tariff rates. Consider also the analogy to *Mistretta* where Congress similarly authorizes deprivations of liberty while punting to an agency the extent to which liberty is to be deprived. Also consider that in *Chevron*, the Court delegated its *Marbury v. Madison* powers to interpret the law, its core function, to administrative agencies but can withdraw it whenever they so choose.\(^\text{72}\) These considerations suggest that the Court would not list income tax rate-setting amongst the core functions of the legislature.

### C. Nondelegation Doctrine as a Justiciability Doctrine

1. Legislative Supremacy as the Purpose of the Nondelegation Doctrine

Article I of the Constitution vests legislative authority in a Congress.\(^\text{73}\) For the proposition that law-making power, once vested in a Congress, cannot be delegated by the Congress to anyone else many cite John Locke's 1690 treatise on civil government.\(^\text{74}\) Early cases pointed also to ordinary

\(^\text{70}\) *Am. Trucking Ass'ns*, 531 U.S. at 487 (Thomas, J., concurring).


\(^\text{73}\) U.S. CONST. art. I, § 1.

\(^\text{74}\) JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT (1690) ("The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others...And when the people have said, We will submit to rules, and be govern'd by Laws made by such Men, and in such Forms, no Body else can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those, whom they have Chosen, and Authorised to make Laws for them. The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the
principles of contract law. 75 Certainly the Constitution would not tolerate a law in which Congress delegated all of its authority to make the public's laws to an entity outside the government or outside the nation itself, such as the United Nations, for example. 76 But the Supreme Court's nondelegation jurisprudence focuses almost entirely on whether Congress has delegated its law-making authority to the President or a federal agency.

By way of the nondelegation doctrine, the Constitution has been interpreted to institute legislative supremacy as the hallmark of our democracy. The President is not authorized to make law, but is expected to be the exclusive source of regulations to implement the public laws. Because both law and regulations are species of rules, it has been impossible for theorists to come up with a workable distinction between law and regulation. Thus, those who, like Justice Thomas, believe there are 'core functions' which the Congress cannot delegate to the President are harder pressed to list those functions which are core and which are delegable. Outside of small areas relating to the military and foreign affairs, Congress must authorize any deprivation of life, liberty, and property. After such authorization, it seems Congress may commit any matter of policy relating to the original Act to the discretion of the President.

Yet the Court requires something more from Congress than a mere authorization to deprive life, liberty, and property. It requires that, in addition to an authorization, Congress must supply an intelligible principle "such that a court could ascertain whether the will of Congress has been obeyed." 77 So, Congress could not provide for a tax on income and simply give the President authority to set the income tax rates without giving the President some type of guidance against which he must justify his actions. But the intelligible principle standard is thin, some might say toothless. The President has been allowed to set commodity prices so long as they are 'fair and equitable' and make other decisions based on the 'public interest.' 78 In this example, this article suggests that a Congress that authorizes the President to prescribe income tax rates so long as they 'balance the budget' and respect 'horizontal equity' and 'vertical equity' has provided three distinct and intelligible principles. If an intelligible principle is all that is needed, then it seems clear that Congress can authorize the President to set

76 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (forbidding delegation "run riot").
77 Mistretta, 488 U.S. at 379.
78 Am. Trucking Ass'ns, 531 U.S. at 474.
the income tax rates.

Notice how legislative supremacy as the purpose for the nondelegation doctrine maintains a particular style of government, a particular style of democracy. After direct democracy is rejected or at least severely limited, there remains a question of what type of representative democracy is appropriate. If there truly existed three "co-equal" branches of government, then an intelligible principle would be unnecessary, because a "co-equal" judiciary should be able to use whatever criteria it felt appropriate to determine whether the President's actions were a good idea. Rather than viewing the three branches of government as co-equal, the nondelegation doctrine via the intelligible principle requirement mandates legislative supremacy. But, by requiring that Congress provide an intelligible principle, the Court ensures that the President is subordinate to the legislature while simultaneously making sure the judiciary is as well. The President's actions under each statute must be in respect of these congressionally provided principles. The mechanism for ensuring that they do is judicial review. Thus, the "intelligible" nature of the principle must be such that a court can determine whether the President is respecting the superiority of the legislature, and the mechanism by which the nondelegation doctrine protects legislative supremacy is judicial review of the President.

But if judges could not effectively review the President's actions when he is legislatively authorized to deprive citizens of their property even in the presence of an intelligible principle, might the nondelegation doctrine hold the congressional grant of authority unconstitutional anyway? Schechter Poultry and American Trucking Ass'ns have language which might support the contention that there is no intelligible principle or set of intelligible principles by which the judiciary can jurisprudentially or nonpolitically review an executive determination of income tax rates.

2. Justiciability

Can a law giving the President the power to make all of the laws be constitutional so long as he is governed by a set of intelligible principles? Would that not be, in the words of Justice Cardozo, "unconfined and vagrant?"79 Left unsaid by Cardozo is that judicial review is the canal that keeps delegations from overflowing. And if the power to make laws by guild is but one example of "uncanalized" law making authority, if it is an example of a matter which the judiciary could not effectively review nor which they could fashion a nonpolitical remedy, might executive authority

79 Schechter Poultry, 295 U.S. at 551 (Cardozo, J., concurring).
to set income tax rates be another?

Facilitation of judicial review as the lynchpin of the nondelegation/delegation doctrine is, however, in tension with the Court’s Due Process jurisprudence. In *Bi-Metallic*, the Court held there is generally no Constitutional right to be heard on matters equally concerning all, which in that case related to the setting of property tax rates. In *Bi-Metallic*, the Court found no right to be heard and thus no judicial review of an executive determination to raise the assessed value of property across the board by forty percent, thysly increasing the taxes paid by all property owners. The setting of income tax rates or the raising of those rates increases the taxes paid by all (or almost all) income recipients, yet, according to *Bi-Metallic*, no judicial review would be available. So one might ask the question why the nondelegation doctrine would hinge on standards for judicial review if a large percentage of executive implementation, those not involving exceptionally affected persons, need not, under the Constitution, be judicially reviewed at all?

On the other hand, if Congress gave the President the authority to set income tax rates, he could levy the entire tax on a relatively small number of people, such that judicial review would be Constitutionally required. Congress has on several occasions written tax statutes directed at a small number of people, and on at least one instance directed the provisions of a tax statute at just one person. Most rifleshot legislation is written so that it appears to be general on its face but in fact applies to one or a few persons. If a President with authority to set the income tax rates were to raise rates on an individual person by rifleshot regulation, upon what standard could a court set aside the determination? Of balancing the budget, vertical equity and horizontal equity, the intelligible principles relating to our hypothetical grant of power to the executive, only horizontal equity is seriously implicated by rifleshot legislation. But even here a judicially created standard for horizontal equity would itself be a purely political choice; particularly considering that vertical equity is required in this hypothetical, which thusly negates the ultimate method for attaining horizontal equity, a flat tax. The nondelegation doctrine is meant in part as a prophylactic against this type of judicial backseat driving.

Ultimately, the nondelegation doctrine, derived from the vesting clause in Article I, and the Due Process Clause, found in the Fifth Amendment to

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81 *Bi-Metallic*, 239 U.S. at 444–45.
82 Londoner v. City & Cnty. of Denver, 210 U.S. 373, 384 (1908).
the Constitution, are not in pari materia. Both of them use effective judicial review as their tool of choice, but towards different purposes. The ultimate purpose of the Due Process Clause is to ensure that the government does not arbitrarily take life, liberty, and property. The nondelegation doctrine aids in that effort, by requiring deprivations to be regulated under an intelligible principle, but is really aimed at another goal, legislative supremacy as the hallmark of democracy. And where an intelligible principle or even a set of intelligible principles cannot subordinate the executive or the judiciary to the legislature, one might argue that the nondelegation doctrine is violated. Thus, judicial review as the hallmark of the nondelegation doctrine is not belittled by the presence in a statute of issues for which the Due Process Clause tends not to afford judicial review.

Instead, the nondelegation doctrine and Due Process Clause tend to complement each other. As the Court in American Trucking Ass'ns intimated when it said “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred,” the greater and more direct the deprivation of life, liberty, or property authorized by the legislature, the greater the need for more precise criteria to restrict the executive. The setting of income tax rates amounts to a great and direct deprivation of property which should be governed by very precise standards but which in fact eludes any intellectual standard other than “do those with certain standards of wealth or levels of income contribute enough?”

IV. CONCLUSION

From a formal perspective, there is little reason to believe that Congress could not constitutionally grant the executive the power to set the income tax rates so long as Congress also provided an intelligible principle to guide the President’s determinations. The Court's intelligible principle test was crafted in a tariff case, and the Court has held that federal income taxes are not a distinguishable legal context. To balance the budget, to provide for vertical equity, and to provide horizontal equity are all principles which a judge could use to set aside arbitrary and capricious income tax rate schedules. If these principles proved insufficient, Congress could provide more. The Bill of Rights would provide other protections against tyrannical actions of the President in setting income tax rates. And should the President depart too far from Congress’s intentions, Congress can repeal the income tax or threaten to repeal it if the President does not adjust her determinations.

84 Am. Trucking Ass'ns, 531 U.S. at 475.
A 'hardcore formalist' might side with Justice Thomas, that there are certain core functions which the Founders entrusted to the legislature and which the legislature may not delegate to anyone inside or outside of the federal government. A 'functionalist' might agree with Justice Rehnquist, that the nondelegation doctrine is supposed to ensure effective judicial review and that statutes written in ways that cannot provide for judicial review are unconstitutional as against the nondelegation doctrine even if Congress accompanies the statute with an intelligible principle or set of intelligible principles. But, here, the formalist and the functionalist must deal with the same problem, identifying those core functions which cannot be delegated and articulating why or identifying which types of legislative authority is not susceptible to judicial review because of their inherently political nature and articulating why. Is the Roberts Court prepared, willing or even wanting to grapple with this question?

A 'functionalist' might also argue that the President’s ability to set income tax rates will give him an unwarranted power over members of the other branches who disagree with him. A 'realist' might believe that because of our dependence on the income tax Congress could not repeal it even if it felt the rates determined by the President were unreasonable. A 'critical theorist' would argue that the result of the case depends on whether the propriety benefit; for example, the Court might approve the grant of authority to a president who promises to lower rates on the wealthy but heavily scrutinize the actual determinations of a President who would raise rates.

Thus, there are theories upon which one could argue that the nondelegation doctrine prohibits Congress from delegating to the President the authority to set the income tax rates. However, the case law is fairly clear. So long as an intelligible principle (for example, horizontal equity, vertical equity, fair and equitable, etc.) is provided, Congress may delegate rate-setting authority to the President. That it may be a tremendously bad idea does not make it an unconstitutional one.\footnote{\cite{Farina} Cynthia R. Farina, \textit{Deconstructing Nondelegation}, 33 Harv. J.L. & Pub. Pol'y 87, 96–99 (2010).}