

Historical Custom and the Custom House: How Custom House Governance from 1789 to the Early 1800s Contradicts a Strong Nondelegation Doctrine

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I. INTRODUCTION

The second question the petitioner asks in *Securities and Exchange Commission v. Jarkesy*,¹ a case currently pending before the Supreme Court, is “[w]hether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine.”² At its simplest, the nondelegation doctrine is a constitutional principle that states that Congress cannot delegate its legislative powers to other entities.³ Much difficulty has come from attempts to delineate exactly when or how a power is legislative.⁴ According to its proponents, the nondelegation doctrine has its earliest roots in the Founders’ arguments and Chief Justice John Marshall’s exposition in *Wayman v. Southard*.⁵ Those proponents anachronistically layer a desired theory on top of the Founders’ views and *Wayman*. As contemporaneously expressed, the nondelegation doctrine first appears in Chief Justice Taft’s opinion in *Myers v. United States*.⁶

¹ Sec. & Exch. Comm’n v. Jarkesy No. 22-859, (U.S. argued Nov. 29, 2023).

² Brief of Petitioner at (I), Sec. & Exch. Comm’n v. Jarkesy No. 22-859, (U.S. argued Nov. 29, 2023).

³ *Nondelegation doctrine*, WEX LEGAL DICTIONARY, LEGAL INFORMATION INSTITUTE, <https://perma.cc/SE2D-X2CU>.

⁴ *Artl.S1.5.2 Historical Background on the Nondelegation Doctrine*, CONST. ANNOTATED: ANALYSIS & INTERPRETATION OF THE U.S. CONST., <https://perma.cc/R8GP-BCD3> (last visited Dec. 28, 2023).

⁵ 23 U.S. 1 (1825).

⁶ 272 U.S. 52 (1926). *Wayman v. Southard* was about whether Congress could regulate the proceedings of federal courts and if so, how. Chief Justice Marshall ultimately concluded that Congress did have the power “to delegate to the Courts the power of altering the modes...of proceedings in suits[.]” *Wayman*, 23 U.S. at 50. Marshall did not lay out a comprehensive nondelegation theory. In fact, Marshall explained that “Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.” *Id.* at 43. Chief Justice Taft, however, did lay out a nondelegation theory in *Myers v. United States*, and Taft’s analysis is on full display in modern Supreme Court nondelegation jurisprudence. *See* Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 492–93 (2010); Seila Law LLC v. Consumer Financial Protection Bureau, 140 S.Ct. 2183, 2197–98 (2020).

Respondents in *Jarkesy* state that “[t]he [nondelegation] doctrine’s roots predate the Founding[.]” citing Federalist 48 for this proposition.⁷ That statement is somewhat ahistoric; the Founders and their contemporaries understood federal duties to share more overlap than we do today. Significant overlap was necessary for the separation of powers scheme to function properly. Federalist 48 supports this proposition sentences before the one cited by respondents in *Jarkesy*: “unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation...can never in practice be maintained.” Furthermore, Federalist 48, as a core of its support for the separation of powers, warns of overconcentration of power in the legislature: “The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”⁸

The modern Supreme Court has similarly glossed over or misread early American history in assertion of the non-delegation doctrine.⁹ In *Seila Law LLC v. Consumer Financial Protection Bureau*,¹⁰ the Court emphasized James Madison’s letter to Thomas Jefferson about the prevailing view of the First Congress.¹¹ Actual federal practices from the Founding period are not cited.

The nondelegation doctrine, with a few exceptions, holds that “lesser [federal] officers must remain accountable to the President, whose authority they wield.”¹² Exceptions are made if the agency does not wield executive power (and is instead an administrative body, or quasi legislative or quasi-judicial, or a mix of the two) or if the inferior officer has limited duties and no policymaking or administrative authority.¹³ Nondelegation doctrine controversies emerge from various contexts but tend to center on the removal power, which is “the most direct method of presidential control[.]”¹⁴ But “Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors.”¹⁵ The

⁷ Brief of Respondents at 47–48, Sec. & Exch. Comm’n v. *Jarkesy* No. 22-859, (U.S. argued Nov. 29, 2023).

⁸ THE FEDERALIST NO. 48 (James Madison), <https://perma.cc/28Q8-DFQN>.

⁹ *See* *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–93 (2010); *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183, 2197–98 (2020).

¹⁰ 140 S.Ct. 2183 (2020).

¹¹ *Id.* at 2197.

¹² *See id.*

¹³ *See id.* at 2198–200.

¹⁴ *See id.* at 2204.

¹⁵ *Touby v. United States*, 500 U.S. 160, 165 (1991).

standard for where to draw the line between permissible and impermissible congressional delegation has for decades been that Congress provide an “intelligible principle” for agency action.¹⁶ But four current Supreme Court justices have expressed a desire to rethink and overrule the intelligible principle standard, with Justice Amy Coney Barrett having not directly expressed her views on the subject.¹⁷ Many commentators anticipate the promulgation of a stronger, more anti-agency nondelegation doctrine by the Supreme Court in the near future.¹⁸

II. ANALYSIS

Contrary to the often-cited historical evidence from proponents of the nondelegation doctrine, some early American history counsels against strong application of the principle. Particularly, the practice of custom houses in early American history somewhat contradicts the nondelegation doctrine.

The American custom house was a building established for the collection of duties from merchants importing goods into the country, located in major seaports, staffed by a federal customs officer.¹⁹ The history of custom houses from 1789 to the early 1800s belies a strong nondelegation doctrine in two ways. First, Congress and the president shared somewhat concurrent authority over the custom houses. These were arguably the most important on-the-ground institutions for the functioning of the federal government, and they were clearly executive in nature. Yet, authority over them was held by both Congress and the president.²⁰

Second, both of those streams of authority were only nominal from 1789 to the early 1800s; actual authority laid with the customs officers themselves—who enjoyed enormous discretion.²¹ That discretion enabled the federal government to collect enough revenue to stay afloat. Throughout the Founding, and until the early 1800s, the theory and operation of custom houses belied nondelegation. Custom houses accounted for 86% of the revenue of the federal government from 1789 to

¹⁶ See *Mistretta v. United States*, 488 U.S. 361, 373 (1989).

¹⁷ See *Gundy v. United States*, 139 S. Ct. 2116, 2130–48 (2019) (Alito, J., concurring in the judgment) (Gorsuch, J., joined by Roberts, C.J., & Thomas, J., dissenting).

¹⁸ See A.J. Jeffries, *Making the Nondelegation Doctrine Work: Toward A Functional Test for Delegations*, 60 U. LOUISVILLE L. REV. 237, 271 (2021); Paul J. Larkin, *Revitalizing the Nondelegation Doctrine*, 23 FEDERALIST SOC’ REV. 238, 246 (2022); Andrew Rockett, *Protecting Climate Change Law from A Revived Nondelegation Doctrine*, 11 MICH. J. ENVTL. & ADMIN. L. 181, 188 (2021).

¹⁹ See GAUTHAM RAO, NATIONAL DUTIES 1–9 (2016).

²⁰ Jennifer Mascott concludes that custom houses were under the exclusive control of Congress, adhering to modern nondelegation doctrine. Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388 (2019). This article challenges that conclusion. See *supra* Section II.

²¹ See RAO, *supra* note 19, at 83, 93–94, 96 (2016).

1816, so their operation in the Founding constitutional scheme deserves examination and weight.²² The custom house was the foundation from which the federal government grew. And, at the risk of sounding anachronistic, they looked a lot like miniature agencies with fairly unfettered discretion. They were on the front lines, and both interpreted and executed law under the purview of the executive.²³ Contemporary articulations of a strong nondelegation doctrine are disconnected from this historical analog. The reason for that significant disconnect is that the Founders had quite different conceptions of the separation of powers than is contended by many nondelegation proponents.²⁴

Professor Jennifer Mascott concludes that custom houses were under the exclusive control of Congress, supporting modern justifications for the nondelegation doctrine.²⁵ That characterization overlooks the influence that the Treasury exerted on its formal subordinates and the fact that neither Congress nor the Treasury seemed to exert more than nominal control over custom house operations.²⁶ Mascott cites Treasury Secretary Alexander Hamilton's implementation of customs statutes as support for the nondelegation doctrine.²⁷ But Hamilton was not deferential to Congress because of a clearly delineated separation of powers scheme; he was deferential because the entire federal system was new and precarious, and he understood that the sharing of authority and actively influencing Congress would make for a more stable and effective government. Hamilton's "reports" to Congress were generally (largely successful) attempts to influence Congress.²⁸ This was power sharing, not the seeking of marching orders, which Hamilton was never the type to do.²⁹

Taken as a whole, the streams of overlapping federal authority and the discretion wielded by early custom houses contradict claims of a strong nondelegation doctrine in the Founding Era.

A. Overlapping Authority Over Custom Houses

The doctrine of nondelegation cannot be accurately inferred in the Founding Era from government practice, at least in the case of custom houses. Congress

²² *Id.* at 176.

²³ *See id.* at 92–93.

²⁴ Hamilton in particular was more worried about excessive legislative power than any other separation of powers issue. *See* RON CHERNOW, ALEXANDER HAMILTON 258–59 (2004).

²⁵ *See* Mascott, *supra* note 20, at 1394, 1400–01.

²⁶ *See* RAO, *supra* note 19, at 83, 93–94, 96.

²⁷ Mascott, *supra* note 20, at 1394, 1400–01.

²⁸ *See* CHERNOW, *supra* note 24, at 303–04.

²⁹ *See id.* at 297.

understood itself to be administering the executive institution of the custom houses.³⁰ So did the president (through the Treasury Department).³¹

In administering the custom houses, as opposed to the relative vagueness when legislating other matters, Congress's customs laws were extremely detailed.³² Far from announcing an intelligible principle and leaving execution to the executive, Congress specified customs rates in hyper specific detail in the Tariff Act of 1789.³³ This emphasis on detail extended all the way down to the customs rates for specific goods. "[D]istilled spirits of Jamaica proof" had a duty of 10 cents a gallon; tens of other goods also had their duties specified exactly.³⁴ This pattern held for subsequent customs acts.³⁵

And yet, the executive also directed custom houses. President George Washington and President Thomas Jefferson selected their customs officers very intentionally. Washington selected all 134 officers for 39 ports of entry.³⁶ Jefferson dismissed 50 Federalist customs officials for replacement by those more loyal to his Republican administration.³⁷

In addition to the selection of customs officers, early presidents guided performance of customs duties—despite Congress's clear expression of authority over the custom houses through customs acts. Treasury Secretary Alexander Hamilton wrote to his customs collectors stating that "there is latitude to avoid a rigorous enforcing of the provision, [and] it is incumbent upon the Collector to make reasonable [and] due allowance, having regard to the usual course of business." Sometimes, "a provision, though not strictly impracticable, may be so inconvenient as to demand some degree of relaxation."³⁸ Hamilton was directly encouraging his collectors to deviate from the strict letter of congressional customs statutes when they needed to.

³⁰ See Mascott, *supra* note 20, at 1394.

³¹ See RAO, *supra* note 19, at 55 (citing Letter from Alexander Hamilton to Duane, September 3, 1780, 401, 402, LAWRENCE S. KAPLAN, ALEXANDER HAMILTON: AMBIVALENT ANGLOPHILE 41–43 (2002), and Letter from Hamilton to Duane, September 3, 180, 402, 404).

³² See Mascott, *supra* note 20, at 1394–95 (citing JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 75 (2017)).

³³ An Act for Laying a Duty on Goods, Wares, and Merchandises imported into the United States, ch. 2 § 1 Stat. 24–26 (repealed 1790), <https://perma.cc/HJ95-CA5B>.

³⁴ See *id.*

³⁵ See Mascott, *supra* note 20, at 1406–34.

³⁶ See RAO, *supra* note 19, at 69.

³⁷ See *id.* at 118.

³⁸ RAO, *supra* note 19, at 94, citing Alexander Hamilton, *Circular to Collectors of Customs*, June 11, 1792, Treasury Circulars, Reel 2.

The obvious question, then, is whether this was simple executive overreach and flouting of proper congressional authority. But that question is fairly anachronistic. Overlapping authority was the norm in the Founding Era, not the exception. Hamilton had also sought congressional clarification for customs protocol throughout his tenure.³⁹ He worked through Congress to establish an extra layer of authority for executive action, as was always his preference.⁴⁰ Within the next two decades, the concurrency was recognized and partially altered when Congress authorized explicit presidential discretion in the administration of custom houses in 1808.⁴¹

Also, it perhaps does not matter if the customs officers' exercise of discretion was a breach of the separation of powers. Custom houses were effectively singularly responsible for the funding of the government.⁴² The way they worked was with nominal authority from both branches, but with huge discretion under the authorization of the president.⁴³ The custom houses needed discretion because the merchants paying the duties demanded influence and leniency, and without their support, the government could not operate. This was the opposite of a clean separation of powers, it was shared federal authority. And it was nominal authority. In other words, the custom house looked a lot like some federal agencies. That was the only way anyone figured out for things to work at the time. Other schemas for custom house governance were attempted by the British, and they failed to bring in significant revenues.⁴⁴ This historical fact strongly resists overbroad claims of the early prominence of the nondelegation doctrine.

B. Discretion in Custom Houses

Custom houses accounted for 86% of federal revenue from 1789 – 1816.⁴⁵ That near-unilateral financial foundation for the federal government exposes the

³⁹ See Mascott, *supra* note 20, at 1400–01.

⁴⁰ See CHERNOW, *supra* note 24, at 281 (stating on the establishment of the Treasury Department: “A tremendous hubbub accompanied the act outlining the treasury secretary’s duties, including his need to report to Congress...Opponents did not see this duty as a welcome form of congressional oversight...they feared it would open the door to executive tampering with legislative affairs—a charge that was, in fact, to hound Hamilton throughout his tenure.”).

⁴¹ See RAO, *supra* note 19, at 146. Congress was still sharing authority with the president but granted the president discretion over detention. *Id.*

⁴² See *id.* at 75, 174, Aaron T. Knapp, *From Empire to Law: Customs Collection in the American Founding*, 43 LAW & SOC. INQUIRY 554, 555 (2018).

⁴³ See RAO, *supra* note 19, at 93.

⁴⁴ See *id.* at 16; Knapp, *supra* note 42, at 558.

⁴⁵ RAO, *supra* note 19, at 176.

importance of custom house functioning. Their functioning was primarily possible through vestment of significant discretion in customs officers. That discretion, at times, was so broad as to look legislative in nature.⁴⁶ From 1789 to the early 1800s, insulated discretion in custom houses was the way to enforce customs laws.

The “customs bond,” or allowance of payment of duties over time instead of up front, was a primary mechanism of customs officers’ discretion.⁴⁷ Customs officers chose not to prosecute overdue bonds against certain merchants, despite general instruction from the Treasury Department that “whenever any persons bond for duties shall be put in suit...you will transmit information to the Collectors of the Several Ports within the state...in order that further credit may be refused.”⁴⁸ Perhaps this was a generous construction of “shall be put in suit” by the customs officers for the merchants they chose not to prosecute. When Congress encouraged cash payments of duties instead of bonds with discounts, customs officers reinterpreted the statute’s word “prompt” (payment) to also apply to merchants not in strict compliance with the law so the merchants received discounts.⁴⁹ Alone in their custom houses, these officers were masters of ambiguity who interpreted laws and directives for the merchants subject to those rules. That ambiguity was essential to the custom houses’ operation and revenue generation.

Professor Knapp argues that while collectors may have been more lenient with merchants than what was statutorily required, those officers were striving to ensure more compliance than before, going through formal channels to execute the law.⁵⁰ That view is consistent with the characterization of the collectors’ discretion in courting merchants. Knapp emphasizes that the collectors helped herald a new, enhanced regulatory regime through the use of formal institutions. Both characterizations acknowledge that to ensure compliance and revenue, collectors had to bend, or at the very least, flexibly interpret, the rules.

Customs officials likely knew that rigid compliance with Treasury instruction and congressional directives would stifle commerce. They ran the risk of alienating merchants from the state entirely and ruining their local reputation, their reputation being the tool they used to do their jobs and why many were selected for their posts in the first place.⁵¹ The Treasury came around to not only accepting but encouraging

⁴⁶ See *id.* at 10, 12–13, 27.

⁴⁷ See Knapp, *supra* note 42, at 578.

⁴⁸ RAO, *supra* note 19, at 92 (citing Hamilton, Circular to Collectors of Customs, February 6, 1972, Treasury Circulars, Reel 2).

⁴⁹ See RAO, *supra* note 19, at 83–84.

⁵⁰ See Knapp, *supra* note 42, at 574.

⁵¹ See RAO, *supra* note 19, at 69, 90, 92.

leniency for merchants through Hamilton's circulars to customs collectors.⁵² Encouraging such flexible interpretation of statutes was why customs revenue went from \$6.5 million for the period from August 1789 to December 1791 to \$5.5 million in the single year of 1794.⁵³

Congress and the judiciary came to sanction the broad discretion of early custom houses.⁵⁴ Congress passed embargo legislation in April 1808 granting customs collectors discretion in issuance of clearances and President Jefferson relied on the collectors to enforce his embargo.⁵⁵

That same year, Adam Gilchrest and J. Sanford Barker were refused a customs clearance at the Charleston harbor.⁵⁶ Fearing their boat full of cotton would be devoured by teredo "shipworms," or termite like worms present in many American ports, Gilchrest and Barker tried to rush the clearance process.⁵⁷ Collector Simon Theus refused the clearance.⁵⁸ Gilchrest and Barker sued Theus in federal court.⁵⁹ In *Gilchrest v. Collector of Charleston*,⁶⁰ the United States Circuit Court in Charleston, (with Supreme Court Justice William Johnson riding circuit), announced a decidedly pro-delegation principle: "The granting of clearances is left absolutely to the discretion of the collector; the right of detaining cases which excite suspicion is given him, with a reference to the will of the executive...the right of granting clearances remains in him unimpaired and unrestricted."⁶¹ Justice Johnson went on to explain that not even the Treasury Department could impair this discretion.⁶² President Jefferson was understandably upset by the ruling.⁶³

Gilchrest was only 17 years old when Chief Justice John Marshall announced: "It will not be contended that Congress can delegate to the courts or to any other tribunals powers which are strictly and exclusively legislative. But Congress may

⁵² See *id.* at 94.

⁵³ See *id.* at 93.

⁵⁴ See RAO, *supra* note 19, at 147–50.

⁵⁵ See *id.* at 149–50.

⁵⁶ See *id.* at 147–48.

⁵⁷ See *id.* at 147.

⁵⁸ See *id.* at 148.

⁵⁹ See *id.*

⁶⁰ 1 Hall L.J. 429 (1808).

⁶¹ *Id.* at 356.

⁶² See *id.*

⁶³ See RAO, *supra* note 19, at 150; Letter from Thomas Jefferson to Charles Cotesworth Pinckney, July 18, 1808, Reel 41, Jefferson Papers.

certainly delegate to others powers which the legislature may rightfully exercise itself.”⁶⁴ If the discretionary authority vested in custom houses in 1808 was not legislative, it was certainly executive (President Jefferson’s administration definitely classified them as executive).⁶⁵ *Gilchrest* thus belies contemporary arguments that the nondelegation doctrine was widely accepted in the Founding Era.

A pro-delegation argument can also be gleaned from the discretion vested in custom houses. If a heavy hand of enforcement was brought down on the custom houses from 1789 to the early 1800s, they probably would not have generated significant revenue. Britain had tried and failed to do so for decades, receiving little revenue for its efforts.⁶⁶ A large part of the success of the early federal government came from getting the merchants on the side of the government and getting them to pay duties at all. Custom house discretion married the merchants’ commercial interest to the interest of self-preservation of the new American government.⁶⁷ The actors on the ground, closest to the information, knew how best to implement government policy, which sounds quite like some contemporary arguments for the discretionary power of federal agencies.⁶⁸ On the other hand, the optimality of custom house discretion should not be overblown, and at least one historian has argued that Federalists continually and firmly strove to shore up custom house enforcement discrepancies and had largely succeeded by 1800 through the Collection Act of 1799.⁶⁹ The obvious counterargument is that the discretionary configuration that worked centuries ago, where time and distance dominated decisions of governmental administration, do not apply in the modern era. Fair enough, but if that is the chief rebuttal, we have at least accepted that the nondelegation doctrine was not omnipresent during the Founding, and, in fact, custom house practice contradicted it.

III. CONCLUSION

Originalist nondelegation doctrine arguments that suggest the doctrine was paramount in the Founding Era are misleading. The establishment and operation of custom houses, the primary funding mechanism for the early federal government, fundamentally belies the nondelegation doctrine. Both the concurrent and nominal

⁶⁴ *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825).

⁶⁵ See RAO, *supra* note 19, at 149.

⁶⁶ See *id.* at 16–17; Knapp, *supra* note 42, at 556.

⁶⁷ See RAO, *supra* note 19, at 51.

⁶⁸ See Rockett, *supra* note 18, at 193.

⁶⁹ See Knapp, *supra* note 42, at 577. See also RAO, *supra* note 19, at 167–68. Certainly by 1817 the custom house paradigm had shifted due to a confluence of factors. The difficulty in pinpointing the turning point between 1800 and 1817 is a reason why the broad phrase “early 1800s” defines the chronological endpoint in this article.

nature of the source of their authority suggest that the Founders had a more overlapping view of the separation of powers than modern nondelegation advocates insist. In operation, insulated discretion was the only way to execute important customs laws.

Moreover, originalist nondelegation doctrine arguments anachronistically misapprehend the Founding Era. This was before the ascendancy of formalist constitutionalism; regulation was omnipresent and it was non-centralized.⁷⁰ The fact that custom house revenue was the government's primary source of funding, and that funding was procured through a system of non-centralized discretion in keeping with decades of local custom, should give us pause in asking if the actions of customs officers were simply against the law.⁷¹ The pervasiveness of heightened discretion and leniency among those who were specifically selected for their character and loyalty to the government suggests that the customs officers conceived of law differently than modern day nondelegation advocates.⁷²

Understanding law in history requires analysis of the law's broader context. In the Founding Era, federal officials desperately wanted the new federal framework to work. Enforcement had to be considered in the passage of laws. The people who enforced those laws had to reckon with the reality of a new, unstable regime, while considering how to give those laws effect and normative power. The back and forth between Congress, the secretary of the treasury, custom house officials, and merchants demonstrated the decentralized messiness of early federalism. Far from ideal, abstract, delineated spheres of power, everything overlapped.⁷³ In that way, the messiness mirrors today. The solution then involved some overlap of powers, where the actors closest to the information of the relevant problems had discretion to implement solutions.⁷⁴ That paradigm reflects some current pro-agency discretion arguments, and its historical primacy in the Founding years should at least give us pause when we cite history to justify a certain separation of powers regime.

⁷⁰ See WILLIAM NOVAK, *THE PEOPLE'S WELFARE* 238–39 (1996).

⁷¹ See RAO, *supra* note 19, at 12–13.

⁷² See *id.* at 69–70.

⁷³ See NOVAK, *supra* note 70, at 237–39 for a similar historical methodology and brief characterization of early American governance.

⁷⁴ See Rockett, *supra* note 18, at 193.