Does California still have a meaningful separation of powers doctrine?

Overview

In this article I address what I view as a significant breakdown in California's constitutional order. I begin with an overview of separation of powers doctrine to explain the importance of the non-delegation doctrine — which prohibits the state legislature from giving away its lawmaking powers. I then explain California's three tests for distinguishing between legitimate and illegitimate delegations of authority. And in all of this, I aim to address a controversy: that Governor Newsom's exercise of "all police powers of the state" in formulating rules restricting individual liberties and shuttering businesses during 2020–21 violated separation of powers and so undermined the rule of law.

Analysis

The rise of the autocratic executive?

The doctrine of separation of powers is the foundation for our entire constitutional system.[1] It is the most fundamental of all constitutional doctrines because it is the rule of law that governs the distribution of government power. And it distinguishes our system from the autocratic regimes that have ruled mankind for most of history.[2]

The federal constitutional framers thought it imperative to separate the powers of the national government between distinct coordinate branches to safeguard individual liberty.[3] They were informed by James Madison's observation that the consolidation of powers inevitably invites despotism.[4] As such, separation of powers is the elegantly simple precept that protecting individual liberty requires that each branch of government must stay in its own lane.

Prudently drawing from Madisonian thought — which was informed by the philosophy of John Locke — the framers of the California constitution were even more explicit than the federal constitution in demanding a strict separation of powers. Indeed, the California constitution not only delegated the legislative, executive, and judicial powers to separate branches, but it expressly cabined them: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."[5]

Madison was most concerned with power concentrating in the legislative branch.[6] Today the protections afforded by the separation of powers doctrine are most acutely threatened by the gradual accretion and consolidation of powers in the executive branch — a phenomena that Gary Lawson has called the "rise and rise of the Administrative State."[7] Properly conceived, executive branch powers consist only in administering and enforcing the laws that the legislature enacts. But to the extent the executive assumes lawmaking powers, it bears greater likeness to the monarchial autocracies that republicanism disavowed with the deliberate separation of powers. Thus, the consolidation of both executive and legislative powers in the same person presents the same dangers to liberty as does the legislature, but without the moderating restraint inherent in an assemblage wherein compromise and coalition building is required to enact law.

The logic of the non-delegation doctrine

Today California's executive branch wields tremendous powers to make rules binding on citizens because the legislature has enacted statutes that purportedly delegate broad law-*making* — not merely law-*executing* — powers to the executive.[8] But the California constitution's assignment of powers to separate branches precludes the legislature from delegating any lawmaking power.[9] As such, the "non-delegation doctrine" seeks to distinguish between legitimate delegations of discretion needed to administer the law, and those delegations that cede the legislature's exclusive prerogative to set public policy — which is the essence of making law.[10]

Under California jurisprudence, the legislature impermissibly delegates the lawmaking power when a statute fails to make fundamental policy decisions, provide adequate standards guiding or channeling the exercise of conferred discretion, or provide adequate safeguards against arbitrary rules or favoritism.[11] But these principles ensure constitutional legitimacy for a delegation only to the extent they are applied with some semblance of rigor — consistent with the theoretical underpinnings of our separation of powers doctrine. And as discussed below that is not always the case in California.

The moribund non-delegation doctrine

For over a century the California Supreme Court has consistently affirmed the continued vitality of the non-delegation doctrine: first in *Hewitt v. State Bd. of Medical Examiners*,[12] again in *In re Peppers*,[13] and thereafter in numerous opinions affirming the rule that the legislature may not confer too much discretion to the executive branch.[14]

Those decisions remain good law. Yet in practice California courts generally overlook opinions that invalidated statutes or rejected statutory interpretations under the non-delegation doctrine.[15] No case better demonstrates the moribund state of the non-delegation doctrine than *Newsom v. Superior Court*.[16] There, Assemblymembers James Gallagher and Kevin Kiley argued that Governor Gavin Newsom's emergency orders on election procedures conflicted with the Elections Code.

Gallagher and Kiley argued that the governor's orders violated the separation of powers because the governor was making new law. But the governor argued — as he has in defending his business-closure orders in other cases — that he was merely exercising lawfully delegated authority under the Emergency Services Act (ESA), which broadly allows the governor to issue any order aimed at mitigating the effects of an emergency.[17] The court ruled that the ESA's delegation of emergency powers was constitutional even though the statute delegates "*all* police power vested in the State" to the governor during a declared emergency.[18]

That reasoning represented an especially anemic view of the non-delegation doctrine — an approach that would uphold any delegation of rulemaking authority. Indeed, it is difficult to imagine a more sweeping delegation of rulemaking authority than a delegation conferring *all* of the state's police powers. After all, the police power is the power to legislate to protect "public health, safety, morals and general welfare."[19] Accordingly, to delegate "all police power" is to grant sweeping lawmaking powers related to virtually any policy question within the legislature's broad ambit.

The California Supreme Court has used three distinct tests to evaluate legislative delegations. The next sections apply those three tests to the *Newsom* decision, which failed to properly apply any of them.

The fundamental policy test

The California Supreme Court has consistently stressed that the legislature is required to set fundamental policy for the state, which means deciding the truly "momentous" (important or consequential) policy issues.[20] The *Newsom* decision merely assumed that the state decided fundamental policy in deciding that the governor should be empowered to issue orders to protect public health; however, referencing a statute's general purpose is not enough.[21] To be sure, every statute has general legislative purpose. For example, *Hewitt* invalidated a delegation in an occupational-licensing statute concerning the practice of medicine — a statute broadly geared toward the goal of protecting public health. Likewise, even though Congress spelled out its general goals for the National Recovery Act, the U.S. Supreme Court found that those general goals were insufficient (under federal doctrine) because Congress failed to provide any governing standard for the specific issue at hand.[22]

Any proper understanding of the fundamental-policy test would have to accord with decisions that found non-delegation violations or addressed the non-delegation doctrine through the canon of avoidance analysis. For example, in *Hewitt* the court held that an act authorizing the regulation of the medical profession violated the California constitution by leaving unanswered the fundamental policy question of

whether and to what extent a physician could make controversial public statements on medical issues.[23] Likewise, in *In re Peppers* the court held that the legislature's ban on shipping "defective" citrus (without defining that essential term) failed to set fundamental policy, notwithstanding a general legislative goal of protecting the "reputation of the citrus industry."[24]

These cases are binding precedent and stand for the proposition that the legislature must affirmatively speak in some reasonable way as to when, and under what conditions, the executive may promulgate regulation affecting individual rights — including any limitation of economic liberties. Such issues represent "important subjects," as opposed to the mere ministerial function of filling-in details.[25] Yet the *Newsom* decision permitted a delegation far beyond what *Hewitt* and *Peppers* would have barred.

The adequate standards test

The adequate standards test requires the legislature to provide "an adequate yardstick for the guidance of the administrative body empowered to execute the law . . . ."[26] This means there must be meaningful direction to channel the exercise of discretion in weighing competing public values when exercising conferred discretion.[27] And it is never permissible for the legislature to say "Do whatever you think best."

But *Newsom* concluded that the ESA's delegation of "all police powers" satisfied the adequate standards test because the legislature made clear that emergency orders must relate to the general goal of protecting public health in an emergency. That is not the test. And if we accept *Newsom's* rationale, the government will argue that there are always adequate standards simply because an exercise of delegated authority must relate in some general sense to the broad goals of the statute. If this generous rule is adopted, then we invite the legislature to give away its police powers on any given regulatory subject.

And the argument for allowing such open-ended delegations is overstated. It is never truly necessary to give an unfettered delegation of authority without at least some

standards meaningfully channeling the exercise of discretion.[28] Even in the context of emergency planning one should expect the legislature to identify the factors the executive should consider before issuing emergency orders; after all, it is possible to anticipate the sort of emergencies that might arise (earthquakes, floods, fires, epidemics, etc.) and to provide an enumerated authorization of powers, anticipating the range of potentially necessary state responses — which might well include business occupancy restrictions under defined conditions. As such, we should be deeply skeptical of the suggestion it is *ever* appropriate to confer an open-ended delegation allowing the executive branch to do anything that the legislature might do in responding to public threats — whatever the issue or exigency may be.[29]

That is not to say that we must expect absolute certitude of governing standards. But our non-delegation case law requires that there must be something directing the executive branch as to how to enforce or administer the statute in question — otherwise the executive would stand as the lawmaker, rather than the administrator. For example, in *Gerawan Farming v. ALRB* the California Supreme Court upheld a statute delegating authority to the Agricultural Labor Relations Board to decide what rules to impose on employers in a state-imposed collective bargaining agreement. While the ALRB had significant discretion to impose rules as it deemed appropriate, it was at least guided by the express criterion that it was expected to consider.[30] By contrast the ESA's unqualified delegation of all police power contains no such guideposts.[31] Yet *Newsom* assumes — in contradiction to everything the California Supreme Court has ever said about the adequate standards test — that there is no need for guideposts.

The adequate safeguards test

In addition to requiring the legislature to decide fundamental policy matters and to provide direction, the non-delegation doctrine may also require certain procedural or even substantive limitations to guard against the risk that that delegated powers may be used in ways the legislature did not intend. As such, the adequate safeguards test requires that the legislature must provide some mechanism to minimize the risk of arbitrary decisions or favoritism.[32] As with the adequate standards test, what

precisely is required may vary with context depending on the scope and nature of the delegation in question. But there still must generally be procedural rules constraining the exercise of discretion. For example, applying similar tests, other state supreme courts have held that a delegation of rulemaking authority is unconstitutional if it does not ensure opportunity for public notice and comment.[33] And in the context of an otherwise broad delegation power, we should expect substantive restraints as well, for example: provisions expressly stating that delegated authority cannot be exercised to impose certain objectionable rules, or objective temporal limitations on delegated authority.

The ESA's unconditional delegation of all police power has no such protections. *Newsom* suggests that it is enough that the legislature might intervene to claw back these delegated powers.[34] But the non-delegation doctrine prohibits an unqualified delegation of power regardless of whether a future legislature might seek to reassert its institutional role. Returning to first principles, the issue is that the legislature violates its constitutional duty when it gives a blank check.

Conclusion

There is room for debate over where exactly to draw the line on delegations. But we must take this task seriously because any devolution of lawmaking powers to the executive represents a breakdown of our most fundamental constitutional precepts, and is therefore an existential threat to the Republic.[35] As such, we should expect courts to apply the non-delegation doctrine with rigor, while allowing the executive branch to carry out fact-finding inquiries necessary to administer and execute the law, and to exercise some degree of (meaningfully circumscribed and guided) discretion in promulgating regulation.[36]

That said, if the *Newsom* decision is correct in upholding a delegation of "all police powers" then separation of powers is nothing more than a fiction that can be set aside whenever the legislature wishes. But one cannot set aside constitutional doctrine without doing violence to the rule of law. As such, we can never ignore separation — not for the sake of political expedience, administrative convenience, or even in the face of emergency.[37]

And there is at least one case percolating that may still vindicate this point. Plaintiffs in *Ghost Golf v. Newsom* challenge the governor's authority to impose business closure orders during his continuing emergency proclamation for COVID-19, and argue that if separation of powers means anything it is that the legislature cannot give the executive its legislative police powers.[38] Accordingly, *Ghost Golf* will test the strength of California's non-delegation doctrine when the parties move toward a merits decision, and likely an appeal, later this year.

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1. *Seila L. LLC v. Consumer Fin. Prot. Bureau* (2020) 140 S.Ct. 2183, 2202 (explaining structural protections for individual liberty). ↑
2. *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 655 (Jackson, J., concurring). ↑
3. *Bowsher v. Synar* (1986) 478 U.S. 714, 730. ↑
4. Madison, The Federalist No. 47 ("The accumulation of all powers, legislative, executive and judiciary, in the same hands … may justly be pronounced the very definition of tyranny."). ↑
5. Cal. Const. Art. 3, § 3. ↑
6. *See* Madison, The Federalist No. 41 ("In republican government, the legislative authority necessarily predominates.") and No. 48 ("The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."); *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 298 ("The founders of our republic viewed the legislature as the branch most likely to encroach upon the power of the other branches."). ↑
7. Lawson, *The Rise and Rise of the Administrative State*, (1994) 107 Harv. L. Rev. 1231, 1231. See also *Tiger Lily, LLC v. United States Dep't of Hous. & Urb. Dev.* (6th Cir. 2021) 5 F.4th 666, 674 (Thupar, J., concurring) (noting the incentive for the legislative branch to "shift[] responsibility to a less accountable branch[]"). ↑
8. I am focused here on the California constitution. But the danger of executive

branch overreach is perhaps even greater at the federal level for the simple fact that our national political climate more often yields divided government, which may in practice invite the President to push the bounds of legitimate power as an end-run around Congress. ↑

9. *See Gerawan Farming, Inc. v. ALRB* (2017) 3 Cal.5th 1118, 1146–47. ↑
10. The core legislative branch functions include passing laws, levying taxes, and making appropriations, and determining and formulating legislative policy. *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 299. ↑
11. *See Kugler v. Yokam* (1968) 69 Cal.2d 371, 384. ↑
12. *Hewitt v. State Board of Medical Examiners* (1906) 148 Cal. 590. ↑
13. *In re Peppers* (1922) 189 Cal. 682. ↑
14. *E.g., Baltz Brewing Co. v. Collins* (1945) 69 Cal.App.2d 639, 645–46 (employing the non-delegation doctrine in a canon of avoidance analysis); *Am. Distilling Co. v. State Bd. of Equalization* (1942) 55 Cal.App.2d 799 (same). *See also People's Federal Savings v. State Franchise Tax Bd.* (1952) 110 Cal.App.2d 696, 697 (finding a non-delegation violation notwithstanding the fact that there was a general goal of administering orderly tax administration). ↑
15. *See* Appellant's Reply Br., *Ghost Golf v. Newsom*, Fifth App. Dist., No. F082357, 35–45 (Apr. 29, 2021) (Ghost Golf Br.) (responding to the Attorney General's argument that a statute should survive if there is any legislative purpose and that it is sufficient merely for the legislature to expect the executive branch's regulations or orders to bear a nexus to that general purpose). ↑
16. *Newsom v. Superior Court*, (2021) 63 Cal.App.5th 1099. ↑
17. *E.g., Ghost Golf v. Newsom* (Fresno Superior Ct., 2021) 2021 WL 3483271. ↑
18. *Newsom* (emphasis added) (upholding Gov. Code § 8627). ↑
19. *See State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, 440. ↑
20. *See Sims v. Kernan* (2018) 30 Cal.App.5th 105, 111. ↑
21. This is actually a charitable reading of the opinion because there was no real analysis on the fundamental policy test. The court affirmed in passing the

rule that the legislature must decide fundamental policy, but did not explain why the delegation of "all police powers" satisfied this test. *See Newsom* at 1115. ↑

22. *See Kamen v. Lindly* (2001) 114 Cal.Rptr.2d 127, 132 (affirming that "[w]here . . . California law is modeled on federal laws, federal decisions interpreting substantially identical [laws] are unusually strong persuasive precedent on construction of our own laws."). *See also Panama Ref. Co. v. Ryan* (1935) 293 U.S. 388, 417–18. ↑
23. *Hewitt* at 594. ↑
24. *In re Peppers* (1922) 189 Cal. 682. ↑
25. *See Hewitt* at 594 (holding unconstitutional a delegation of authority to decide whether an individual should be allowed to continue practicing medicine). ↑
26. *Gerawan Farming, Inc. v. ALRB* (2017) 3 Cal.5th 1118, 1146–47. ↑
27. *See People's Federal Savings* at 697. ↑
28. *See Taking Delegations Seriously*, *supra* n.7 at 29–32 (confronting the necessity defense). ↑
29. This argument does not call into question the proposition that a statute may confer authority on an administrative agency to color-in the details of a regulatory scheme established by the legislature. An agency may legitimately engage in rulemaking, exercising gap-filling authority, so long as it is not deciding the truly consequential issues. ↑
30. *Gerawan Farming, Inc. v. ALRB* at 1153. ↑
31. *Id*. at 1148. ↑
32. Whereas the fundamental policy and adequate standards test appear to closely track our federal non-delegation jurisprudence, the adequate safeguards test is unique to state law. But it is noteworthy that numerous states have developed and applied some version of this test as an added bulwark against despotism. ↑
33. Perhaps there is room to argue that different state courts are applying slightly different adequate safeguards tests. But there appears to be commonality in these decisions, which should provide at least persuasive authority for California courts. *E.g., Matter of Powell* (1979) 92 Wn.2d 882, 893 (affirming that Washington's non-delegation doctrine requires adequate

safeguards, and citing the same administrative law treatise as the California Supreme Court has relied in affirming the adequate standards test); *Protz v. Workers' Comp. Appeal Bd.* (Pa. 2017) 161 A.3d 827, 834–35 (affirming that the Pennsylvania's non-delegation doctrine requires "important safeguards," including opportunity for notice and comment); *Hope–A Women's Cancer Ctr., P.A. v. State* (N. C. 2010) 693 S.E.2d 673, 679 (affirming that North Carolina's non-delegation doctrine generally requires opportunity for a public hearing). ↑

34. *See Newsom* at 116–17. ↑
35. *See generally* Wake, *Taking Non-Delegation Doctrine Seriously* (forthcoming N.Y.U. J. of L. & Lib., spring 2022). ↑
36. Administration of the law requires an agency to engage in fact-finding in order to determine when there are violations of the law, or when application of the law is made contingent on certain findings. *See Gundy v. United States* (2019) 139 S.Ct. 2116, 2136 ("[O]nce Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding."). ↑
37. *See Youngstown Sheet & Tube Co.* (enforcing separation of powers doctrine even in the midst of crisis). ↑
38. Pacific Legal Foundation, *Small Businesses Fight Gov. Newsom's Unlawful Color-Code Shutdown Scheme, Pacific Legal Foundation* (2021). ↑