RESPONSE

Hunting for Nondelegation Doctrine's Snark

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Just the place for a Snark! I have said it twice:
That alone should encourage the crew.
Just the place for a Snark! I have said it thrice:
What I tell you three times is true

—Lewis Carroll, *The Hunting of the Snark*[1]

Lewis Carroll's *Hunting of the Snark* portrays a nonsensical band of hunters in search of a "Snark," a beast that none of the hunters can describe or define except in terms too nonsensically specific or vacuously general to identify the beast. The Snark's "five unmistakable marks," according to the Bellman (the band's leader), are (1) a "meagre and hollow, but crisp" flavor; (2) a "habit of getting up late"; (3) "slowness in taking a jest"; (4) "fondness for bathing machines"; and (5) "ambition."[2] None of these five markers, of course, would pick the Snark out of a crowd. What's worse, while most Snarks are harmless, some Snarks are "Boojums," a subcategory defined only by their disastrous effect on observers.[3] Warned the uncle of the Baker (one of the intrepid Snark hunters): "But oh, beamish nephew, beware of the day/ If your Snark be a Boojum! For then/ You will softly and suddenly vanish away,/And never be met with again!"[4]

Lewis was, of course, Charles Dodgson, Oxford logician and master of word play.[5] It is tempting, therefore, to draw a linguistic moral from his nonsense poem about Snarks: the poem mocks pseudo-definitions—words that bear the appearance of marking out the domain

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1. LEWIS CARROLL, THE HUNTING OF THE SNARK: AN AGONY IN EIGHT FITS 7 (The Floating Press 2009) (1871).

2. *Id.* at 15–16.

3. *Id.* at 16.

4. *Id.* at 19.

5. On Carroll's place in the history of logic, see Francine F. Abeles, *Lewis Carroll: Logic*, INTERNET ENCYCL. OF PHIL., https://iep.utm.edu/lewis-carroll-logic/ (last visited Apr. 7, 2022) [https://perma.cc/ZM9C-NWK3].

of a term but, in fact, say nothing useful about how that term is actually used.

If so, a fitting sequel could be written about the nondelegation doctrine. Like the Snark and the Boojum, the nondelegation doctrine is an elusive quarry, defined by pretentious words that provide little guidance about which laws will be upheld and which struck down. Snarky doctrines cover a hodge-podge of decisions with verbose formulations none of which predict the doctrine's effect on laws that the doctrine encounters. Just as the only mark of a Boojum is that they cause observers to vanish, so too, the only mark of an excessive delegation is that courts declare it to be excessive.

Vague and unpredictable constitutional doctrines are nothing unusual, but few doctrines are as verbose in their vagueness as the nondelegation doctrine. Decisions invoking the nondelegation doctrine are notorious for their pretentious incantations of Anglo-American jurisprudence's greatest hits: Locke, Montesquieu, Blackstone, and the Federalist Papers are solemnly invoked along with earnest assurances that limiting legislative delegations somehow protects democracy or liberty. But, like the Snark's "five unmistakable marks,"[6] none of this verbiage provides any guidance whatsoever in distinguishing which delegations are struck down and which are upheld.

Ben Silver recognizes that there is something amiss with the "unmistakable marks" of the nondelegation doctrine. As he puts it in *Nondelegation in the States*, "the doctrinal tests are decoupled from enforcement and thus outcomes."[7] State courts applying what sound like strict tests (for instance, banning delegations of "fundamental policy decisions"[8]) nevertheless uphold broad delegations, while state courts applying what sound like deferential tests nevertheless strike delegations down: "Evidently, something apart from the doctrinal formulation of the states' nondelegation doctrine is driving enforcement[,]"[9] Silver concludes. Systematic statistical data supports Silver's conclusion that judicial rhetoric provides little guidance in predicting whether a delegation will survive or be struck down.[10]

6. *Id.* at 15–16.

7. Ben Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1221 (2022).

8. *See, e.g.*, Chelmsford Trailer Park, Inc. v. Town of Chelmsford, 469 N.E.2d 1259 (Mass. 1984) (holding that the nondelegation doctrine turns on whether the legislature "delegate[d] the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy").

9. Silver, supra note 7, at 1224.

10. Silvers' intuition that doctrinal formulations do not affect case outcomes has been confirmed by Daniel Walters whose statistical analysis of state court decisions indicates that "the doctrinal formulation existing in a state is not a meaningful predictor of case outcomes in individual cases." Daniel E. Walters, *Decoding Nondelegation after* Gundy*: What the Experience in*

What unspoken principle might then explain which delegations arouse judicial suspicion? Silver argues that two underlying principles lurk behind the apparently irrelevant judicial verbiage. According to Silver, some decisions are rooted in "separation of powers" insofar as the court seeks to prevent one of the three canonical branches of state government from exercising the powers assigned to another branch.[11] Other decisions are rooted in considerations of "sovereignty" insofar as the decision seeks to prevent the transfer of some "sovereign" power "beyond the walls of the state government itself."[12] As examples of such sovereignty-eroding delegatees, Silver lists "private parties, parallel state governments, the federal government, and occasionally even municipalities."[13] Later in the article, he throws in legislatively authorized plebiscites as well.[14]

Silver offers more than a taxonomy: he also wants to draw lessons for federal courts from the state-court career of the nondelegation doctrine, suggesting that the state courts' models might transform federal doctrine in unpredictable and perhaps undesirable ways. For instance, considerations of "sovereignty" would suggest that congressional delegations of federal policymaking power to state governments are especially suspect, because such delegations remove federal power entirely from the federal government.[15] By contrast, concerns about separation of powers might suggest that existing federal constitutional doctrine, now framed in terms of the alleged textual requirements of Articles I, II, and III of the U.S. Constitution, might have to be reformulated in terms of nondelegation. On "separation of powers" grounds, for instance, executive officials should not exercise judicial power not because the text of Article III, Section 1 vests such power in Article III courts, but rather because "separation of powers" writ large bars such power from being delegated by courts or Congress outside the Article III judiciary.[16]

There is much to like about Silver's article: it is analytically sharp, doctrinally comprehensive, and written with clarity and grace. Moreover, on the substance, Silver is surely correct that one cannot understand judicial concerns about delegation without accounting for

State Courts Tells Us about What to Expect When We're Expecting, 71 EMORY L.J. 417, 462, 469 (2022).

11. Silver, *supra* note 7, at 1227–31.
12. *Id.* at 1243.
13. *Id.* at 1215.
14. *Id.* at 1247.
15. *See id.* at 1264.
16. *Id.*

courts especially disfavoring certain sorts of delegatees.[17] It is a familiar point, for instance, that state courts often express special suspicion of delegations to private organizations, noting that private actors' self-interest and lack of any electoral tie to voters undermines popular control of lawmaking.[18] With admirable ambition to synthesize the doctrine, Silver insists that "the Sovereignty view of nondelegation must not be conflated with a straightforward rule against delegations to private entities."[19] Instead, "the rule against private delegations is a particular instance of a much broader rule against delegating outside the state government," encompassing judicial decisions limiting delegations to private parties, municipalities, plebiscites, or municipal corporations.[20]

I am inclined, however, to be skeptical about the explanatory force of Silver's separation-of-powers/sovereignty dichotomy. As I explain in more detail below, the judicial concerns underlying suspicion of municipalities, plebiscites, and private organizations are simply too divergent to be explicable as manifestations of some single impulse to protect the abstract value of sovereignty.

Consider, first, the case-resolving power of Silver's "sovereign powers" category. Silver never plainly explains how his dual distinction reveals judicial concerns motivating the doctrine. He acknowledges that "courts sustain delegations in many of these cases" involving alleged loss of "sovereignty."[21] The sovereignty/separation-of-powers distinction, therefore, does not necessarily mark the boundary between delegation-invalidating Boojums and the ordinary Snarks. Why, then, should we care about this line? It is certainly true that, as Silver notes, "none of these discussions [of sovereignty-based limits on delegation] could be mistaken for an application of the [separation-of-powers] theory of nondelegation,"[22] because, in the former, "the court is not considering a transfer of power between governmental branches."[23] The clarity of the distinction, however, does not establish its importance. I know exactly where the Borough of Brooklyn ends and the Borough of Queens begins, but nothing turns on this information, because nothing of significance changes when I cross the line.

17. *Id.* at 1255–59.

18. *See, e.g.*, Behm v. City of Cedar Rapids, 922 N.W.2d 524, 570–72 (Iowa 2019); Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W. 2d 454 (Tex. 1997).

19. Silver, *supra* note 7, at 1242.

20. *Id.* at 1242–43.

21. *Id.* at 1247.

22. *Id.*

23. *Id.*

What does it mean to say that courts are suspicious of delegations to private organizations, municipalities, and plebiscites for similar sovereignty-protecting reasons? The reasons for suspicion of private organizations seem fundamentally different from the reasons offered to distrust plebiscites and municipalities. Courts seem to worry about delegations to private organizations on the ground that they served the narrow self-interest of small occupational or business groups that would exploit consumers with jacked-up prices and diminished competition. As *Texas Boll Weevil Eradication Foundation v. Lewellen* put it, the private delegatee "may have a personal or pecuniary interest which is inconsistent with or repugnant to the public interest to be served."[24] Judicial suspicion of state legislative delegations to cities, by contrast, rested on fear of municipal socialism: city leaders like Hazen Pingree (Detroit) and Victor Berger (Milwaukee) sought to take over privately owned street car lines to reduce utility magnates' power over city residents.[25] The Michigan Supreme Court's decision[26] invalidating a state law's creating a Detroit streetcar commission was the first blow in a three-decade struggle between conservatives and progressives in Michigan over municipal ownership and regulation. As Professor Charles A. Kent solemnly intoned in arguing for an injunction on Pingree's streetcar plans to the Michigan Supreme Court, "This is the first tangible movement in the direction of socialism."[27]

The nondelegation doctrine deployed against municipalities, in short, was used to protect property rights and curb local populist majoritarianism.[28] This seems like a concern fundamentally different from the judicial worry that economic insiders will exploit consumers. What useful purpose, then, is served by conflating these radically judicial different purposes under the abstract rubric of protecting "state sovereignty"? If the goal is to predict the outcome of cases, then the doctrinal umbrella of "sovereignty" seems unhelpful. Lots of delegations to private parties, after all, are upheld without fear that the state's sovereignty will be endangered. State courts, for instance, generally

24. 952 S.W. 2d 454, 469 (Tex. 1997).

25. On Hazen Pingree's campaign to create municipally owned streetcars, see Alexandra W. Lough, *Hazen S. Pingree and the Detroit Model of Urban Reform,* 75 AM. J. ECON. & SOCIO. 58 (2016). On the struggle over home rule in Wisconsin that centered on Milwaukee's creation of a streetcar system, see Michael E. Libonati, *"Neither Peace Nor Uniformity": Local Government in the Wisconsin Constitution*, 90 MARQ. L. REV. 593, 605–07 (2007) (describing history of home rule in Wisconsin).

26. Att'y Gen. v. Pingree, 120 Mich. 550 (1899).

27. NEIL J. LEHTO, THE THIRTY-YEAR WAR: A HISTORY OF DETROIT'S STREETCARS, 1892–1922, at 161 (East Lansing, Mich. State Univ. Press 2017).

28. On the role of the nondelegation doctrine as a curb on municipal power in the late nineteenth and early twentieth centuries, see Howard Lee McBain, *The Delegation of Legislative Power to Cities*, 32 POL. SCI. Q. 276 (1917).

tolerate delegations of the power of private arbitrators to resolve labor disputes between municipalities and their unions.[29] The underlying practical concern driving these outcomes are unlikely to be some abstract fear that the delegatee erodes state sovereignty.

The worry about protecting state "sovereignty" also cannot explain the behavior of the "sovereign" state people who seem to amend their state constitutions in blithe disregard for the value of "sovereignty" as Silver defines that value. Silver claims that delegations to private entities and local governments both undermine sovereignty by delegating power outside the state government altogether. The doctrine against private delegations remains robust in many states, however, while the various doctrines limiting state legislatures' delegations to local governments have mostly been relegated to desuetude.[30] If some concern with protecting state "sovereignty" unifies these doctrines, then why are they treated so differently by state voters? Sometimes voters simply overrule judicially imposed nondelegation limits on local government by ratifying state constitutional home-rule provisions; by contrast no state has ever conferred such sweeping autonomy on private delegatees. Silver concludes that such provisions indicate that "delegations to municipal bodies would be invalid but for those provisions."[31] Perhaps, but it seems odd that voters would be so nonchalant about sacrificing their state's "sovereignty" to untrustworthy agents like cities and counties. The sovereignty-protecting rationale, in sum, does not really explain why some delegations stand and others fall.

Even if he does not explain constitutional outcomes, Silver is on to something in judicial rhetoric. In invalidating a legislative delegation to a popular referendum, for instance, the Maryland Court of Appeals in *Brawner v. Curran*[32] emphasized that delegations to the voters at large and to municipalities were essentially similar in defying the state constitution's reservation of legislative power to the state legislature.[33] That rhetoric certainly maps onto Silver's idea that sovereignty of the

29. For an example, see Milwaukee County v. Milwaukee Dist. Council 48-Am. Fed'n of State, Cnty. & Mun. Emps., 325 N.W.2d 350 (Wis. 1982) ("The test must not be how one classifies arbitrators, but whether there are guarantees against an excessive or unrestrained exercise of their power. We conclude that the authority delegated a private arbitrator does not fail because it is conferred on a 'private person,' if proper safeguards are provided.").

30. 2 McQuillin Mun. Corp. § 4:9 (3d ed.) (noting that legislative delegations of power to municipal corporations now forms an exception to the rule that forbids the legislature to delegate any of its powers to subordinate divisions).

31. Silver, *supra* note 7, at 1252.

32. 119 A. 250, 251 (Md. 1922).

33. *Id.* at 252 ("It has been said that this distinction is arbitrary and illogical, and rests more upon political expediency than upon sound legal principles, nevertheless the final and complete answer to that position is that the question is no longer open . . . .").

state is undermined by delegations to cities and plebiscites in similar ways because both the plebiscite voters and cities are not on the state's constitutional organization chart.[34]

If we are looking for an explanation of constitutional outcomes, however, then Silver's distinction still leaves us hunting for the Snark of the nondelegation doctrine. Like judicially imposed nondelegation limits on municipal power, judicial limits on plebiscites have been swept away by state constitutional amendments, such that now the voters at large function in many states as a kind of back-up legislature.[35] Again, Silver could retort that the very fact that such amendments were needed to ratify the delegations indicates a presumption against delegations to actors "outside" the state.[36] But states' voters' willingness to set aside this presumption suggests that we should be a bit skeptical about these delegatees' "outsider" status. Put bluntly, it is hard to take seriously the notion that delegations to cities and plebiscites raise practical concerns like the worries raised by delegations to private trade associations or foreign governments.

It is no criticism of Silver's achievement to argue that the protection of state "sovereignty" seems too abstract to explain the nondelegation doctrine. There is a very real possibility, after all, that no such unified explanation is possible: the "doctrine" might not actually exist as a logically unified set of coherent principles. Nondelegation outcomes might turn on particularistic concerns too granular to be captured by the doctrinal abstractions deployed by judicial opinions. On this view, the phrase "nondelegation doctrine" might be a crude umbrella term for a lot of barely related judicial worries about particular delegatees' selfish bias, impulsiveness, ignorance, or ideological extremism. Silver resists this conclusion on the ground that "[m]ost states treat their nondelegation doctrine as a single doctrine with applicability to many different situations[.]"[37] He seeks out, therefore, some unifying principles, because "even if the scrutiny afforded to delegations changes based on the type of delegation, states nevertheless unite the challenges under the same doctrinal umbrella."[38]

There is reason to be skeptical about such judicial assurances of doctrinal coherence. Such declarations might be analogous to the

34. Silver, supra note 7, at 1252.

35. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 795 (2015) (noting that "the Arizona Constitution 'establishes the electorate [of Arizona] as a coordinate source of legislation' on equal footing with the representative legislative body.") (quoting Queen Creek & Cattle Corp. v. Yavapai Cnty. Bd. of Supervisors, 501 P.2d 391, 396 (Ariz. 1972)).

36. Silver, supra note 7, at 1215.

37. *Id.* at 1218.

38. *Id.* at 1218–19.

Bellman's statement that "what I tell you three times is true"[39]: just because state courts say something repeatedly does not mean that the statements become accurate through repetition. It might be that the nondelegation doctrine and the Snark are both mythological beasts.[40] If so, then hunting for the Snarky doctrine's "principles" might necessarily be a futile enterprise.

39. CARROLL, *supra* note 1, at 7.

40. In support of the idea that the nondelegation is a myth despite the contrary assurances of state judges, consider Whittington and Iuliano's finding that the doctrine does not actually constrain expansive legislative delegations of power—the central function that the doctrine is supposed to perform. Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017).