

ECONOMICS AND POLITICS OF REGULATIONS

At page 54 appears the real gravamen of Hamburger:

When James I attempted to impose legal duties through his proclamations, the [English common-law] judges held this void without showing any deference...

. . . The English thereby rejected extralegal lawmaking, and in the next century the American people echoed the English constitutional response by placing all legislative power in Congress. *Nonetheless, the courts nowadays defer to the executive's extralegal lawmaking . . . This deference to the executive is incompatible with the judicial duty to follow the law than according large deference to the expert commissions* (emphasis added).

In a devastating review Professor Veremule tries to provide a fitting response:

But what if validly-enacted statutes themselves instruct the courts to defer? Legislative delegation of interpretive authority to agencies, if otherwise valid, would square the circle, reconciling the two approaches that Hamburger wants to contrast. *If the law itself includes a valid delegation of law-interpreting authority to the agencies, then faithful judges, independently applying all relevant law in the case at hand, would conclude that the agency's interpretive authority is not extra-legal, but securely intralegal. This is of course the delegation theory of Chevron, now reigning as the official theory after its adoption by the Supreme Court more than a decade ago. (Emphasis added: "No"... forthcoming Texas Law Review 2015) .*

In Re Delhi Laws Act, as early as 1951. Justices Mahajan and Kania would not authorize delegation at all as this would be contrary to the C but a majority (comprising Justices Fazl Ali, Patnajali Sastri, S R Das, Vivian Bose, and B K Mukherjea) held otherwise.

Prescribing the “essential legislative function test” as the limit of delegation, the Court found that function to lie in the “essential features “of legislative power, which consists in “declaring its policy and making it a binding rule of conduct.’

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The “policy may be particularised in as few or as many words as the legislature thinks proper and it is enough if an intelligent guidance is given to the subordinate authority. *The Court can interfere if no policy is discernible at all or the delegation is of such an indefinite character as to amount to abdication, but as the discretion vests with the legislature in determining whether there is necessity*” (emphasis added).