



THE NONDELEGATION DOCTRINE AFTER GUNDY

Joseph Postell*

ABSTRACT: The Supreme Court's decision in *Gundy v. United States* did not revive the nondelegation doctrine by applying it to strike down a statute for the first time since 1935. However, the various opinions in *Gundy* suggest that a majority of the Court may be willing to entertain delegation challenges in the near future. The revival of the nondelegation doctrine would have significant implications for the future of the administrative state, but those implications are unclear because of the lack of scholarship specifically addressing the appropriate scope and application of a revived nondelegation doctrine.

In Part I, this article describes the current debate over, and legal status of, the nondelegation doctrine at the federal level. It analyzes

*Associate Professor of Political Science, University of Colorado at Colorado Springs. I am grateful to Larissa Huhn for valuable and excellent research assistance.

the Court's opinion in *Gundy* in Part II, explaining how that decision indicates the Court's interest in reviving the nondelegation doctrine. Part III takes some initial steps towards identifying the appropriate scope and logic of the nondelegation doctrine, drawing upon two sources: the historical application of the doctrine in the 19th Century, and the contemporary application of the doctrine at the state level today.

INTRODUCTION

In *Gundy v. United States*,¹ the Supreme Court rejected a nondelegation challenge to the Sex Offender Registration and Notification Act (SORNA), consistent with the doctrine's decades-long decline into irrelevance.² A majority of the Court was unwilling to conclude that a statutory grant of authority to the U.S. Attorney General to determine the applicability of SORNA to offenders convicted before SORNA's enactment violated Article I, section 1 of the U.S. Constitution, which mandates that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States."³

A close reading of the opinions in *Gundy*, however, reveals that a majority of the Court may be willing to apply the nondelegation doctrine in future cases.⁴ Both Justice Gorsuch in dissent and Justice Alito in concurrence expressed reservations about the scope of congressional delegations to the administrative state. Justice Gorsuch's dissent was joined by Chief Justice Roberts and Justice Thomas. Because the case was heard prior to his confirmation, Justice Kavanaugh did not take part in the decision, but he has since

¹ *Gundy v. United States*, 139 S. Ct. 2116 (2019).

² See Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002).

³ U.S. Const. Art. I, § 1.

⁴ See Part II.

indicated his own willingness to enforce the doctrine. The opinions in *Gundy* indicate that willingness to revive the nondelegation doctrine has grown on the Court from a single vote to a potential majority.

If a majority is indeed prepared to reconsider the current status of the nondelegation doctrine and apply it to statutes currently on the books, it is critical to understand the distinction between acceptable delegations of executive power to administrative agencies and unacceptable delegations of legislative power. Even defenders of a robust nondelegation doctrine, to this point, have been unable to offer a clear line of distinction.⁵

While this article does not attempt to answer, comprehensively, this challenge, it attempts a few first steps in that direction. Before proceeding to that objective, however, Part I of the article surveys the current scholarly debate on the nondelegation doctrine, and Part II explores the Court's opinion in *Gundy* to illustrate the willingness of several justices to apply that nearly-moribund doctrine. Part III turns to two potential sources that may help to clarify the line of distinction between acceptable and unacceptable delegations: the application of the doctrine during the 19th Century, and current state-level application of the doctrine, which is more robust than is generally appreciated.

I. THE CONTEMPORARY DEBATE OVER DELEGATION

Although there are dissenters, legal scholars generally agree that the U.S. Constitution contains a nondelegation principle, even if they disagree on whether it can serve as a meaningful limitation on the ability of Congress to grant wide discretion to agencies through

⁵ See note 25.

vague statutory mandates.⁶ Eric Posner and Adrian Vermeule, for instance, concede that “the Constitution bars the delegation of legislative power.” They simply claim that “a statutory grant of authority to the executive branch or other agents can never amount to a delegation of legislative power.”⁷ For Posner and Vermeule, by definition, the power granted to an executive official is executive in nature rather than legislative. Therefore, all executive officials are merely carrying out, or executing, a statute, regardless of the nature of their authority or the extent of their discretion. Still, they acknowledge that the Constitution contains a nondelegation principle.

A. NONDELEGATION AS SEPARATION OF POWERS

This is where the scholarly consensus ends, however. There is little agreement among scholars on the normative foundations of the nondelegation doctrine or the extent to which it limits the discretion that can be granted to executive officers.⁸ Normatively, the nondelegation doctrine is most commonly derived from the principle of separation of powers. Under this theory, the delegation of legislative power is problematic because it leads to a combination of legislative and executive powers, which are constitutionally required to remain separate. As Travis Mallen writes, “[t]he nondelegation

⁶ For a recent, and prominent, exception to this consensus, consider Julian Davis Mortenson and Nicholas Bagley, *Delegation at the Founding* (University of Michigan Public Law and Legal Theory Research Paper Series, Paper No. 658, February 2020), archived at <https://perma.cc/X8XN-QLXC> (arguing that the nondelegation doctrine was not part of the original constitutional understanding).

⁷ See Posner and Vermeule, 69 U. Chi. L. Rev. at 1723 (cited in note 2).

⁸ See Joseph Postell, *The People Surrender Nothing: Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 Mo. L. Rev. 1003, 1004 (2016).

doctrine is a function of separation of powers.”⁹ In similar terms, Martin Redish grounds the doctrine in the separation of powers principle: “separation of powers was established in order to prevent undue accretion of political power in one branch. Abandonment of the nondelegation doctrine effectively permits the executive branch to accumulate an almost unlimited amount of power.”¹⁰ Ronald Krotoszynski similarly writes that “[a]s a formal matter...the nondelegation doctrine remains a part of the separation of powers doctrine.”¹¹

The separation of powers rationale is prominent in Supreme Court jurisprudence as well. Justice Thomas, who before Justice Gorsuch joined the Court was the most prominent defender of the nondelegation doctrine, consistently justified nondelegation as a separation of powers principle. In *Whitman v. American Trucking*, he signaled that he “would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”¹² Justice Thomas returned to the theme of separation of powers in a 2015 case involving Amtrak, where he again opined that “[w]e have too long abrogated our duty to enforce the separation of powers required by the Constitution” by permitting broad delegations of power to “a vast and unaccountable

⁹ Travis Mallen, *Rediscovering the Nondelegation Doctrine through a Unified Separation of Powers Theory*, 81 Notre Dame L. Rev. 419, 421 (2005).

¹⁰ Martin Redish, *The Constitution as Political Structure* 142 (Oxford 1995).

¹¹ Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 Ind. L. J. 239, 265 (2005).

¹² *Whitman v. American Trucking Associations*, 531 U.S. 457, 487 (2001) (Thomas concurring).

administrative apparatus that finds no home in our constitutional structure.”¹³

B. NONDELEGATION AS POLITICAL ACCOUNTABILITY

As Justice Thomas’s most recent opinion illustrates, the separation of powers justification for nondelegation is sometimes combined with the principle of electoral accountability. In this line of argument, the problem of delegation is framed as a problem of accountable government. When laws are made by Congress, so goes the argument, they are made by elected officials who are accountable to the voters. Administrative officers are not elected and are therefore less accountable to the public.

This justification for the nondelegation doctrine provides a stronger foundation than the pure reliance on the theory of separation of powers. The problem with grounding the argument for nondelegation in the separation of powers is that combination of power is an accidental, not an essential feature of delegation.¹⁴ Legislative power is still impermissibly delegated, even if the delegation does not combine legislative and executive power. It is easy to envision an administrative agency that exercises only legislative or rulemaking authority, without possessing executive or judicial power. In such a case, the powers of government are not combined, but the nondelegation doctrine is still violated. In short, the separation of powers rationale describes a problem with some, but not all possible delegations of legislative power, and is therefore insufficient to ground the doctrine.

¹³ *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225, 1254–55 (2015) (Thomas concurring).

¹⁴ See Postell, 81 Mo. L. Rev. at 1011 (cited in note 8).

Therefore, the argument from political accountability shores up a weakness in the separation of powers rationale for the nondelegation doctrine. It is frequently deployed as the ground for nondelegation, albeit less commonly than the separation of powers argument. David Schoenbrod's classic book on delegation has most prominently linked delegation and accountability.¹⁵ Schoenbrod argues that delegation has "the political consequence of allowing officials to duck responsibility for costs" of regulation.¹⁶ He ties the notion of responsibility to Article I of the Constitution:

Statutory laws, by providing a clear outcome for most cases, make legislators accountable for at least the major outlines of the laws that they impose on society. In contrast, delegation allows Congress to avoid taking a position on any controversial choice. This is fundamental, because both democratic accountability and Article I's safeguards of liberty depend on legislators having to take a position on the laws that government imposes.¹⁷

Others have followed Schoenbrod in arguing that the nondelegation doctrine rests on the principle of political accountability. Martin Redish, for instance, combines the separation of powers and accountability arguments by devising a "political commitment" test to evaluate nondelegation cases. The political commitment test advocates a "return to the first principles of our system of separation of powers by asking simply whether congressional legislation evinces a sufficient political commitment to

¹⁵ David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (Yale 1993).

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 99–118.

enable the voters to judge their representatives.”¹⁸ If “the voters would be placed in a substantially better position to judge their representatives by learning whether they had voted for or against the challenged legislation,” the law would survive a nondelegation challenge.¹⁹

Like the separation of powers argument, however, the political accountability argument is vulnerable to criticism. Administrative agencies can be made more accountable to the public through various mechanisms such as congressional oversight, presidential management, public participation in the administrative process, and public interest litigation.²⁰ One of the primary goals of administrative law over the past several decades has been to make the administrative state more accountable to the public through these mechanisms. In short, grounding the nondelegation doctrine in the principle of political accountability captures an important difficulty that some delegations produce, but that is not intrinsic to delegation as such.

C. NONDELEGATION AS “SUBDELEGATION”

More recently, Philip Hamburger has framed the nondelegation doctrine as a principle against “subdelegation” of power.²¹ Relying on background principles of agency or fiduciary law, Hamburger argues that the Constitution is the means by which “the people delegate power to government. In particular, they delegate a specialized power to each branch of the government.”²² Therefore,

¹⁸ Redish, *The Constitution as Political Structure* at 154 (cited in note 10).

¹⁹ *Id.* at 154–55.

²⁰ Postell, 81 Mo. L. Rev. at 1011–12 (cited in note 8).

²¹ Philip Hamburger, *Is Administrative Law Unlawful?* 377–402 (Chicago 2014).

²² *Id.* at 377.

the nondelegation doctrine is not about the delegation of power, but about the further or “sub” delegation of delegated power. As Hamburger explains, “the question is not whether the principal can delegate the power, but whether the agent can subdelegate it.”²³ The answer to this question is “no”: “When a principal delegates power to an agent, the agent ordinarily cannot subdelegate the power to a sub-agent.”²⁴ In sum, power is originally delegated by the principal – that is, the people themselves – to the agent, which is the institutions of the national government. The question is not whether principals can delegate authority, but whether agents can – and agency law answers that question in the negative.

This rationale for the nondelegation is on much firmer ground than the separation of powers or accountability arguments. It is much closer to the arguments made by the Framers of the Constitution themselves. Subsequent scholarship has connected Hamburger’s argument about “subdelegation” to the nature of the Constitution as a whole,²⁵ and has demonstrated the relationship between the notion of subdelegation and the Framers’ conception of the social compact.²⁶

Under social compact theory, political power resides within the people and is inalienable. The people delegate, but do not alienate, their power when they vest it in a government through a social compact or Constitution. As James Wilson explained at the Pennsylvania ratifying convention, political power

²³ Id.

²⁴ Id. at 380.

²⁵ Gary Lawson and Guy Seidman, *A Great Power of Attorney: Understanding the Fiduciary Constitution* (Kansas 2017).

²⁶ See Postell, 81 Mo. L. Rev. at 1012–18 (cited in note 8).

resides in the people, as the fountain of government; that the people have not – that the people mean not – and that the people ought not, to part with it to any government whatsoever. In their hands it remains secure. They can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper.²⁷

In describing the people as the “fountain of government,” Wilson meant that they were the source of political authority. Only the people, by nature, have political authority. Government officials hold the authority vested in them by the people as trustees. Because the people alone truly possess power, they alone can delegate that power to others. As James Otis, another member of the Founding generation, explained, “supreme absolute power is originally and ultimately in the people; and they never did in fact freely, nor can they rightfully make an absolute, unlimited renunciation of this divine right. It is ever in the nature of the thing given in trust.”²⁸ Like Wilson, Otis asserted that political power resides ultimately in the people and is only granted to government in trust. Because government officials are trustees rather than owners of political power, they do not have the power to delegate it to others.

Alexander Hamilton expressed this view most eloquently in *Federalist* No. 84.²⁹ In that essay Hamilton defended the original Constitution’s omission of a Bill of Rights by appealing to the logic of social compact theory. Bills of rights may be necessary, he alleged,

²⁷ James Wilson, *Pennsylvania Ratifying Convention*, in Phillip B. Kurland and Ralph Lerner, eds., *1 Founders’ Constitution: Major Themes* 61, 62 (Chicago 1987) (emphasis omitted).

²⁸ James Otis, *The Rights of the British Colonies Asserted and Proved*, in Kurland and Lerner, eds., *1 Founders’ Constitution* 52 (cited in note 27).

²⁹ *Federalist* 84 (Hamilton), in *The Federalist Papers* 509, 512 (Penguin 1961) (Rossiter, ed.).

in nations where social compact theory was not the basis of the government's authority. In those nations, government is assumed to be the possessor of sovereignty, and the people must stipulate limitations on government's authority. The U.S. Constitution, however, is based on the opposite presumption: the people are the sovereign, and the government only has the power to do what is positively stipulated in the document which grants it authority. As Hamilton explained, bills of rights "have no application to constitutions professedly founded upon the power of the people....Here, in strictness, the people surrender nothing, and as they retain everything, they have no need of particular reservations."³⁰ In Hamilton's view, the people never parted with their authority when they created the government. They surrendered none of their power, and retained all of it. Government only held its power in trust.

Although most arguments for the nondelegation in scholarship and jurisprudence focus on the separation of powers and accountability rationales, the argument from social compact theory and against subdelegation best captures the way the Constitution's Framers described the relationship between the people and their government. By focusing on the fact that the people are the only rightful possessors of political authority, the Framers implicitly argued that government could not alter the Constitution's organization of political authority.

D. THE MYTHICAL NONDELEGATION DOCTRINE

While most scholars agree that the nondelegation doctrine was a principle that existed at the Constitution's Founding, some scholars

³⁰ *Id.*

dissent from this view. Eric Posner and Adrian Vermeule advocate “Interring the Nondelegation Doctrine,” claiming that we should “lay the doctrine to rest once and for all, in an unmarked grave.”³¹ Although they agree that the Constitution formally prohibits the delegation of legislative power, they negate the nondelegation doctrine in practice by defining “every statutory grant of authority to the executive branch” as executive power.³² Under this definition, such grants of authority “can never amount to a delegation of legislative power.”³³ While ostensibly agreeing that the nondelegation doctrine exists, Posner and Vermeule define it out of existence in practice.

Other scholars, however, deny that the nondelegation doctrine actually existed in a meaningful sense at the time of the Constitution’s Framing. Keith Whittington and Jason Iuliano argue that, at least at the national level, “there was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power.”³⁴ In their view, the traditional scholarly account of the nondelegation doctrine’s existence during the early American republic “is more mythic than historical.”³⁵ Unlike Posner and Vermeule, who accept the theoretical existence of the nondelegation doctrine while weakening its practical effect,

³¹ Posner and Vermeule, 69 U. Chi. L. Rev. at 1723 (cited in note 2).

³² Id.

³³ Id.

³⁴ Keith Whittington and Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 380–81 (2017).

³⁵ Id. at 426. In response, Joseph Postell and Paul Moreno offer evidence of the doctrine’s existence in early American congressional debates, statutes, and Supreme Court decisions, as well as evidence from the 20th Century that a doctrinal change was necessary to enable broader delegations of legislative power during and after the Progressive Era. See Postell and Moreno, *Not Dead Yet – Or Never Born? The Reality of the Nondelegation Doctrine*, 3 Const. Stud. 41 (2018).

Whittington and Iuliano point to the historical application of the doctrine to suggest that it was never that significant a feature of American constitutionalism.

A third co-authored article takes an even stronger position against the existence of the nondelegation doctrine. Julian Davis Mortenson and Nicholas Bagley argue that “[t]he nondelegation doctrine has nothing to do with the Constitution as it was originally understood.”³⁶ In some sense, Mortenson and Bagley’s argument mirrors Posner and Vermeule’s. They assert that, for the Founders, “Any action authorized by law was an exercise of ‘executive power’ inasmuch as it served to execute the law.”³⁷ Therefore, they agree with Posner and Vermeule that every action taken by executive officials in pursuance of statutory objectives, by definition, is an exercise of executive power. They go further, however, in claiming that the Founders never articulated or defended a version of the nondelegation doctrine as it is understood today.³⁸

II. THE NONDELEGATION DOCTRINE IN GUNDY

In its most recent consideration of the nondelegation doctrine, in *Gundy*, the Supreme Court considered whether 34 U.S.C. §20913(d), a provision of SORNA, violated the nondelegation doctrine. A plurality of the Court concluded that “the delegation in SORNA easily passes muster.”³⁹ The disputed provision authorizes the

³⁶ Mortenson and Bagley, *Delegation at the Founding* at 6 (cited in note 6).

³⁷ *Id.* at 4.

³⁸ *Id.* at 22. Mortenson and Bagley note that the Founders voiced concerns about the delegation of legislative power, but they view those concerns as a manifestation of a non-alienation doctrine rather than a nondelegation doctrine: “the founders thought that legislative power...could be delegated by whomever happened to hold it, so long as it wasn’t permanently alienated.”

³⁹ *Gundy*, 139 S. Ct. at 2129.

Attorney General “to specify the applicability of the requirements of [section 20913] to sex offenders convicted before the enactment of this chapter...and to prescribe rules for the registration of any such sex offenders....”⁴⁰ Section 20913 requires offenders to register with state governments, providing them with basic information such as names and current addresses, to be included in state and federal sex offender registries.

A. STATUTORY CONSTRUCTION AND PRECEDENT: THE
GUNDY PLURALITY

Writing for the plurality, Justice Kagan upheld the statute’s applicability provision regarding “pre-Act offenders” by combining statutory interpretation and an appeal to precedent. As both scholars and the Court have consistently granted, Justice Kagan agreed that the Constitution “bars Congress from transferring its legislative power to another branch of Government.”⁴¹ However, before concluding that Congress has transferred its legislative power to the Attorney General, she continued, the statute must be interpreted to glean the extent of the Attorney General’s discretion. As Justice Kagan explained, “a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegatee’s use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.”⁴² If the statute, after it is

⁴⁰ 34 U.S.C. § 20913(d).

⁴¹ *Gundy*, 139 S. Ct. at 2121.

⁴² *Id.* at 2123.

construed, provides no principles to guide the discretion of the delegatee, it must violate the nondelegation doctrine.

According to Justice Kagan, SORNA provides more than the necessary guidance, if it is construed properly. Kagan noted a previous decision, *Reynolds v. United States*,⁴³ that construed SORNA to limit the Attorney General's authority, a decision which "effectively resolved the case now before us."⁴⁴ In addition, she noted the Act's statement of purpose and its legislative history to interpret the AG's power to "specify the applicability" of SORNA to pre-Act offenders.⁴⁵ Congress intended to establish a "comprehensive national system for the registration" of sex offenders, according to SORNA's statement of purpose, and "[t]he Act's legislative history ... show[s] that the need to register pre-Act offenders was front and center in Congress's thinking."⁴⁶ If Congress's intention was to cover pre-Act offenders, then the AG was given a clear mission "to order their registration as soon as feasible."⁴⁷ In sum, Justice Kagan construed SORNA, by invoking its statement of purpose and legislative history, to limit considerably the AG's discretion in deciding how to treat sex offenders convicted before its enactment.

Once the statute is construed in this manner, Justice Kagan concluded, "we can consider whether it violates the Constitution....Under this Court's long-established law, that question is easy. Its answer is no."⁴⁸ As noted above, Justice Kagan answered the constitutional question, once the statute was narrowly construed, by referring to the "Court's long-established law" on the

⁴³ 565 U.S. 432 (2012).

⁴⁴ *Gundy*, 139 S. Ct. at 2124.

⁴⁵ *Id.* at 2127.

⁴⁶ *Id.*

⁴⁷ *Id.* at 2128.

⁴⁸ *Gundy*, 139 S. Ct. at 2129.

nondelegation doctrine. Under the precedents of the Court, she noted, “a delegation is constitutional so long as Congress has set out an ‘intelligible principle’ to guide the delegatee’s exercise of authority.”⁴⁹ As long as Congress has provided some guidance to the AG in SORNA, therefore, the statute does not violate the nondelegation doctrine. Furthermore, Justice Kagan noted, the requirements to satisfy the intelligible principle rule “are not demanding.”⁵⁰ After listing myriad vague statutory provisions that have been upheld by the Court since the New Deal, including provisions to regulate in the “public interest” and to set “fair and equitable” prices, Justice Kagan concluded that the statute “easily passes muster.”⁵¹

In short, Justice Kagan and the three justices who joined the Court’s opinion rested their acceptance of the statute by narrowly construing the authority it gave to the Attorney General, and the Court’s historical reluctance to invalidate statutes on nondelegation grounds. Unless the Court is willing to question its decades-old approach to the nondelegation doctrine, the plurality implied, it has to accept the statutory provision challenged in *Gundy*. Both the concurring and dissenting opinions in the decision, however, revealed an interest in doing just that.

B. THREE, FOUR, OR FIVE VOTES FOR NONDELEGATION?

Although a plurality of the Court found the statute easily within constitutional limitations, there were signs that the four-justice plurality could become a minority of the court in future cases. Four of the Justices signaled, either by dissenting in *Gundy* or in

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

concurring opinions, their concern over the scope of congressional delegation and their potential willingness to enforce the nondelegation doctrine in future cases.

Though he voted with the plurality to uphold the challenged provision of SORNA, Justice Alito, in a brief opinion, raised the possibility of a more fundamental challenge to the Court's traditional approach to nondelegation. "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort," he wrote.⁵² But absent that deeper challenge to the Court's established precedents, Justice Alito believed that the provision in SORNA fit within those precedents and therefore should be upheld.

Justice Gorsuch's dissenting opinion offering a full-throated defense of a reinvigorated nondelegation doctrine was joined by both Chief Justice Roberts and Justice Thomas. Justice Gorsuch especially criticized the Court's intelligible principle test as "an understanding of the Constitution at war with its text and history."⁵³ After articulating several distinct reasons for the existence of the nondelegation doctrine, from the need for restraint in lawmaking,⁵⁴ to the need for deliberation,⁵⁵ notice,⁵⁶ and accountability,⁵⁷ Justice Gorsuch attacked the Court's intelligible principle test as having "no basis in the original meaning of the Constitution, in history, or even

⁵² *Gundy*, 139 S. Ct. at 2131 (Alito concurring).

⁵³ *Id.* (Gorsuch dissenting).

⁵⁴ *Id.* at 2134 (Gorsuch dissenting).

⁵⁵ *Id.*

⁵⁶ *Gundy*, 139 S. Ct. at 2135.

⁵⁷ *Id.* at 2134–35.

in the decision from which it was plucked,”⁵⁸ “To leave this aspect of the constitutional structure alone undefended,” he continued,

would serve only to accelerate the flight of power from the legislature to the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people’s representatives in order to protect their liberties.⁵⁹

In addition to his general admonition to the Court to enforce the nondelegation doctrine, Justice Gorsuch sought to outline the circumstances in which it should be used to invalidate statutes. As he put it, assuming “we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What’s the test?”⁶⁰ He articulated three independent “guiding principles” that the Court should employ.

The first principle is that “as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to fill up the details.”⁶¹ As long as Congress has made the policy choices, the details can be delegated to an agency. Second, Justice Gorsuch explained, “once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.”⁶² Congress may authorize the executive branch to find the existence of certain facts before applying a rule. Third, he continued, “Congress may assign the executive and judicial branches certain non-legislative responsibilities.”⁶³ If a

⁵⁸ Id. at 2139. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

⁵⁹ *Gundy*, 139 S. Ct. at 2142. (Gorsuch dissenting).

⁶⁰ Id. at 2135.

⁶¹ Id. at 2136 (internal quotations omitted).

⁶² Id.

⁶³ *Gundy*, 139 S. Ct. at 2137 (Gorsuch dissenting).

power is not legislative in the sense that it prescribes a rule and measure for private conduct, but simply authorizes the executive or judiciary to set rules for the exercise of its own powers, it is not a delegation of legislative power. For example, the statutes authorizing the payment of Revolutionary War pensions under such regulations as the President shall promulgate would have simply given the executive the power to regulate matters such as the frequency of payments and the method for verifying the authenticity of forms.

These principles would still enable Congress to delegate certain responsibilities to the other branches of government. As Justice Gorsuch argued, enforcing this reinvigorated nondelegation doctrine would not “spell doom for what some call the administrative state. The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government.”⁶⁴ In other words, Justice Gorsuch’s reinvigorated nondelegation doctrine would still allow for the modern regulatory state to function, albeit in a different form. Nevertheless, it is difficult to see in Justice Gorsuch’s three principles how the myriad statutes that make up the modern administrative state would be treated by a majority prepared to enforce them. Because he was writing in dissent, he could state these principles at a level of generality, but if his view became the view of a majority on the Court, serious questions would arise about the constitutionality of many significant laws, from the Clean Air Act to the Occupational Safety and Health Act to the Federal Communications Act.

Combined with Justice Alito’s potential vote to reassert the nondelegation doctrine, the three-justice dissent may leave the current status of the nondelegation doctrine in the hands of Justice Kavanaugh, who did not participate in the hearing or decision in

⁶⁴ *Id.* at 2145 (internal quotations omitted).

Gundy because he was not yet on the Court when the case was argued. There are good reasons to think that he would vote to enforce the nondelegation doctrine in future cases, providing the fifth vote for a significant change in the application of the nondelegation doctrine.

For instance, in a 2017 opinion written while on the D.C. Circuit Court of Appeals, dissenting from the denial of rehearing *en banc* in *U.S. Telecom Association v. Federal Communications Commission*, Kavanaugh advanced a “major rules doctrine” that would require Congress to speak clearly and explicitly when authorizing administrative agencies to make policy on issues “of vast economic and political importance.”⁶⁵ This doctrine, Kavanaugh argued, is based in part on a “presumption against the delegation of major lawmaking authority from Congress to the Executive Branch.”⁶⁶ In laying out this doctrine, Kavanaugh built upon a principle outlined by the Supreme Court in a variety of cases such as *FDA v. Brown and Williamson*, which denied the FDA’s assertion of authority to regulate the tobacco industry in part because “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”⁶⁷ *Brown & Williamson* and subsequent cases expressed a principle of statutory interpretation on issues of major importance: ambiguity in statutes might indicate a congressional intent to have an agency fill in the details when the issues are relatively minor, but resolution of important issues must be explicitly delegated to the agency.

⁶⁵ *U.S. Telecom Association v. Federal Communications Commission*, 855 F.3d 381, 417 (D.C. Cir. 2017).

⁶⁶ *Id.* at 419.

⁶⁷ *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); see also *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

Kavanaugh's major questions doctrine, however, goes a step further, extending the principle not only to statutory interpretation but also to the range of constitutionally-acceptable delegation in the first place. In a short statement respecting the denial of certiorari in *Paul v. U.S.*, which would have reconsidered the Court's opinion in *Gundy*, Justice Kavanaugh made this further step explicit: "major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch."⁶⁸ Under Kavanaugh's approach to the nondelegation doctrine, "congressional delegations to agencies of authority to decide major questions" would be unconstitutional, but "Congress could delegate to agencies the authority to decide less-major or fill-up-the-details decisions."⁶⁹

Justices Kavanaugh and Alito, therefore, have both offered signals that they are willing to reconsider the Court's longstanding approach to the nondelegation doctrine. In future cases, they are likely to side with the three justices who dissented in *Gundy*. There appears to be a five-justice majority prepared to enforce the nondelegation doctrine in future cases. The emergence of a such a majority would mark a significant legal development. Indeed, one law professor writes that it would "call[] into question the whole project of modern American governance."⁷⁰ As already noted,⁷¹ Justice Gorsuch's dissenting opinion implied a more limited application of the nondelegation doctrine, but one that would still leave much of modern government's legal status up in the air. Given

⁶⁸ *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (cert. denied).

⁶⁹ *Id.*

⁷⁰ Nicholas Bagley, *Most of Government is Unconstitutional* (N.Y. Times, June 21, 2019), archived at <https://perma.cc/BAG7-XYQ7>.

⁷¹ See note 63 and accompanying text.

the importance of this controversy, it is imperative to understand the implications of reviving the nondelegation doctrine for the administrative state, as well as the proper scope of its application.

III. PREPARING FOR THE REINVIGORATED NONDELEGATION DOCTRINE

The nondelegation doctrine has been the focus of extensive scholarly attention over the past few decades.⁷² In spite of this, we curiously have no real indication of the implications of reviving the nondelegation doctrine at the national level. Which statutes would be deemed to have delegated legislative power to an administrative agency? Would any statute granting rulemaking authority violate Article I? If not, how would the Court determine which rulemaking powers are beyond the pale? The principles offered by Justices Gorsuch and Kavanaugh do not provide a great deal of clarity in predicting how future cases may be resolved.

Justice Gorsuch's principles in *Gundy* require Congress to make the policy decisions when it writes a statute, leaving agencies only the power to fill up the details.⁷³ Justice Kavanaugh's "major questions doctrine" for nondelegation says much the same thing. Both are restatements of Chief Justice John Marshall's famous formulation in *Wayman v. Southard* declaring that there is an ambiguous line "which separates those important subjects which

⁷² See Posner and Vermeule, 69 U. Chi. L. Rev. at 1721 (cited in note 2) (describing the doctrine is "[o]ne of the most exhaustively analyzed topics in public law"); see also Lawson and Seidman, *A Great Power of Attorney* at 327 (cited in note 25) (the doctrine "may be dead as doctrine, but it is very much alive as a subject of academic study."). Travis Mallen observed in 2005 that "[i]n the last decade, no fewer than fifty articles have been published on the subject" of nondelegation. See Mallen, 81 Notre Dame L. Rev. at 419 (2005) (cited in note 9).

⁷³ See note 60 and accompanying text.

must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details."⁷⁴

Given the importance of these questions for the Court's future jurisprudence, and the lack of clarity in the answers to these questions, there is a pressing need to study the history of the nondelegation doctrine to explore how these questions were resolved in the past, and are resolved today by other courts. This Part therefore examines, preliminarily, two sources of assistance in crafting the distinction between impermissible and permissible delegations: the application of the nondelegation doctrine in the 19th Century, mostly by state courts, and the application of the doctrine at the state level today.

There are challenges that stand in the way of relying upon these state cases, both historical and contemporary, for guidance in applying the nondelegation doctrine at the federal level. Most significant is the different separation of powers provisions that exist in state constitutions. These provisions are often stricter than anything contained in the U.S. Constitution, so courts in some states may be more aggressive in applying the nondelegation doctrine because it is mandated, by implication, from the state constitutions they apply. However, as Jim Rossi notes in his survey of state constitutional provisions and nondelegation doctrines, "Many state supreme courts invoke a strong or moderate version of the nondelegation doctrine, rather than the weak version endorsed by federal courts. This is true regardless of the texts of state constitutions, although for some state courts constitutional text is

⁷⁴ *Wayman v. Southard*, 23 U.S. 1, 43 (1825).

given some weight in addressing the issue.”⁷⁵ In other words, many state courts apply a stronger version of the nondelegation doctrine without resting their opinions on a strong constitutional provision concerning nondelegation. This Part reviews the historical and contemporary application of the nondelegation at the state level, before returning to the question of varying constitutional provisions.

A. THE 19TH CENTURY DELEGATION DOCTRINE

In their survey of the nondelegation doctrine during the 18th and 19th Centuries, Keith Whittington and Jason Iuliano conclude that “[t]here was no golden age in which the courts enforced a robust nondelegation doctrine that compelled legislators to make hard policy choices.”⁷⁶ This statement obscures the more nuanced story told by the data on which they rely, however. According to their own estimates, state courts invalidated approximately 18 percent of statutes they encountered on nondelegation grounds during the period they survey (most of the 19th Century and the early part of the 20th).⁷⁷ On its face, an 18 percent invalidation rate suggests a relatively robust nondelegation doctrine, rather than a mythical one.

Invalidation rates, however, cannot paint an adequate picture of the status or application of the nondelegation doctrine in the 19th Century. Nondelegation cases during that period did not uniformly involve broad delegations of discretionary authority to administrative agencies. To understand the application of the nondelegation doctrine in the 19th Century, it is necessary to

⁷⁵ Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1193 (1999).

⁷⁶ Whittington and Iuliano, 165 U. Pa. L. Rev. at 383 (cited in note 34).

⁷⁷ Id. at 426.

appreciate the different facts presented by these cases in comparison to modern nondelegation cases.

Many, if not most, of the state cases in the 19th Century involved what were called “local option” cases, which we typically know today as referenda.⁷⁸ State legislatures would submit proposed laws to the people, in various localities or statewide, for adoption or rejection. These laws often involved the banning of alcohol sales or the imposition of school taxes. Courts actually divided across states on how to evaluate these kinds of delegations. According to the analysis presented in Part I, above,⁷⁹ such laws may be upheld under the theory that the agent legislature is putting the decision in the hands of the principal, the people, who initially vested the authority in the legislature.

Some state courts accepted this rationale and upheld local option laws. The Supreme Court of Ohio, for instance, upheld a state law providing for local referenda on the question of establishing public support for railroads in 1852.⁸⁰ The most famous of these cases, *Locke’s Appeal*, appealed to the agency-law analogy in upholding a similar statute in Pennsylvania.⁸¹ The Pennsylvania Supreme Court acknowledged that “a power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another....Hence it is a cardinal principle of representative government, that the legislature cannot delegate the power to make laws to any other body or authority.”⁸² Yet, it argued, in this case the

⁷⁸ See Postell and Moreno, 3 Const. Stud. at 57 (cited in note 35).

⁷⁹ See Part I.C.

⁸⁰ See *Cincinnati, Wilmington & Zanesville Railroad Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77 (1852).

⁸¹ See *Locke’s Appeal*, 72 Pa. 491 (1873).

⁸² *Id.* at 494.

delegation was to the people to determine when the law went into effect, and was therefore not in violation of the principle.⁸³

Other courts viewed these laws as violations of the nondelegation principle. As Louis Jaffe summarizes, “a considerable majority of the state courts held a state-wide referendum unconstitutional” during the 19th Century, and “local option met the same fate.”⁸⁴ In an 1853 case, the New York Court of Appeals invalidated a statewide referendum to establish free public schooling as a violation of the nondelegation principle.⁸⁵ According to the theory of subdelegation or the social compact theory of nondelegation, the court’s analysis was flawed. The court claimed that “[t]he Senate and Assembly are the only bodies of men clothed with the power of general legislation,” and that “[t]he people reserved no part of it to themselves.”⁸⁶ But this was the wrong question to ask. The question was not whether the people had reserved the power to make laws, but whether such an essential aspect of sovereignty could ever truly be alienated by the people to the legislature. According to social compact theory, the government is an agent of the people, who “retain everything” even if they do not explicitly say so.⁸⁷ Such mistakes were not uncommon. The Delaware Court of Errors and Appeals held a law establishing local referenda for banning liquor licenses as an unconstitutional delegation of legislative power, noting that “a power, or authority, vested in one

⁸³ Id. at 498.

⁸⁴ Louis Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 Colum. L. Rev. 561, 562–63 (1947).

⁸⁵ See *Barto v. Hinrod*, 8 N.Y. 483 (1853).

⁸⁶ Id. at 488.

⁸⁷ Federalist 84 (Hamilton), in *The Federalist Papers* 509, 512 (Penguin 1961) (Rossiter, ed.) (cited in note 29).

or more persons to act for others...is a trust and confidence reposed in the party, which cannot be transferred or delegated.”⁸⁸

In short, any attempt to use the 19th Century delegation doctrine as a means of understanding how it might apply today requires disaggregating the different kinds of delegations that legislatures employed during that century. The issue that is most commonly confronted in national-level nondelegation cases today is delegation to administrative agencies, not back to the people themselves. A comprehensive study of the 19th Century nondelegation doctrine at the state level, when delegations to executive agencies were involved, has yet to be written.⁸⁹

Such a history is certainly beyond the scope of this article, but the scattered indications from scholars both during and after the 19th Century indicate that the doctrine was robust. Louis Jaffe noted that state legislatures were forced by courts to delegate specifically on fire insurance forms rather than delegate that responsibility to agencies.⁹⁰ Commentators during the Progressive Era of the early 20th Century generally concluded that the law was changing rapidly from a robust nondelegation principle to a weak or nonexistent one. Elihu Root famously proclaimed in 1916 that “the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight.”⁹¹ Herbert Croly, a progressive who embraced this development, nevertheless acknowledged that it was incompatible with the 19th Century nondelegation doctrine. He wrote in 1914 that “the administration has been steadily aggrandized at the

⁸⁸ *Rice v. Foster*, 4 Harr. 479, 489 (Del. 1847).

⁸⁹ See Mortenson and Bagley, *Delegation at the Founding*, at 4 n. 9 (cited in note 6).

⁹⁰ Louis Jaffe, *An Essay on Delegation of Legislative Power: I*, 47 Colum. L. Rev. 359, 361-62 (1947).

⁹¹ See, e.g., Marvin B. Rosenberry, *Administrative Law and The Constitution*, 23 Am. Pol. Sci. Rev. 32, 37 (1929).

expense both of the legislature and of the courts. Legislatures have been compelled to delegate to administrative officials functions which two decades ago would have been considered essentially legislative, and which under the prevailing interpretation of the state constitutions could not have been legally delegated.”⁹² These statements suggest that there was a robust nondelegation doctrine at the state level in the 19th Century, and that it would be fruitful to examine whether that doctrine can provide any guidance for a post-*Gundy* nondelegation doctrine.

B. NONDELEGATION IN THE STATES TODAY

There is another place to look for guidance in how a reinvigorated nondelegation doctrine would be applied: the states today. Although the nondelegation doctrine is a dead doctrine at the federal level, it has survived at the state level, where it remains “alive and well.”⁹³ As Jason Iuliano and Keith Whittington have estimated, courts have invalidated approximately 750 statutes since 1940, around ten per year.⁹⁴ The overwhelming majority of these cases (85%) and invalidations (97%) have occurred at the state level.⁹⁵

The rest of this Part surveys, briefly, the major themes in these cases and what they might indicate for a reinvigorated federal nondelegation doctrine.⁹⁶ A cautionary note must precede such a

⁹² Herbert Croly, *Progressive Democracy* 351 (Macmillan 1914).

⁹³ Jason Iuliano and Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 Notre Dame L. Rev. 619 (2017).

⁹⁴ *Id.* at 636.

⁹⁵ *Id.*

⁹⁶ To call the scholarship on the state nondelegation doctrines sparse is to put it mildly. Two significant articles have attempted to survey the state doctrines: Gary J. Greco, *Standards or Safeguards: A Survey of the Nondelegation Doctrine in the States*, 8 Admin. L. J. 567 (1994), and Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist*

brief survey, however. First, there is a great deal of variation across states, and even historically within states, making a general assessment a difficult task. Second, some states have stronger nondelegation clauses in their state constitutions, so their approaches to nondelegation cannot be simply copied by federal courts applying a different constitutional structure. These caveats aside, the state nondelegation doctrines today suggest that, a reinvigorated federal nondelegation doctrine would not be used to invalidate most, or even much, of the modern administrative state. However, it may be used to police some specific types of delegations to the administrative state.

The following analysis divides the state nondelegation doctrine into six different categories of cases: 1) cases applying the doctrine as an *ultra vires* doctrine, 2) cases involving private delegations of power, 3) cases involving the delegation of tax power, 4) cases involving the “incorporation” of statutory standards made by other bodies, 5) cases involving the power to define punishment for crimes, and 6) the delegation of regulatory authority to administrative bodies.

1. *Nondelegation as Ultra Vires*

In a few jurisdictions – most prominently, in New York – the nondelegation doctrine is applied as an *ultra vires* doctrine rather than as a constitutional prohibition against delegation. That is, some states use the doctrine to invalidate actions taken by administrative

Separation of Powers Ideals in the States, 52 Vand. L. Rev. 1167, 1187–1216 (1999). Jason Iuliano and Keith Whittington provide an empirical survey of the current state nondelegation doctrines, but only briefly discuss the holdings of the various cases. See Iuliano and Whittington, 93 Notre Dame L. Rev. at 639–41 (cited in note 93). Since 1999, no article has attempted to survey the current status of nondelegation in the states, and the status of the doctrine in many states has changed since 1999, so the earlier articles are dated.

agencies that surpass the delegation of power granted to them by statute. The question in these cases is not whether it is permissible for the legislature to delegate power to agencies, but whether the power claimed by the agency has actually been delegated in a specific statute. Classifying these cases as nondelegation cases, therefore, is something of a misnomer.

The most visible recent case in this area occurred in 2014 in New York, when the New York Court of Appeals invalidated New York City's restriction on the size of cups and containers for sugary beverages.⁹⁷ Applying a four-factor test established in a 1987 case, the court determined that the New York City Board of Health had usurped the power of the legislature in banning oversized beverages without specific statutory authority.⁹⁸ The same analysis has been employed in several more recent cases in New York.⁹⁹

Other states have applied the nondelegation doctrine as an *ultra vires* doctrine in the past few years.¹⁰⁰ However, this application of the nondelegation doctrine does not address the permissible scope of delegation, but rather asks whether the agency action has actually been delegated by statute. Therefore, it addresses a different question

⁹⁷ See *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep't of Health and Mental Hygiene*, 16 N.E.3d 538 (N.Y. 2014).

⁹⁸ The 1987 case is *Boreali v. Axelrod*, 517 N.E.2d 1350 (N.Y. 1987).

⁹⁹ See, e.g., *N.Y. State Board of Regents v. State University of New York*, 178 A.D.3d 11 (N.Y. Sup. 2019), *Dua v. N.Y.C. Department of Parks and Recreation*, 2010 N.Y. Misc. LEXIS 6595 (N.Y. Sup. 2019), *Dry Harbor Nursing Home v. Zucker*, 175 A.D.3d 770 (N.Y. App. 2019).

¹⁰⁰ See, e.g., *McLane Co., Inc. v. Davis*, 353 Ark. 539 (2003), *Williform v. Ark. Department of Human Services*, 551 S.W.3d 401 (App. Ark. 2018), and *Monsanto Co. v. Arkansas State Plant Board*, 576 S.W.3d 8 (Ark. 2019) in Arkansas; and *Citizens for Marriage v. Board of Canvassers*, 688 N.W.2d 538 (Mich. App. 2004) in Michigan.

than the federal nondelegation doctrine, even if it goes by the same name.

2. *Delegations to Private Actors*

Some legal scholars read various Supreme Court opinions as establishing a more robust nondelegation doctrine when private parties are the recipients of the authority, or they advocate the creation of such a distinction.¹⁰¹ Many states, however, take seriously this distinction between delegation to governmental bodies and delegation to private bodies.¹⁰²

In some states, recent judicial opinions have explicitly affirmed that delegations to private actors will be subjected to greater scrutiny than delegations to public authorities. The Supreme Court of Louisiana, borrowing from the U.S. Supreme Court's opinion in *Carter v. Carter Coal*, has repeatedly called private delegation "legislative delegation in its most obnoxious form."¹⁰³ Most recently, in 2013, the Supreme Court of Louisiana invalidated statutes designed to promote the state's rice industry through a program

¹⁰¹ See, e.g., James Rice, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 Calif. L. Rev. 539 (2017); Paul D. Larkin, *Regrounding the Private Delegation Doctrine* (Center for the Study of the Administrative State, Working Paper No. 19-06, Feb. 22, 2019), archived at <https://perma.cc/NK8V-9KYL>.

¹⁰² In addition to the cases from Louisiana and Pennsylvania, discussed immediately below, see *Vakas v. Kansas Board of Healing Arts*, 808 P.2d 1355 (Kan. 1991), where the Supreme Court of Kansas stated that the state legislature may delegate power to state agencies "if the legislature establishes reasonable and definite standards to govern the exercise of this authority," but that legislative power may not "be delegated to nongovernmental organizations or groups." *Id.* at 1360.

¹⁰³ *Alexandria v. Alexandria Fire Fighters Assn.*, 57 So.2d 673 (La. 1952); *Krielow v. Louisiana Department of Agriculture and Forestry*, 125 So.3d 384 (La. 2013); *Carter v. Carter Coal*, 298 U.S. 238, 311 (1937).

funded by assessments voted on by the rice industry.¹⁰⁴ The court concluded that the statutes “expressly empower private citizens to determine whether to impose or nullify the assessments.”¹⁰⁵ Because, in the court’s words, “[t]he Legislature cannot delegate to private citizens the power to create or repeal laws,” the statutes failed to survive a nondelegation challenge.¹⁰⁶

Other state courts have indicated that private delegations will be treated differently than delegations to public entities. In invalidating the state’s Workers’ Compensation Act because it required physicians to use impairment ratings from the American Medical Association, the Pennsylvania Supreme Court noted that “the General Assembly delegated authority to a private entity, not to a government agency or body. Conceptually, this fact poses unique concerns that are absent when the General Assembly, for instance, vests an executive-branch agency with the discretion to administer the law.”¹⁰⁷ In particular, the court noted, “private entities are isolated from the political process, and, as a result, are shielded from political accountability.”¹⁰⁸ Like the Supreme Court of Louisiana, therefore, the Pennsylvania Supreme Court has indicated in recent years that delegations to private actors will be carefully scrutinized.¹⁰⁹

¹⁰⁴ *Krielow*, 125 So.3d at 396 (cited in note 103)

¹⁰⁵ *Id.* at 389.

¹⁰⁶ *Id.*

¹⁰⁷ *Protz v. Workers’ Compensation Appeals Board*, 161 A.3d 827, 837 (Pa. 2017).

¹⁰⁸ *Id.*

¹⁰⁹ While the Pennsylvania Supreme Court acknowledged that “our precedents to date have not unequivocally supported the...view that the General Assembly cannot, under any set of circumstances, delegate authority to a private person or entity,” it also noted that “our precedents have long expressed hostility towards delegations of governmental authority to private actors.” *Id.* at 837. The court could not resolve “this tension in our jurisprudence” in *Protz*, but it did not see the need to, since it concluded

Perhaps the most prominent state case dealing with private delegation is the “Boll Weevil” case, *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, in which the Texas Supreme Court invalidated a 1993 statute that authorized cotton growers, certified by the Commissioner of Agriculture, to propose geographic eradication zones and to propose assessments for cotton growers to pay for the eradication of boll weevils.¹¹⁰ The Texas Boll Weevil Eradication Foundation is a private entity certified by the Commissioner of Agriculture, and the Texas Supreme Court indicated that it was this factor, rather than the question of the taxing power, that determined the law’s fate. The court remarked that the assessments levied by the Foundation constituted “regulatory fees, not occupation taxes.”¹¹¹ However, the court continued, “[a]s difficult as the issue of proper legislative delegation may be, the considerations are even more complex when the delegation is made not to another department or agency of government, but to a private individual or group....[T]he basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the public. Thus, we believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.”¹¹²

Texas Boll Weevil is distinctive because in addition to setting forth a rationale for distinguishing public and private delegations, the

that the delegation was sufficiently standardless to condemn it, even if the delegation had been to a governmental body. *Id.*

¹¹⁰ *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997).

¹¹¹ *Id.* at 462.

¹¹² *Id.* at 469.

Texas Supreme Court set forth an eight-factor test to determine the constitutionality of a private delegation.¹¹³ This complex balancing test has been employed by the Texas Supreme Court in a number of subsequent cases, most notably *FM Properties Operating Co. v. City of Austin* (2000), which dealt with water quality zones established by homeowners in the City of Houston.¹¹⁴

The question whether a private delegation will survive scrutiny seems to be closely related to the kind of issue that is delegated to the private actor. When the power to tax is involved, as discussed in the following section, courts tend to be highly skeptical. On the other hand, when occupational licensing authority is delegated to private professional boards and associations, the statutes routinely survive scrutiny. One interesting exception is the Kansas case of *Sedlak v. Dick* (1995), which struck down a statute providing for a Workers Compensation Board with members selected by the Kansas Chamber of Commerce and Industry and the Kansas AFL-CIO.¹¹⁵

Nevertheless, statutes which delegate the authority to license occupations, such as pharmacists and veterinarians, to professional boards and associations, routinely face nondelegation challenges in state courts, and routinely survive them.¹¹⁶ State courts will generally apply the same nondelegation principles to licensing agencies that apply to other regulatory agencies, which are generally permissive.

¹¹³ *Id.* at 472. The Texas Supreme Court was quick to note that “these standards apply only to private delegations, not to the usual delegation by the Legislature to an agency or another department of government.” *Id.*

¹¹⁴ *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000). See also Robert A. Ewert, *Delegations to Private Entities: The Application of the Boll Weevil Eight Factor Test*, 2 Tex. Tech J. Tex. Admin. L. 275 (2000).

¹¹⁵ *Sedlak v. Dick*, 887 P.2d 1119 (Kan. 1995). See Eric Therooff, *The Private Nondelegation Doctrine in Kansas and the Kansas State High School Activities Association*, 44 U. Kan. L. Rev. 633 (1995).

¹¹⁶ See Iuliano and Whittington, 165 U. Pa. L. Rev. at 643 (cited in note 35).

Thus, if a statute authorizing a licensing agency fails to provide any guidance or clear standards to the agency, it may be struck down.¹¹⁷

3. *Delegation and the Power to Tax*

State courts apply the nondelegation doctrine applies most forcefully and consistently in the tax context. When statutes delegate the tax power courts will frequently step in to invalidate them. However, it is important to note that almost all of the relevant cases involve delegations of the tax power to private bodies, raising two concerns in the same case.

In *Scott v. Donnelly*, for instance, the Supreme Court of North Dakota held that the state legislature could not give the Potato Development Commission, composed of three members appointed by the state's governor, the authority to set excise tax rates on potatoes.¹¹⁸ In reaching this conclusion the court quoted a previous opinion claiming that "[t]he power to tax is a legislative power, and cannot be delegated to boards or commissions whose appointment has not been in some way assented to by the people."¹¹⁹ A Pennsylvania court held, similarly, that a statute could not grant a Solid Waste Enforcement Officer the authority to set "fair and reasonable" garbage collection rates.¹²⁰ Idaho's Supreme Court

¹¹⁷ See, e.g., *Gilbert v. Medical Examining Board*, 349 N.W.2d 68, 74 (Wis. 1984).

¹¹⁸ *Scott v. Donnelly*, 133 N.W. 2d 418, 423-426 (N.D. 1965).

¹¹⁹ *Id.* at 424, quoting *Vallely v. Board of Park Commissioners*, 111 N.W. 615 (N.D. 1907). See also *Crow v. McAlpine*, 277 S.C. 240, 244 (S.C. Supreme Court 1981):

[I]t constitutes an implied limitation upon the power of the General Assembly to delegate the taxing power. Where the power is delegated to a body composed of persons not assented to by the people, nor subject to the supervisory control of a body chosen by the people, this constitutional restriction is violated.

¹²⁰ *Meyersdale Borough Refuse Service v. Wentworth*, 36 Pa. D. & C. 3d 654, 657 (C.P. 1985).

established a framework in 1984 for determining the circumstances under which the tax power could be delegated to a private entity, in upholding a law authorizing a sales tax on hotel rooms imposed by auditorium districts.¹²¹ That case overturned a 1923 decision that interpreted the Idaho Constitution to require that the legislature could not delegate its tax power to another entity.¹²²

While all of these cases involve the delegation of the power to tax, some courts were only willing to strike down statutes that gave this power to private entities.¹²³ Others extended the nondelegation principle to delegations of tax power to public entities (as in *Scott v. Donnelly*).¹²⁴ In the latter case, the state courts were willing to impose the nondelegation doctrine on statutes that the Supreme Court found unobjectionable in *Skinner v. Mid-American Pipeline Co.*¹²⁵

4. Delegation and “Incorporation”

One subset of state nondelegation cases involves delegations to Congress or other governments. In such cases, statutes typically incorporate congressional or other statutes’ definition of terms or standards. One leading case from Arizona in 1978, *State v. Williams*,

¹²¹ *Greater Boise Auditorium District v. Royal Inn of Boise*, 684 P.2d 286 (Idaho 1984).

¹²² *State v. Nelson*, 213 P. 358 (Idaho 1923).

¹²³ See *Crow v. McAlpine*, 277 S.C. at 244 (cited in note 119).

¹²⁴ The fact that the power was delegated to a private entity in *Boll Weevil* seems to have heightened judicial scrutiny of the statute. As the Texas Supreme Court noted in a subsequent case, delegations to private entities are “subject to more stringent requirements and less judicial deference.” See *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 874 (Tex. 2000). See also *Tex. Workers’ Comp. Comm’n v. Patient Advocates of Tex.*, 136 S.W.3d 643 (Tex. 2004).

¹²⁵ See *Skinner v. Mid-American Pipeline Co.*, 490 U.S. 212, 222–23 (1989) (“We find no support...for Mid-America’s contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power.”).

invalidated a statute that delegated the definition of fraud to, *inter alia*, the United States Department of Agriculture by incorporation.¹²⁶ The court held that “It is perfectly legitimate for the Legislature to adopt existing federal rules, regulations or statutes as the law of this state.... However, it is universally held that an incorporation by state statute of rules, regulations, and statutes of federal bodies ... constitutes an unlawful delegation of legislative power.”¹²⁷ The Supreme Court of Arizona determined that if the statute incorporated an existing, fixed definition of fraud, it would be acceptable, but the law could not incorporate “future pronouncements of federal law” that the USDA may subsequently adopt.¹²⁸

Other states have similarly invalidated statutes that delegate the power to define terms or standards by incorporation. In 1995, for example, the Oklahoma Supreme Court invalidated a law that delegated the power to determine prevailing wages to the U.S. Department of Labor:

“The current Act leaves an important determination to the unrestricted and standardless discretion of unelected bureaucrats. Worse, it delegates to an administrative arm of the federal government. As a result, the federal agency which actually determines the prevailing wage is less answerable to the will of the people of Oklahoma than is the [state’s] Labor Commissioner[.]”¹³⁰

¹²⁶ *State v. Williams*, 583 P.2d 251 (Ariz. 1978).

¹²⁷ *Id.* at 254–55.

¹²⁸ *Id.* at 254.

¹³⁰ *Oklahoma City v. State*, 918 P.2d 26, 30 (Okla. 1995).

The conclusion most state courts have drawn is that a law can adopt existing standards by incorporation, because the enacting legislature presumably knew and endorsed the standard that existed at the time of enactment. However, the incorporation of future standards lacks this characteristic. Citizens cannot hold a legislature accountable for standards adopted by a governmental body in the future. Therefore, such incorporations are unconstitutional.¹³¹

5. *Delegation and Criminal Punishment*

Some states that have otherwise permissive delegation doctrines impose limits on delegation when the executive receives the power to define punishments for crimes or to define criminal offenses. In two separate cases, Utah's state courts have invalidated the state's Controlled Substances Act because under it "the administrator not only determines that a substance should be controlled, he further schedules the substance, which in effect, declares the magnitude of the penalty and fixes the punishment. The administrator is exercising an essential legislative function which cannot be transferred to him."¹³²

A similar law in Mississippi was deemed to be an unconstitutional delegation in 1974.¹³³ The Supreme Court of

¹³¹ See F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 La. L. Rev. 1201, 1254–55 (2008). Boyd cites several state courts' opinions, in jurisdictions in addition to those considered here. According to Boyd, courts in dozens of other states have, at one time or another, followed this principle. See *id.* at 1255–57 & n. 228. He acknowledges, however, that "if most states have at times recognized this relationship between incorporation and non-delegation ... they have [not] consistently done so." *Id.* at 1257.

¹³² *State v. Gallion*, 572 P.2d 683, 689 (Utah 1977). See *State v. Green*, 793 P.2d 912 (Utah App. 1990).

¹³³ *Howell v. State*, 300 So.2d 774 (Miss. 1974).

Mississippi stated that the “practical effect” of the power to schedule and reschedule substances was “to increase or diminish the criminal penalty for violation of the act.”¹³⁴ “The result is that the State Board of Health is given the authority to define a crime, and ordain its punishment,” the court claimed.¹³⁵ This power “to define crimes and fix the punishment therefor,” the court concluded, “is vested exclusively in the legislature, and it may not delegate that power either expressly or by implication[.]”¹³⁶

In spite of these examples, one scholar has written that “‘administrative crimes’ are pervasive in American law.”¹³⁷ Some states take a permissive approach to such delegations, but several states follow the example of Utah and Mississippi and treat them skeptically.¹³⁸

6. *Regulatory Agencies*

Delegations of regulatory power to administrative agencies also routinely survive judicial scrutiny at the state level. In these cases, which resemble the typical nondelegation case at the federal level, state courts have generally followed the trajectory of national constitutional law. If statutes contain some intelligible principle to guide the agency’s use of its discretion, statutes will typically be upheld.

The Alaska Supreme Court, for instance, has generally upheld significant delegations of authority to administrative agencies, unless

¹³⁴ Id. at 779–80.

¹³⁵ Id. at 780.

¹³⁶ Id. at 781.

¹³⁷ Brenner Fissell, *When Agencies Make Criminal Law*, 10 U.C. Irvine L. Rev. *3 (forthcoming 2020), archived at <https://perma.cc/QMP4-NYAA>.

¹³⁸ See id. at 20 (citing cases in Florida and Colorado).

the legislature provides no guidance to the agency to guide the use of discretion.¹³⁹ Like the Supreme Court, state courts are often ambiguous whether this constitutes an acceptance of the delegation of legislative power, provided that the statute guides the use of the power, or whether the guidance is necessary to avoid the delegation of the legislative power in the first place. This ambiguity is captured in the following statement by the Alaska Supreme Court:

“a strict theory of the separation of powers ignores realities and the practical necessities of government.... The real question, then, is not whether there may be delegation. Rather it is how far the legislature may go in delegating power to an agency[.]”¹⁴⁰

Courts often acknowledge the inevitability and the advisability of delegation without specifying whether legislative power or some other power is being delegated.

Some courts are more explicit about the unconstitutionality of delegating legislative power. Montana’s Supreme Court, for instance, has said that:

The law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. Accordingly, in delegating powers to an administrative body with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and

¹³⁹ See *State v. Fairbanks North Star Borough*, 736 P. 2d 1140, 1144 (Alaska 1987) (“[T]he legislature unconstitutionally delegated legislative authority when it enacted [the statute] without providing any meaningful guidance.”).

¹⁴⁰ *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 588 (Alaska 1960).

must not vest them with an arbitrary and uncontrolled discretion with regard thereto, and a statute or ordinance which is deficient in this respect is invalid.¹⁴¹

This requirement is similar to the Supreme Court's "intelligible principle" test, but it is often applied with greater scrutiny, which likely accounts in part for the greater rate of invalidation by state courts in nondelegation cases. The Montana Supreme Court, applying the rule that statutes must prescribe a policy, standard, or rule to guide agency discretion, struck down a statute which directed the Department of Business Regulation to rule on merger applications without providing standards or guidelines to guide the Department's decision.¹⁴² In some states, therefore, the nondelegation doctrine – applied to typical delegations of regulatory power to agencies – can have teeth."

In Wisconsin, the state's Supreme Court has generally upheld statutes that do not reach the level of ambiguity characteristic of the statutes struck down by the U.S. Supreme Court in 1935. However, some statutes have gone beyond those bounds and have been invalidated by Wisconsin's Supreme Court. In fact, in 1935, in *Gibson Auto Co. v. Finnegan*, the Wisconsin Supreme Court invalidated a statute that resembled the National Industry Recovery Act, authorizing the majority of an industry or trade to propose codes of fair competition that the governor would promulgate.¹⁴³

Although the rule has not been followed consistently by the Wisconsin Supreme Court,¹⁴⁴ it has generally followed the rule that

¹⁴¹ *Bacus v. Lake County*, 354 P.2d 1056, 1061 (Mont. 1960).

¹⁴² *In re Authority to Conduct Savings & Loan Activities, Etc.*, 597 P.2d 84 (Mont. 1979).

¹⁴³ See *Gibson Auto Co., Inc. v. Finnegan*, 259 N.W. 420 (Wis. 1935).

¹⁴⁴ One expert on the state's constitution describes the "lack of consistency in this area." See Jack Stark, *The Wisconsin State Constitution* 90 (Oxford 2011).

“[a] delegation of legislative power to a subordinate agency will be upheld if the purpose of the delegating statute is ascertainable and there are procedural safeguards to insure [sic] that the board or agency acts within that legislative purpose.”¹⁴⁵ However, in contrast to the U.S. Supreme Court’s application of the intelligible principle rule, Wisconsin’s Supreme Court has periodically struck statutes that lack clear standards. The Court invalidated a statute that authorized state circuit courts to determine whether the “public interest” was served by establishing a sewage district.¹⁴⁶ This case was decided in 1969, however, so it may be of little precedential value today.

Again, however, the Wisconsin Supreme Court’s approach has not been entirely consistent. In 1984, the Court upheld a statute that authorized the Board to revoke medical licenses if a licensed individual engages in conduct “unbecoming a person licensed to practice or detrimental to the best interests of the public.”¹⁴⁷ The Court found that there were sufficient procedural safeguards to limit the scope of the statute’s delegation of authority. On the whole, as with most states, Wisconsin’s nondelegation doctrine is more robust than the federal nondelegation doctrine, but by a relatively slim margin.

Illinois’ Supreme Court has specified multiple factors to consider in delegation cases, to foster more consistent and predictable application of the doctrine. The Court invalidated a statute in 1973 that authorized a “Commission on Human Relations” to assemble a list of homeowners in certain “areas,” and real estate agents would be forbidden from soliciting them. The rationale of the statute was to prevent agents from using fears of racial integration to reduce

¹⁴⁵ *Watchmaking Examining Board v. Husar*, 182 N.W.2d 257, 262 (Wis. 1971).

¹⁴⁶ *In re City of Fond du Lac Metropolitan Sewerage District*, 166 N.W.2d 225 (Wis. 1969).

¹⁴⁷ *Gilbert v. Medical Examining Board*, 349 N.W.2d at 74 (cited in note 117).

housing prices below market value. Nevertheless, because the statute provided no guidance to the Commission to guide its designation of “areas,” the Illinois Supreme Court struck the statute.¹⁴⁸ After that decision, the Court acknowledged its inconsistent application of the doctrine, and set forth a new multi-factor test requiring statutes to identify “(1) the persons and activities potentially subject to regulation; (2) the harm sought to be prevented; and (3) the general means intended to be available to the administrator to prevent the identified harm.”¹⁴⁹ In subsequent cases, Illinois courts have generally upheld statutes as long as statutes have attempted to satisfy these conditions.¹⁵⁰

While Arizona is classified by one scholar as a “strong” nondelegation state due to its decision in *State v. Williams*, discussed above,¹⁵¹ the Arizona court used permissive language in that case to justify greater acceptance of delegation in most contexts:

While we continue to be guided by the principle that the Legislature may not completely delegate its law making power to another governmental agency, we recognize[]...the increasing trend in the cases to uphold certain adequately circumscribed delegations of power.¹⁵²

The Supreme Court of Arizona, quoting from a 1971 case, accepted the

¹⁴⁸ *People v. Tibbitts*, 305 N.E.2d 152 (Ill. 1973).

¹⁴⁹ *Stofer v. Motor Vehicle Casualty Co.*, 369 N.E.2d 875, 879–80 (Ill. 1977).

¹⁵⁰ See, e.g., *Friendship Facilities, Inc. v. Region 1B Human Rights Authority*, 521 N.E.2d 578 (Ill. App. 1988); *ESG Watts, Inc. v. Pollution Control Board*, 675 N.E.2d 135 (Ill. App. 1997).

¹⁵¹ See Rossi, 52 Vand. L. Rev. at 1196 (cited in note 75).

¹⁵² *State v. Williams*, 583 P.2d at 254 (cited in note 126).

increasing tendency, due to the complexity of our social and industrial activities, to hold as nonlegislative the authority conferred upon commissions and boards to formulate rules and regulations and to determine the state of facts upon which the law intends to make its action depend.¹⁵³

In sum, even at the state level, where the nondelegation doctrine is applied far more frequently, delegations are generally upheld as long as they are accompanied by either specific standards or general statements of policy. There are a few exceptions that indicate the nondelegation doctrine at the state level resembles the doctrine at the national level, but courts are more bold in applying it.

In addition to those discussed above, state courts have recently struck statutes as violating a version of the intelligible principle test in Pennsylvania, Florida, and Oklahoma. In each of these cases, however, the particular circumstances of the cases may have played a stronger role in the outcome than the doctrine.

The Pennsylvania Supreme Court determined that a section of the state's Gaming Act for failing to "provide the Gaming Control Board with definite standards, policies and limitations to guide its decision-making with regard to zoning issues."¹⁵⁴ That part of the law was therefore unconstitutional. The Florida Supreme Court invalidated "Terri's Law," passed to prevent the withholding of nutrition and hydration from Terri Schiavo, because the statute provided "no criteria to guide the Governor's decision about whether to act."¹⁵⁵

¹⁵³ *Id.*, citing *State v. Arizona Mines Supply Co.*, 484 P.2d 619, 625 (Ariz. 1971).

¹⁵⁴ *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 419 (Penn. 2005).

¹⁵⁵ *Bush v. Schiavo*, 885 So.2d 321, 336 (Fla. 2004).

Finally, in *In Re: Initiative Petition No. 366*, decided in 2002, the Supreme Court of Oklahoma invalidated a petition that would designate English as the state's official language on nondelegation grounds, with very little analysis other than a statement that the petition's "omission of any principles leaves the fundamental policy-making function to the unbridled discretion of the State Board of Education and the Board of Regents for Higher Education" (who had authority to make exceptions by adopting rules for educational institutions).¹⁵⁶

Although all three of these cases have been decided since 2000, the controversial nature of the subjects addressed in them may render them to be of little precedential value. It is hard to say, therefore, what guidance the Supreme Court could draw from the states' varying approaches to typical delegations of regulatory power to administrative agencies. Perhaps the "public interest" language that is characteristic of many federal regulatory statutes may be vulnerable if the U.S. Supreme Court were to adopt the approach that prevails in many states today. Alternatively, taking Illinois as an example, the Court may translate the delegation doctrine into a more predictable test by identifying the range of factors it will examine in distinguishing lawful and unlawful delegations.

CONCLUSION: THE LIMITS OF A REINVIGORATED NONDELEGATION DOCTRINE

The opinions in *Gundy*, as well as Justice Kavanaugh's statement regarding the denial of certiorari in *Paul v. U.S.*, indicate that the Court may well revive the nondelegation doctrine in the coming years. If it does so, it will be critical for the Court to address two theoretical challenges that have generally frustrated the doctrine's

¹⁵⁶ *In re Initiative Petition No. 366*, 46 P.3d 123, 129 (Okla. 2002).

consistent application. First, the Court must present a compelling foundation for the doctrine's existence in the first place. To date, the doctrine's defenders on the Court have typically invoked the separation of powers and the need for accountability, and assumed that was enough to ground the doctrine. As this article has argued, however, the most compelling foundation for the nondelegation doctrine is the social compact, principal-agent theory of sovereignty that is rooted in the Constitution.

Second, the Court must provide a clear line of distinction that separates unlawful delegations of legislative power from permissible delegations of executive power. While it is not well-known or studied, the nondelegation doctrine still serves as a relatively robust check on the powers that can be delegated to administrative agencies. This article has surveyed cases from a variety of states, in which the doctrine was applied to a variety of issues, to provide a preliminary sketch of how the doctrine is applied at the state level. While the nondelegation is rarely used to invalidate statutes that delegate regulatory power to executive actors, it is more aggressively used to police delegations of the tax power and delegations of power to private actors. The doctrine has not been used to declare most of government to be unconstitutional or to cripple state governments. This suggests that even if the nondelegation doctrine returns to prominence in constitutional law, it likely would not be the apocalyptic event that some have suggested it would be.