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The Myth of the State Nondelegation Doctrines

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INTRODUCTION

Scholars and commentators across the ideological spectrum are preparing themselves for a possible revival of the nondelegation doctrine. The Supreme Court, as most know, has not invalidated a law on nondelegation grounds since 1935, prompting the famous observation from Cass Sunstein that the "conventional" nondelegation doctrine—which invalidates statutes that do not provide sufficiently specific congressional direction—"has had one good year, and 211 bad ones (and counting)."[1]

Nevertheless, there are clear signals that a change is on the horizon. In one of the most recent major cases involving the conventional nondelegation doctrine, *Gundy v. United States*,[2] three Justices signed an opinion by Justice Gorsuch advocating the abandonment of the Court's "intelligible principle" test adopted in 1928 in *J. W. Hampton, Jr. v. United States*.[3] Instead, the Justices urged the adoption of a more robust limitation on congressional delegations of authority to administrative agencies.[4] They were seemingly joined by Justice Alito, who, though writing separately in *Gundy*, voiced support for "reconsider[ing] the approach we have taken for the past 84 years."[5] The critical fifth vote may come from Justice Kavanaugh, who opined in the denial of certiorari in a similar case that Justice Gorsuch's "scholarly analysis of the

1. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000). As of January 2022, that would be one good year and 232 bad ones (and still counting).

2. 139 S. Ct. 2116 (2019).

3. 276 U.S. 394, 409 (1928) (rejecting a nondelegation doctrine challenge, the Court stated: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

4. *Gundy*, 139 S. Ct. at 2139–42 (Gorsuch, J., dissenting).

5. *Id.* at 2130–31 (Alito, J., concurring in judgment).

Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."[6]

More recently, in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*,[7] the Court granted an application to stay the Occupational Safety and Health Administration's emergency rule mandating that employers with over 100 employees require workers to receive a COVID-19 vaccine or submit to a mask and testing regime.[8] In concluding that the National Federation of Independent Businesses and other challengers likely would prevail on the merits, the Court relied on the "major questions" doctrine, which generally holds that Congress must speak clearly in a statute if it wishes to assign to an executive agency decisions of vast economic and political importance.[9]

Justice Gorsuch wrote a concurring opinion relating the major questions doctrine to fundamental nondelegation and separation of powers principles.[10] Justice Alito joined Justice Gorsuch's concurring opinion, likely confirming his willingness to support a stronger application of the conventional nondelegation doctrine (as opposed to the major questions variant).[11] Neither Justice Kavanaugh nor Justice Barrett, however, joined Justice Gorsuch's opinion in *National Federation of Independent Business*, which suggests that they may prefer continuing to view the major questions doctrine as more of a limit or exception to *Chevron* deference, rather than a means of reinvigorating the conventional nondelegation doctrine. Nevertheless, there now appear to be six Justices on the Court who may be sympathetic to reinvigorating the nondelegation doctrine, in one way or another, in a future case.[12]

While some originalists prepare to celebrate the rebirth of the nondelegation doctrine, other scholars fret. Julian Mortenson and Nicholas Bagley, for instance, argue that "[t]he nondelegation doctrine didn't exist at the founding. It's a fable that originalists tell themselves."[13] It may be "a

6. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

7. No. 21A244 (S. Ct. Jan. 13, 2022) (per curiam).

8. *Id.* slip op. at 1–2.

9. *See id.* slip op. at 5–6.

10. *Id.* at slip op. 4–6 (Gorsuch, J., concurring).

11. *See id.* slip op. at 1.

12. For a brief discussion of what the Occupational Safety and Health Administration's opinions may mean for the future of the nondelegation, major questions, and *Chevron* deference doctrines, see Randolph J. May, NFIB v. OSHA*: Nondelegation, Major Questions, and* Chevron*'s No Show*, YALE J. ON REGUL. (Jan. 25, 2022).

13. Julian Davis Mortenson & Nicholas Bagley, *There's No Historical Justification for One of the Most Dangerous Ideas in American Law*, THE ATLANTIC (May 26, 2020),

comforting story. But it's just not true," they claim.[14] And they not only claim it is untrue, but that it is also dangerous.

This Article does not wade into the historical controversy over the legitimacy of the nondelegation doctrine.[15] Instead, it examines the claim that enforcing the conventional nondelegation doctrine would, in Mortenson and Bagley's words, "threaten the very foundation of the modern American state."[16] It does so by exploring how the nondelegation doctrine functions in the states and what implications might reasonably be drawn from examination of the state cases.

In his insightful new book, *Who Decides? States as Laboratories of Constitutional Experimentation*, Jeffrey Sutton, Chief Judge for the United States Court of Appeals for the Sixth Circuit, points out that many state constitutions, including several that predate the U.S. Constitution, contain provisions that expressly separate the legislative, executive, and judicial branches.[17] Judge Sutton says that, with their constitutional separation of powers that is replicated in the U.S. Constitution, state courts "may offer useful insights about how best to construe generally phrased, sometimes implied, limitations on the powers of each branch."[18]

Until recently, scholars have neglected the role of the nondelegation doctrine in the states.[19] As Jason Iuliano and Keith Whittington observe, "the Supreme Court has been the beginning and the end of most legal inquiry into the nondelegation doctrine."[20] Consequently, scholars are

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https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-orliginalism/612013/ [hereinafter Mortenson & Bagley, *No Historical Justification*]; *see also* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279–82 (2021) (arguing that the historical record does not support the claim that the conventional nondelegation doctrine was widely accepted or implemented during the founding period).

14. Mortenson & Bagley, *No Historical Justification*, *supra* note 13.

15. One of us has done so in other articles. *See, e.g.*, Joseph Postell, *"The People Surrender Nothing": Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 MO. L. REV. 1003, 1003, 1022 (2016); Joseph Postell & Paul D. Moreno, *Not Dead Yet—or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONST. STUD. 41, 42–43, 65 (2018).

16. Mortenson & Bagley, *No Historical Justification*, *supra* note 13.

17. JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 184 (2022).

18. *Id.*

19. There are some recent exceptions. *See* Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 620 (2017); Joseph Postell, *The Nondelegation Doctrine After* Gundy, 13 N.Y.U. J. L. & LIB. 280, 282, 325 (2020); Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. (forthcoming 2022) (manuscript at 4–6) (on file with authors); Daniel Walters, *Decoding Nondelegation After* Gundy: *What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. (forthcoming 2022) (manuscript at 3–4, 53) (on file with authors).

20. Iuliano & Whittington, *supra* note 19, at 635.

generally unaware of the comparatively significant role nondelegation plays in many states. Being unaware of this experience at the state level exacerbates fears that a revived nondelegation doctrine would lead to a fundamental assault on modern government.[21]

This Article surveys the nondelegation doctrine in the states. It updates the analysis found in a few important articles published in the 1990s. Generally, it finds that, contrary to previous scholarship, the nondelegation doctrine is impotent even in states where it has been used to invalidate statutes in recent decades. It also finds that many states have been miscategorized in previous studies, either because of the age of the precedents cited, or because cases called nondelegation cases, at most, involve applying what Professor Sunstein calls "nondelegation canons" such as *ultra vires*.[22] The Article, therefore, suggests that, if the experience of the states is any guide, the Supreme Court will not fundamentally disrupt the modern regulatory state if it imposes some form of a more robust version of the nondelegation doctrine in future cases.

Part I provides a brief review of the scholarship on the state nondelegation doctrines. The discussion is necessarily brief because only two or three studies of the state nondelegation doctrines have been published in the past few decades. This Part also examines forthcoming articles that discuss the current status of the nondelegation doctrine in the states. Part I also raises some problems with the earlier scholarship.

Part II addresses one of the most important problems with the existing scholarship on the nondelegation doctrine: the use of the term "nondelegation" to describe cases that raise issues related to, but different from, the conventional nondelegation doctrine. Part II distinguishes four types of issues—*ultra vires*, incorporation by reference, delegation to private entities, and delegation of the tax power—from the conventional nondelegation cases that concern statutory grants of lawmaking or regulatory authority to administrative bodies. It shows that many of the states that scholars categorize as strong nondelegation states have actually invalidated statutes on these narrower grounds.

Part III discusses the status of conventional nondelegation cases in the states, namely those involving grants of lawmaking or regulatory authority to administrative bodies. It finds that only ten states have relatively robust nondelegation doctrines in this typical conventional context, and even those states rarely invalidate laws. Part IV offers some thoughts on the

21. As Daniel Walters writes: "Perhaps the main reason that the nondelegation doctrine inspires such strong reactions is because its effects are almost entirely unknown . . . . In this empirically impoverished environment, it becomes far too easy to characterize a robust nondelegation doctrine as a panacea or a bogeyman, as one pleases." Walters, *supra* note 19 (manuscript at 20).

22. Sunstein, *supra* note 1, at 316–17.

implications of the state nondelegation doctrines, suggesting that—at least at the state level—the nondelegation doctrine is not a divisive partisan issue, and has not been used to hamstring states' administrative capacities. Therefore, based on our examination, current fears that the U.S. Supreme Court would dismantle the administrative state by reviving the nondelegation doctrine appear to be unwarranted.

I. THE INCOMPLETE SCHOLARLY UNDERSTANDING

The conventional nondelegation doctrine is rooted in fundamental separation of powers principles. At the federal level, Article I of the Constitution provides that "[a]ll legislative [p]owers herein granted shall be vested" in Congress.[23] Similarly, Articles II and III provide that the executive and judicial powers shall be vested respectively in a President and the federal courts.[24] The purpose of separation of powers is, as James Madison famously explained in *Federalist* no. 47, to prevent "the accumulation of all powers, legislative, executive, and judiciary in the same hands," which, were it to occur, "may justly be pronounced the very definition of tyranny."[25]

To maintain the separation of powers, legislatures would not be permitted to delegate any of their legislative powers to the other branches, including administrative agencies. But the Supreme Court's nondelegation jurisprudence has long embodied a more functional rather than strict formalistic approach in assessing whether a particular delegation of authority is unconstitutional.[26] Thus, in rejecting a nondelegation doctrine challenge to a tariff statute in 1928, in *J.W. Hampton, Jr. v. United States*, the Court formulated this test: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[27] In other words, the conventional doctrine requires that Congress supply an "intelligible principle" to limit executive discretion.[28]

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23. U.S. CONST. art. I, § 1.

24. *Id.* art. II, § 1; *id.* art. III, § 1.

25. THE FEDERALIST NO. 47 (James Madison). As one of us has argued, the nondelegation doctrine can also be grounded in social compact principles. Under this argument, because government is originally established by a delegation of power from the people, it holds power in trust and therefore cannot further delegate this power. *See generally* Postell, *supra* note 15, at 1012–18 (discussing the foundation and origins of the nondelegation doctrine).

26. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825). In *Wayman*, Chief Justice John Marshall said that, while Congress may not delegate "exclusively" its legislative power, it could delegate power "to those who are to act under such general provisions to fill up the details." *Id.* at 42–43.

27. J. W. Hampton, Jr. v. United States, 276 U.S. 394, 409 (1928).

28. Sunstein, *supra* note 1, at 318.

This ensures that Congress, which is directly accountable to the people, establishes the general policy, rather than administrative agencies whose unelected officials are not so accountable. While the Supreme Court may be poised to alter the scope of the nondelegation doctrine, as of now, the "intelligible principle" standard remains in place as the basis for determining whether a law is unconstitutional as a violation of the nondelegation doctrine.[29]

The two most comprehensive treatments of state nondelegation doctrines in recent years are by Gary Greco, published in 1994, and by Jim Rossi, published in 1999.[30] Another recent study of the state nondelegation doctrines, by Jason Iuliano and Keith Whittington, concludes that the nondelegation doctrine is "alive and well" in the states.[31] Two more articles are forthcoming but publicly available.[32] This section summarizes the findings of these articles, depicting the current state of the scholarly findings on the state nondelegation doctrines. It then offers a friendly criticism of the analyses in these articles, suggesting that a fresh survey of the state nondelegation doctrines will produce a more accurate but different picture. The following sections provide that survey.

A. Surveying the Existing Scholarship

Professor Greco's article is the most comprehensive. It divides the states into three categories: those with "'strict' standards," those with "'loose' standards," and those which focus on "procedural safeguards."[33]

Greco lists eighteen states as "strict" nondelegation states.[34] These states "require[] the legislature to provide definite standards and/or procedures that the agency must adhere to when making a decision."[35] The standard

29. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019). As Justice Elena Kagan explained in her opinion for the plurality: "So we have held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Id.* at 2123 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).

30. Gary J. Greco, Note, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. 567, 568–69 (1994); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167 (1999). Rossi devotes one section of his article to "State Approaches to Nondelegation." *Id.* at 1991–2001.

31. Iuliano & Whittington, *supra* note 19.

32. *See* Silver, *supra* note 19; *see also* Walters, *supra* note 19.

33. Greco, *supra* note 30, at 579–80.

34. Those states are: "Ohio, Oklahoma, Pennsylvania, New York, Kentucky, Texas, Nebraska, New Hampshire, Florida, Montana, Virginia, Massachusetts, New Mexico, Nevada, South Dakota, South Carolina, Arizona, and West Virginia." *See id.* at 580–81, 583–84.

35. *Id.* at 580.

applied in these states "requires that the legislature provide definite and clear standards with the delegation" of power in a statute.[36] Thus, even in the states Greco categorizes as "strict" nondelegation states, statutes are upheld if reviewing courts deem them to establish definite standards, procedures, or both. In practice, the requirement that the statute must establish definite standards or guidance for the agency is not always applied strictly.

The other two categories, in Greco's analysis, apply a weaker nondelegation principle. Those states in the "'loose' standards" category merely require "either the legislature or the administrative agency to provide standards and/or procedural safeguards" when making decisions, and the states in the "procedural safeguards" category only require that "the administrative agency either has in place, or has adopted, procedural safeguards to follow when making a decision."[37]

Greco's "'loose' standards" category contains twenty-four states.[38] Although these states' courts require some standards to be specified in statutes that delegate power to agencies, they "have allowed delegations of broad power to administrative agencies with minimal direction from the legislature."[39] While these standards can be minimal and loose, some of these states also require procedural safeguards in addition to the minimal and loose statutory standards.[40] But regardless, according to Greco, these states allow almost any statute to pass muster.[41]

The final category in Greco's analysis, those states that do not require statutory standards at all, merely focusing on "procedural safeguards," contains six states.[42] Because the courts in these states do not require even minimal statutory standards to uphold a delegation, Greco argues, "the legislatures have even less of an effect on policy" in these states than those in the "loose standards" category.[43] In sum, Greco's survey treats eighteen states as having relatively strong nondelegation doctrines, with the remaining states presenting variations of weak nondelegation principles.

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36. *Id.*

37. *Id.*

38. These states are: "Indiana, Wyoming, Mississippi, Missouri, Vermont, New Jersey, Idaho, Georgia, Hawaii, Connecticut, Kansas, Tennessee, Illinois, North Carolina, Colorado, Louisiana, Rhode Island, Delaware, Maine, Alaska, Alabama, Minnesota, North Dakota, and Michigan." *Id.* at 588–92.

39. *Id.* at 588.

40. *See generally id.* at 588–97.

41. *Id.* at 593 n.117.

42. These states are: Oregon, Washington, Wisconsin, Maryland, Iowa, and California. *See id.* at 599–600. Arkansas and Utah do not fit neatly into any of Greco's three categories, so they are treated independently. *See id.* at 579 n.66.

43. *Id.* at 601.

Professor Rossi's article, which (in his words) has "attempted to update and refine [Greco's] summary of state doctrine,"[44] also places the states into three separate categories, along similar lines as Greco. In his analysis, the states have either "weak" nondelegation doctrines, "strong" nondelegation doctrines, or "moderate" nondelegation doctrines.[45]

Rossi places twenty states in the "strong" nondelegation category.[46] In these states "statutes are periodically struck on nondelegation grounds."[47] Rossi's "strong" nondelegation category contains all eighteen states in Greco's "strict standards" category, plus Illinois (which Greco calls a "loose standards" state) and Utah (which Greco does not categorize).[48]

The states with "moderate" nondelegation standards, in Rossi's analysis, "do not always require specific standards, but may vary the degree of standards necessary depending on the subject matter of the statute or the scope of the statutory directive."[49] However, all these states look to the statutory standards, rather than allowing procedural safeguards alone to validate a delegation of power.[50] Twenty-three states have such "moderate" nondelegation doctrines.[51]

Rossi's "weak" nondelegation states resemble Greco's weakest category, the "procedural safeguards" only category. As Rossi explains, in his "weak" category, courts "uphold[] . . . delegations as long as the agency has adequate procedural safeguards in place."[52] Rossi places seven states in the "weak" category—the same six that Greco places in the "procedural safeguards" category, plus Arkansas (which Greco leaves uncategorized).[53]

As this brief survey illustrates, Professors Greco and Rossi agree on the

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44. Rossi, *supra* note 30, at 1191 n.108.

45. *Id.* at 1191–1200.

46. The states are: Texas, Florida, Arizona, Illinois, Kentucky, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, South Carolina, Utah, Virginia, and West Virginia. *See id.* at 1196–97. Rossi mentions Utah in the "strong" nondelegation section, suggesting that he is placing it in that category, but he does not explicitly say this. *See id.* at 1201.

47. *Id.* at 1197.

48. Greco, *supra* note 30, at 597 (Illinois); *id.* at 579 n.66 (Utah).

49. Rossi, *supra* note 30, at 1198.

50. *Id.* at 1200.

51. These states are: Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, New Jersey, North Carolina, North Dakota, Rhode Island, Tennessee, Vermont, and Wyoming. *Id.* at 1201.

52. *Id.* at 1191.

53. Those states are: Washington, California, Iowa, Maryland, Oregon, and Wisconsin. *Id.* at 1201.

broad outlines of the state nondelegation doctrines. They agree that a minority of states have a "strong" or "strict standards" doctrine, and they agree almost entirely on the states which fit into this category.[54] They agree that a small number of states do not look to statutory standards at all, but merely require procedural safeguards, and they agree almost entirely on the states which fit into this category.[55] Finally, they agree that nearly half of the states apply a loose nondelegation doctrine in which minimal, vague statutory standards are sufficient to avoid unconstitutionally delegating power.[56] Table 1 provides an overview and comparison of the Greco and Rossi classifications of the forty-seven states on which they agree.

Table 1: Scholars' Classification of the State Nondelegation Doctrines

"Strict Standards" (Greco) "Strong" (Rossi)	"Loose Standards" (Greco) "Moderate" (Rossi)	"Proc. Safeguards" (Greco) "Weak" (Rossi)
Arizona, Florida, Kentucky, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, West Virginia	Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, New Jersey, North Carolina, North Dakota, Rhode Island, Tennessee, Vermont, Wyoming	California, Iowa, Maryland, Oregon, Washington, Wisconsin

54. Aside from Illinois, which will be discussed shortly, the only disagreement between the two is regarding Utah, which Greco does not classify, and which Rossi places into the "strong" category. Greco, *supra* note 30, at 579 n.66; Rossi, *supra* note 30, at 1196–97.

55. The only disagreement between the two is regarding Arkansas, which Greco does not classify, and which Rossi places into the "weak" category. Greco, *supra* note 30, at 579 n.66; Rossi, *supra* note 30, at 1192 n.115.

56. Greco places twenty-four states into this category, while Rossi places twenty-three. They only disagree about the status of Illinois, which Rossi moves into the "strong" nondelegation category. Illinois will be treated in detail in the following section, but in short, Greco's assessment of Illinois as a "loose standards" state is more accurate. *Compare* Greco, *supra* note 30, at 594–97, 590–91 n.105 (categorizing Illinois as a state with broad, nonuniform standards for delegation), *with* Rossi, *supra* note 30, at 1201 (categorizing Illinois as a state with specific legislative standards for delegation).

As mentioned, both the Greco and Rossi articles appeared in the 1990s. Iuliano and Whittington offer a more recent assessment in a 2017 article that does not place the states into different categories, but does acknowledge the higher success rate of nondelegation challenges in the states as opposed to the federal level. As they summarize, the nondelegation doctrine "has become an increasingly important part of state constitutional law. Contrary to the conventional wisdom, the nondelegation doctrine is alive and well, albeit in a different location."[57] Their analysis, therefore, is consistent with the findings of Greco and Rossi: many states have stricter nondelegation doctrines and the success rate of nondelegation challenges at the state level is high relative to the federal nondelegation doctrine.

Two forthcoming articles on the status of nondelegation in the states are worth discussing. They tend to confirm the analysis in this Article while focusing on slightly different themes and taking different approaches. In one, Daniel Walters constructs a dataset of over 4,000 state nondelegation cases from 1830 to 2019 and analyzes them to determine the practical effect of different doctrinal tests applying the nondelegation principle.[58] Walters classifies the states along the three categories that he describes as the "Gorsuch test."[59] Taken from Justice Gorsuch's dissenting opinion in *Gundy*, the three categories are: (1) the distinction between the power to decide important matters and to fill in the details; (2) the power to find facts that trigger legal effects specified in law; and (3) that power may be permissibly delegated if the executive inherently shares overlapping power in that domain.[60] He finds that there is no statistically significant difference in the frequency of invalidation across states that adopt different categories of the Gorsuch test, suggesting that the Gorsuch test would not be "meaningfully more stringent than the intelligible principle standard."[61]

This Article complements Walters's analysis but differs in its approach in a few important respects. First, it focuses on how the nondelegation doctrine is applied in the states today, focusing on a briefer and more recent timeframe to capture how the states currently employ the doctrine. Second, it explores the Court's reasoning in prominent cases to illustrate how the various tests are applied rather than examining the trends empirically in a large dataset.

The other forthcoming article, by Benjamin Silver, highlights the states' "hardly monolithic" approach to nondelegation, focusing as this Article does on the wide variety of contexts in which the nondelegation doctrine is applied

57. Iuliano & Whittington, *supra* note 19, at 620.

58. *See* Walters, *supra* note 19, at 27–39.

59. *Id.* at 18.

60. *Id.* at 23.

61. *Id.* at 39.

in the states.[62] In addition, it aims to unite these various manifestations of the nondelegation doctrine in the states under two "motivations or theories of nondelegation," the "Separation of Powers theory" and the "Sovereignty theory."[63] Like Walters's analysis, Silver's article supports the claim in this Article that much of what appears to be a conventional nondelegation doctrine in the states is actually the manifestation of related, but slightly different concerns, than those scholars focus on at the national level.[64]

These studies provide an array of case citations and useful analyses that help to illuminate the status of the state nondelegation doctrines. Nonetheless, the Greco and Rossi analyses, which offer the most comprehensive survey of the status of the state nondelegation doctrines, are misleading in important ways. As the following subsection explains, they provide an incomplete and even sometimes misleading picture of the state nondelegation doctrines, which are much less robust than the scholarly accounts suggest.

B. The Problems with the Existing Scholarship

While the studies published in the 1990s are valuable, they are limited by several factors. The most obvious and fundamental problem is that they are obsolete. Greco's case citations run from 1950–1991, and many of the cases cited as evidence for a particular state's approach to nondelegation are over fifty years old. While some of these cases may not have been explicitly overturned, if a state's highest court has not offered a pronouncement on the nondelegation doctrine since the 1960s or 1970s, it may not be useful to cite old cases as evidence for calling them "strict" nondelegation states. Although Rossi adds some cases, his analysis relies almost entirely on the cases Greco cites, and is subject to the same criticism.

Since these articles were published over twenty years ago, it is understandable that some of the data on which they rely are outdated. Concerns about obsolescence are confirmed when looking at some of the states categorized by Greco and Rossi. For instance, both articles place Virginia in the "strict standards" or "strong" nondelegation category because of a 1955 case, *Chapel v. Commonwealth*,[65] which invalidated a statute delegating regulatory authority to a dry cleaner's board.[66] As this Article explains later, *Chapel* does not appear to be

62. Silver, *supra* note 19, at 4.

63. *Id.* at 5.

64. *Id.* at 7.

65. 89 S.E.2d 337 (Va. 1955).

66. *Id.* at 343. No other recent cases are cited from that state in either study. *See* Greco, *supra* note 30, at 583 n.81; Rossi, *supra* note 30, at 1197 n.156. *Chapel* does not seem to be widely cited in subsequent cases in Virginia, and the Supreme Court of Virginia generally

a widely cited precedent, and the Supreme Court of Virginia generally upholds statutes that delegate authority to administrative bodies. Additionally, Greco and Rossi place Ohio and Massachusetts in the "strong" or "strict" nondelegation category. However, as this Article explains below, nondelegation challenges have not been successful in those states for some time.

In sum, to understand the current state of the nondelegation doctrine in the states, it is necessary to update these studies with more current cases. Iuliano and Whittington's historical analysis confirms this point. Their study finds that the number, and success rate, of nondelegation challenges actually *rose* in the period from 1937–1980.[67] As they write, "the nondelegation doctrine not only survived the New Deal Era, but increased in strength for decades after."[68] However, Iuliano and Whittington's data suggests that the timing of the findings in the Greco and Rossi articles have rendered their conclusions less reliable now, because they find a sharp decline in the number of nondelegation challenges and their success rate after 1980.[69] In other words, the success rate of state nondelegation challenges has fallen considerably in the past forty years, and studies which rely on cases decided in the 1950s, 1960s, and 1970s may not accurately capture the way the nondelegation doctrine works in a state today.[70]

This Article therefore presents an updated picture of the nondelegation doctrine in the states by focusing almost exclusively on cases decided since 1980. Because that is when the doctrine began its decline, according to the data compiled by Iuliano and Whittington, any successful nondelegation challenges since then would indicate a relatively robust doctrine.

A second problem with these older studies is that they seem to miscategorize several states. Greco concedes in his pioneering study that some of his categorizations may have been inaccurate.[71] Among the eighteen states he categorizes as "strict" states, the statutes were *upheld* in the leading cases in nine states.[72] In two of these states Greco acknowledges that they

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upholds statutes that delegate authority to administrative bodies. *See, e.g.*, Elizabeth River Crossings v. Meeks, 749 S.E.2d 176, 196 (Va. 2013) (allowing the Virginia General Assembly to delegate to the Virginia Department of Transportation the authority to set toll fees).

67. Iuliano & Whittington, *supra* note 19, at 633.

68. *Id.*

69. *Id.* at 631–34. Their data set is composed of cases "between 1940 and 2015 that were decided in a year divisible by five" rather than a comprehensive set of cases from the period. *Id.* at 635.

70. *Id.* at 634. Greco also acknowledges that "the doctrine [is] in general decline in the states." Greco, *supra* note 30, at 601.

71. *See, e.g.*, Greco, *supra* note 30, at 587, 594 (conceding that Arizona, Louisiana, North Carolina, and South Carolina could be placed into more than one category).

72. Greco, *supra* note 30, at 586–87.

could be miscategorized as "strict."[73] This leaves only nine states where the leading cases actually resulted in the invalidation of a statute under the nondelegation doctrine.[74]

In other words, both Greco and Rossi categorize some states as "strict" or "strong" nondelegation states, but their leading cases upheld the statutes against nondelegation challenges.[75] As Greco admits:

> Category I [Strict Standards] states appear to adhere to a strict nondelegation doctrine. Recently, however, as this survey demonstrates, nine out of the eighteen states within Category I have upheld delegations of power to state agencies. Moreover, all of the states in Categories II and III recently upheld delegations to state agencies.[76]

Classifying a state that has not invalidated a statute on nondelegation grounds as a strong nondelegation state is likely overinclusive.

The third and final difficulty with the older studies is that they treat state nondelegation cases as a monolithic category. This is a misleading approach that fails to capture the differences in nondelegation cases at the state level. Many cases cited by leading studies are substantively different than the typical nondelegation case, which involves the delegation of lawmaking or regulatory authority to an agency. States treat delegations of tax power, delegations to private actors, and other types of delegations differently than the typical delegation.[77] A statute may be invalidated in a state on narrow grounds that do not apply to the delegation of lawmaking or regulatory authority. Classifying such a state as a strong nondelegation state may fail to capture how that state's courts address the delegation of regulatory authority. For instance, it may surprise readers to see New York's inclusion on the list of strong nondelegation states.[78] Its inclusion, however, is misleading, because its leading "nondelegation" cases are more accurately described as *ultra vires* cases.[79]

To avoid this difficulty, the analysis in this Article distinguishes the conventional nondelegation case, involving the delegation of lawmaking or regulatory power to administrative agencies in allegedly unconstitutional

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73. Those states are Arizona and South Carolina. *See* Greco, *supra* note 30, at 587. As we argue in this Article, those two states indeed were miscategorized. Neither state is a strict nondelegation state.

74. Those states are: Oklahoma, Pennsylvania, New York, Kentucky, Texas, New Hampshire, Florida, Montana, and Virginia. Greco, *supra* note 30, at 586–87.

75. *See* Rossi, *supra* note 30, at 1196–97. For instance, Rossi cites cases from Ohio and South Carolina as evidence for categorizing them as "strong" nondelegation states, but in those cases the statutes were upheld. *Id.* at 1197 nn.151 & 155.

76. Greco, *supra* note 30, at 601.

77. *See* discussion *infra* Sections II.B–D.

78. Greco, *supra* note 30, at 586; Rossi, *supra* note 30, at 1201.

79. *See* discussion *infra* Section A.

statutes, from other contexts. Some of these contexts are simply not about nondelegation, such as the *ultra vires* cases. Others involve more specific nondelegation issues such as delegations to private actors, delegations of tax power, delegations back to the people through initiative petitions, or delegations to other actors through incorporation by reference. Some states, such as New York, Texas, and Arizona, take stricter approaches to these narrower questions than to the issue of delegation to regulatory agencies generally.[80]

Admittedly, distinguishing the state cases involving the conventional nondelegation doctrine from the cases that apply nondelegation-type arguments narrows our view of how the nondelegation doctrine affects the law more generally. It is important to note that nondelegation-related doctrines may play a significant role in shaping the law, and thus that the impact of the nondelegation doctrine may be broader in these states than it would appear if we merely focused on the conventional nondelegation doctrine. However, the contemporary debate over the resurrection of the nondelegation doctrine is focused on the conventional doctrine, by which statutes are invalidated for transferring power from legislatures to regulatory bodies. To assess the current state of that conventional doctrine in the states, as well as the possible impact of reviving the conventional doctrine at the national level, it is helpful to focus our attention on how the states apply this conventional doctrine. This makes it necessary to distinguish other nondelegation-type arguments from applications of the conventional nondelegation doctrine.

Before turning to the states and the cases, a caveat must be noted. In state nondelegation cases, the state courts are, of course, applying state constitutional provisions, which differ significantly from the U.S. Constitution. Many states have stronger separation of powers provisions in their state constitutions, and some even have express nondelegation language. As Rossi explains, "[t]he overwhelming majority of modern state constitutions contain a strict separation of powers clause."[81] The most famous, the Massachusetts Constitution of 1780, proclaims that:

> [T]he legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[82]

Rossi explains that thirty-five states have similar clauses in their constitutions.[83] In addition, some state constitutions, such as Arkansas's,

80. *See* discussion *infra* Part II.

81. Rossi, *supra* note 30, at 1190.

82. MASS. CONST. art. XXX.

83. Rossi, *supra* note 30, at 1190–91.

expressly prohibit delegation of certain functions, such as the power to tax.[84]

Presumably, if states with strong constitutional nondelegation provisions strike down statutes, they would be of limited value in guiding the U.S. Supreme Court, which cannot rely on similar clauses in its nondelegation analysis. That presumption, however, may not be accurate. In nondelegation cases at both the state and national level, the constitutional text matters less than the analysis of what constitutes a delegation of legislative rather than executive power. Whether a state contains a strong separation of powers provision or not, the state courts still have to determine the nature of the power delegated. That analysis is what determines the outcome in most cases.[85] Indeed, Rossi notes that almost all of the states that are "weak" nondelegation states contain strict separation of powers clauses.[86] As he summarizes: "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 . . . ."[87] In other words, the state constitutional text does not dictate the way state courts approach the nondelegation doctrine. Therefore, their analyses are not confined to their own contexts and can still be instructive for the Supreme Court as it applies the nondelegation doctrine at the national level.

II. TARGETED APPLICATIONS OF THE STATE NONDELEGATION DOCTRINES

A chief problem with existing studies of the state nondelegation doctrines is that they treat all nondelegation cases as part of a single category. If a case was decided on delegation grounds, it is usually counted in these studies as a typical nondelegation case. However, as this section explains, many of the cases in which state courts have invalidated statutes use the language of nondelegation, but they present unique or narrow circumstances that differentiate them from conventional nondelegation inquiries. Once we distinguish these cases from the typical cases, the status of state nondelegation doctrines will appear in a clearer light.

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84. ARK. CONST. art. II, § 23.

85. As Justice Scalia explained in *Whitman v. American Trucking*:

> In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article I, § 1 of the Constitution vests '[a]ll legislative powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . .

531 U.S. 457, 472 (2001) (internal citations omitted). The analysis in nondelegation cases hinges on the nature of the power delegated. This is the critical question regardless of whether the relevant constitution bars delegation of legislative power implicitly or explicitly.

86. Rossi, *supra* note 30, at 1193.

87. *Id.*

A. Nondelegation as Ultra Vires

Several states have invoked the nondelegation doctrine since 1980 to invalidate agency actions for what should more accurately be described as *ultra vires* reasons, or beyond the agency's legal power or authority.[88] Most prominently, the New York Court of Appeals invalidated the New York City Department of Health's "soda ban" under a test devised by a major 1987 case called *Boreali v. Axelrod*.[89] The *Boreali* case struck regulations governing smoking in public areas because the agency had "overstepped the boundaries of its lawfully delegated authority when it promulgated a comprehensive code to govern tobacco smoking in areas that are open to the public."[90] In other words, the problem in *Boreali* and in *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene*[91]—the "soda ban" case—was that the agency assumed authority not granted in the delegation, not whether the statute lawfully delegated authority with sufficient specificity to overcome a conventional nondelegation challenge.[92] Similar challenges have recently prevailed in other states, sometimes adopting the language of nondelegation.[93] Most notably, the Wisconsin Supreme Court struck an executive order issued by the head of the state's Department of Health Services in April 2020 because the order rested on an expansive interpretation of the agency's statutory authority—one which would implicate the nondelegation doctrine if upheld.[94]

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88. *See id.* at 1197.

89. Boreali v. Axelrod, 517 N.E.2d 1350 (N.Y. 1987); N.Y. Statewide Coal. of Hisp. Chambers of Com. v. N.Y. City Dep't of Health & Mental Hygiene, 16 N.E.3d 538 (N.Y. 2014).

90. *Boreali*, 517 N.E.2d at 1351.

91. 16 N.E.3d 538. (N.Y. 2014).

92. *See id.* at 541; *Boreali*, 517 N.E.2d at 1351.

93. Recent challenges in Arkansas and Michigan provide clear examples of this trend. *See* McLane Co. v. Davis, 110 S.W.3d 251 (Ark. 2003) (ruling that the Arkansas Department of Finance and Administration was granted the authority to adjust additional costs of cigarettes); Williform v. Ark. Dep't of Hum. Serv., 551 S.W.3d 401 (Ark. App. 2018) (holding that the Arkansas Department of Human Services overstepped its statutory authority by assigning its investigative responsibilities to a private actor); Belanger v. Dep't of State, 438 N.W.2d 855 (Mich. App. 1989) (ruling that the Michigan Department of State was granted the authority to suspend drivers' licenses but not to enforce drivers' licenses according to state statutory provisions). In some states, the controversy has centered on whether agencies can claim sovereign immunity to avoid *ultra vires* challenges. *See* Monsanto Co. v. Ark. State Plant Bd., 576 S.W.3d 8, 13 (Ark. 2019) (affirming that *ultra vires* challenges could be brought against agencies). *But see* City of El Paso v. Heinrich, 284 S.W.3d 366, 368–69, 372, 373 (Tex. 2009) (ruling that state agencies are immune from such challenges).

94. Wisconsin Legislature v. Palm, 942 N.W.2d 900, 917 (Wis. 2020). In January 2022 the

These cases offer relatively little guidance for the Supreme Court's nondelegation jurisprudence since the Court has incorporated *ultra vires* considerations in other doctrines. Most notably, the Court has consistently used what is now known as the "major questions" doctrine as a canon of construction to limit agency actions that are based upon expansive interpretations of statutory delegations that otherwise might have been invalidated as nondelegation violations.[95] It has also incorporated these concerns about overly expansive exercises of agency discretion into its *Chevron* analysis of agency statutory interpretation.[96]

B. Nondelegation and Incorporation by Reference

State statutes often incorporate definitions of legal terms promulgated by other governmental bodies or agencies. In some cases, at the state level, nondelegation challenges have succeeded on the grounds that such laws improperly delegate legislative authority because they enable non-legislative actors to define the terms of statutes. These laws typically fall into one of two categories: incorporation of federal definitions, or incorporation of technical terms and standards issued by trade organizations.

In one prominent 1978 case from Arizona, *State v. Williams*,[97] the Arizona Supreme Court declared a welfare statute unconstitutional because it incorporated federal and state definitions of fraud contained in administrative rules that could be changed post-enactment.[98] The court claimed that "an

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Wisconsin Supreme Court requested briefing on whether it should "reconsider and modify current precedents on the non-delegation doctrine . . . ." Alexander Shur, *Supreme Court Weighs Whether to Rein in Dane County Board's Delegation to Health Agency*, WIS. STATE J., https://madison.com/news/local/govt-and-politics/supreme-court-weighs-whether-to-rein-in-dane-county-boards-delegation-to-health-agency/article_ed898d38-144e-5833-8cf7-cb69d4f605d7.html (Jan. 18, 2022) (internal quotations omitted). As of this writing, however, Wisconsin is still a weak nondelegation state that has recently used the doctrine in the *ultra vires* context.

95. This analysis was central to the Court's reasoning in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*. No. 21A244 (S. Ct. Jan. 13, 2022) (per curiam).

96. *See, e.g.*, Indus. Union Dep't. v. Am. Petroleum Inst., 448 U.S. 607 (1980); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); King v. Burwell, 576 U.S. 473 (2015). Cass Sunstein has recently suggested that, in his view, the Court's "major questions" doctrine is best understood as divisible into two separate doctrines, a "weak" version which exempts major questions from *Chevron* deference, and a "strong" version that, by invoking a clear statement principle or requirement, interprets statutes to forbid agencies from using ambiguous statutes to assume authority to decide questions of great economic and political significance. Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021).

97. 583 P.2d 251 (Ariz. 1978).

98. *Id.* at 254–55.

incorporation by state statute of rules, regulations, and statutes of federal bodies to be promulgated subsequent to the enactment of the state statute constitutes an unlawful delegation of legislative power."[99] The statute was invalidated only on these narrow grounds. The court took pains to state that most statutes containing intelligible principles will be upheld.[100]

Similarly, the Oklahoma Supreme Court invalidated a law in 1995 for tying the prevailing wage rate to that of the U.S. Department of Labor.[101] In most states, as long as the law incorporates a term or definition that is frozen in another state or federal statute, it is equivalent to the legislature enacting that fixed standard into law and therefore raises no delegation problem.[102] On the other hand, if the incorporated standard can be changed by another governmental body, the legislature has effectively delegated its lawmaking power to that body, since the latter can change the law that the former enacted.[103]

Incorporation of private organizations' standards, typically in cases involving occupational licensing, presents more challenging issues for state courts. This is partly due to the private nature of the delegation, which many states scrutinize more strictly than delegations to governmental bodies.[104] In some states these delegations have been found invalid. The Supreme Court of Kansas, for instance, invalidated a scheme for registering pharmacists that required applicants to be a graduate of a college accredited by a private accreditation organization.[105] This scheme, the court claimed, "has the effect of delegating to [the accreditation agency] through its accreditation process the standards of education required before registration is permitted."[106] The court concluded that such a delegation "constitutes an unlawful delegation of legislative authority to a nongovernmental association and is constitutionally impermissible."[107] On the other hand, most states affirm the constitutionality of occupational licensing schemes when they are challenged on nondelegation grounds.[108]

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99. *Id.*

100. *Id.* at 255.

101. City of Okla. City v. State *ex rel* Okla. Dep't of Labor, 918 P.2d 26 (Okla. 1995).

102. F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 LA. L. REV. 1201, 1254–55 (2007).

103. For other cases following this approach, see *id.* at 1255–57 n.226–29.

104. *See infra* Section C (citing examples of cases where state courts applied the nondelegation doctrine more strictly toward private entities).

105. Gumbhir v. Kan. State Bd. of Pharmacy, 618 P.2d 837, 843 (Kan. 1980).

106. *Id.*

107. *Id.*

108. Iuliano & Whittington, *supra* note 19, at 643.

C. Private Delegation in the States

In *Carter v. Carter Coal*,[109] the Supreme Court proclaimed delegation of legislative power to private actors to be "legislative delegation in its most obnoxious form."[110] Following the logic of that pronouncement, many states have imposed heightened scrutiny against delegations of power to private actors. The Supreme Court of Louisiana struck statutes in 2013 that assessed rice growers to pay for marketing for the state's rice industry, with the assessments voted upon by the rice growers themselves.[111] In 1999, the Arkansas Supreme Court invalidated a similar scheme.[112] The Pennsylvania Supreme Court recently applied the nondelegation doctrine against a workers' compensation statute that required physicians to use impairment ratings from the American Medical Association.[113] In Kansas, the state's supreme court struck down a statute that set up a Workers' Compensation Board containing members selected by the Kansas Chamber of Commerce and Industry and the Kansas American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).[114]

The Louisiana and the Pennsylvania courts explicitly stated that private delegations must be treated more strictly than delegations to public agencies. Invoking *Carter Coal* on private delegations, the Louisiana court indicated that the rice marketing assessment was unconstitutional because "[t]he Legislature cannot delegate to private citizens the power to create or repeal laws."[115] The Pennsylvania Supreme Court opined that in giving the American Medical Association's impairment ratings legal authority, "the General Assembly delegated authority to a private entity, not to a government agency or body. Conceptually, this fact poses

109. 298 U.S. 238 (1936).

110. *Id.* at 311.

111. Krielow v. La. Dep't of Agric. & Forestry, 125 So. 3d 384 (La. 2013).

112. Leathers v. Gulf Rice Ark., 994 S.W.2d 481 (Ark. 1999).

113. Protz v. Workers' Comp. Appeals Bd., 161 A.3d 827 (Pa. 2017). *Protz* illustrates how these nondelegation issues overlap. The case raised both private delegation and incorporation concerns, since the law authorized the incorporation of the American Medical Association's (AMA's) guidelines governing impairment ratings. *See id.* at 830. The court dealt with the incorporation concern by citing the same rationale as the Oklahoma Supreme Court in *Cline* and *American Medical Response*: "the non-delegation doctrine does not prevent the General Assembly from adopting as its own a particular set of standards which are already in existence at the time of adoption. However . . . the non-delegation doctrine prohibits the General Assembly from incorporating, sight unseen, subsequent modifications to such standards . . . ." *Id.* at 838–39.

114. Sedlak v. Dick, 887 P.2d 1119 (Kan. 1995).

115. *Krielow*, 125 So. 3d at 389.

unique concerns that are absent when the General Assembly . . . vests an executive-branch agency with the discretion to administer the law."[116]

The most prominent instance of a state crafting a private delegation doctrine, however, comes from Texas. In *Texas Boll Weevil Eradication Foundation v. Lewellen*,[117] known as the "Boll Weevil" case, the Texas Supreme Court struck down a 1993 statute similar to the rice marketing scheme struck by Louisiana's court two decades later.[118] The law authorized cotton growers to propose geographic eradication zones and to impose assessments for cotton growers to pay for boll weevil eradication.[119] The court argued it was "axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts."[120] To apply this principle, the court constructed an eight-factor balancing test to evaluate the constitutionality of such delegations.[121] According to this test, courts must consider the following factors:

- Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?
- Are the persons affected by the private delegate's actions adequately represented in the decisionmaking process?
- Is the private delegate's power limited to making rules or does the delegate also apply the law to particular individuals?
- Does the private delegate have a pecuniary or other personal interest that may conflict with its public function?
- Is the private delegate empowered to define criminal acts or impose criminal sanctions?
- Is the delegation narrow in duration, extent, and subject matter?
- Does the private delegate possess special qualifications or training for the task delegated to it?
- Has the legislature provided sufficient guidelines to guide the private delegate in its work?[122]

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116. *Protz*, 161 A.3d at 837. The Pennsylvania Supreme Court was not willing to say "unequivocally . . . that the General Assembly cannot, under any set of circumstances, delegate authority to a private person or entity." *Id.* But it noted that "hostility towards delegations of governmental authority to private actors" is increased compared to delegations to administrative agencies. *Id.*

117. 952 S.W.2d 454 (Tex. 1997).

118. *Id.* at 486–87 (noting that Louisiana, at the time, had a similar law on the books).

119. *Id.* at 457.

120. *Id.* at 469.

121. *Id.*

122. *Id.* at 472.

The Texas Supreme Court, in cases following *Boll Weevil*, indicated that "the importance of each factor will necessarily differ in each case."[123] It went on to use *Boll Weevil*'s multifactor test in some important cases, including a decision regarding the validity of water quality zones that were created by homeowners in the City of Houston.[124] In *Boll Weevil*, the court made clear that this heightened scrutiny applied "only to private delegations, not to the usual delegations by the Legislature to an agency or another department of government."[125]

D. Delegation and the Tax Power

Delegation of the tax power to private entities is especially vulnerable to judicial scrutiny in several states. In many of these cases the issue of private delegation and the delegation of tax power are intermingled, making it difficult to discern whether these cases constitute a separate category or a subset of the private delegation cases.

In Virginia, a statute delegating taxing power to the Northern Virginia Transportation Authority (NVTA), a political subdivision of Virginia that encompasses several northern Virginia counties, was held unlawful on nondelegation grounds.[126] The Supreme Court of Virginia concluded that the state's general assembly left "the sole discretion to impose the regional taxes and fees" with NVTA.[127] Because the state's Bill of Rights—enshrined in Article I of its constitution—mandated that taxes could not be imposed without the consent of the people or their representatives, the court concluded that the state legislature could not delegate the tax power "to a non-elected body such as NVTA."[128] Virginia, therefore, clearly prohibits delegating the taxing power to unelected bodies.

Idaho and North Dakota have also addressed the delegation of tax power in recent cases. For instance, the Supreme Court of Idaho upheld a law in 1984 authorizing the creation of auditorium districts that could impose sales taxes on hotels.[129] The court defended the legitimacy of the delegation by focusing on provisions in the law that narrowed the scope of the delegation by defining the specific purposes for which the taxes must be used and the

123. FM Props. Operating Co. v. City of Austin, 22 S.W.3d, 868, 875 (Tex. 2000).

124. *Id.* at 874–75.

125. *Boll Weevil*, 952 S.W.2d at 472.

126. Marshall v. N. Va. Transp. Auth., 657 S.E.2d 71 (Va. 2008) (striking down sections of Virginia code as unconstitutional delegations of taxing power. VA. CODE ANN. §§ 46.2–755.1, 46.2–755.2, & 46.2–1167.1).

127. *Id.* at 78.

128. *Id*. at 79–80.

129. Greater Boise Auditorium Dist. v. Royal Inn of Boise, 684 P.2d 286, 286, 290–91 (Idaho 1984).

limit on the amount of the tax that could be imposed.[130] The following year, it used the same framework to uphold a similar delegation of tax authority.[131] One justice dissented from the court's opinion in the latter case and summarized the court's approach in his dissent. According to this justice, the court will uphold delegations of tax power if the law contains:

> (1) clear definitions of *who* could tax and *what* could be taxed; (2) an established *upper tax limit* by which the [agency] could not exceed in imposing a tax; (3) a clear purpose for which the revenues thus earned must be spent; and (4) specific details by which the tax would be administered and collected.[132]

Although this summary of the prevailing doctrine comes from a dissenting opinion, it seems to summarize accurately the factors the Idaho court uses to determine the legitimacy of previous delegations of tax power.

North Dakota takes a stronger stance against such delegations. One notable case extensively cited by other state courts is *Scott v. Donnelly*,[133] in which the North Dakota Supreme Court held that the state legislature could not grant the authority to set excise tax rates on potatoes to a Potato Development Commission appointed by the governor.[134]

These four contexts—*ultra vires*, reference by incorporation, private delegations, and delegations of tax power—present unique circumstances that many state courts treat differently than the conventional nondelegation case, which focuses on the delegation of lawmaking or regulatory power to administrative agencies. Separating these cases and issues from the conventional category allows us to focus more sharply on the narrow set of states and cases where courts have created tests to apply the conventional nondelegation doctrine in that context.

III. DELEGATION OF LAWMAKING OR REGULATORY AUTHORITY

In contrast to the issues discussed in the previous section, the central controversy over the Supreme Court's potential revival of the nondelegation doctrine is Congress's delegation of lawmaking or regulatory authority to

130. *Id.* at 286–90.

131. Sun Valley Co. v. City of Sun Valley, 708 P.2d 147, 147–53 (Idaho 1985).

132. *Id.* at 158 (Bistline, J. dissenting).

133. 133 N.W.2d 418 (N.D. 1965).

134. *Id.* at 426. South Carolina has also addressed the delegation of tax power. *See* Crow v. McAlpine, 285 S.E.2d 355, 358 (S.C. 1981) (finding "an implied limitation [in the state's constitution] 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 . . . this constitutional restriction is violated.").

administrative bodies.[135] Thus, this section provides an extended discussion of the states' doctrines as applied in that context—the "conventional" nondelegation doctrine as Sunstein calls it.[136]

Those looking to the states as models for robust nondelegation doctrines that limit delegations of lawmaking or regulatory authority to administrative agencies will be disappointed. While some state courts imposed strict limits on such delegations through the middle part of the twentieth century, very few do so today. In the states where nondelegation challenges have been successful in recent years, the analysis does not appear very different from the Supreme Court's intelligible principle test.[137] The difference is in how the courts apply the test in practice. In these few states, the test is whether there are adequate standards and procedural safeguards to ensure proper judicial review of administrative rules and provide accountability to the public.

The highest courts of a few states, however, have applied a more workable and specific test to determine whether a statute violates the nondelegation doctrine. In these cases, courts ask whether statutes adequately define an agency's scope of authority by examining whether the persons subject to the agency's authority are carefully identified in the statute. Illinois and Florida, in particular, constructed such tests in recent decades.[138]

Since 1980, when Iuliano and Whittington claim the doctrine went into decline,[139] other states have invalidated statutes on nondelegation grounds, but almost all the statutes at issue appear to have been carelessly crafted and to have contained no limits on agency discretion. They simply authorized an administrative officer or body to exercise authority without any guidance as to the ends to be pursued. This is the case with the decisions from Alaska, New Hampshire, Montana, Oklahoma, and Vermont, discussed below.

This Part begins by briefly describing the prevailing lax approach to nondelegation taken by the vast majority of states. It then focuses on the

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135. *See supra* notes 2–16 and accompanying text; *see also* Redman v. Ohio Dept. of Indus. Rel., 662 N.E.2d 352, 357 (Ohio 1996); *see also* Randolph J. May, *The Nondelegation Doctrine Is Alive and Well in the States*, REGUL. REV. (Oct. 15, 2020), https://www.thereg review.org/2020/10/15/may-nondelegation-doctrine-alive-well-states/ (quoting Midwest Inst. of Health v. Governor, 958 N.W.2d 1, 17 (Mich. 2020) ("[c]hallenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's . . . exercise of the delegated power.")).

136. *See* Sunstein, *supra* note 1, at 317–28 (explaining the "conventional" doctrine relative to the "nondelegation canons" described in the rest of the article).

137. See, for example, the reasoning of the Supreme Court of Pennsylvania in *Blackwell v. Commonwealth State Ethics Commission*, 567 A.2d 630 (Pa. 1989), discussed *infra* Section 8, as well as other cases invalidating statutes for lack of standards discussed *infra* Section 8.

138. *See infra* Section III.B.; *infra* Section III.C.2.

139. *See* Iuliano & Whittington, *supra* note 19, at 632–34.

states where the nondelegation doctrine is applied with some rigor to illustrate the approach state courts take in these cases.

A. The Majority of States: The Conventional Nondelegation Doctrine Is Moribund

Most states apply a weak nondelegation doctrine, similar to that of the U.S. Supreme Court, which simply looks to statutes for vague standards or statements of policy in order to uphold them.[140] While not explicitly using the "intelligible principle" test that the U.S. Supreme Court has adopted, these states' courts use essentially the same approach, however it is denominated. States as varied as Arizona, Arkansas, California, Colorado, Ohio, Kansas, Maryland, Mississippi, Massachusetts, New York, and Utah have followed this approach since the middle of the twentieth century.[141] In many of these states, courts also focus on the procedural safeguards that accompany the delegation in determining whether a statute is constitutional.[142] Some combination of broad standards and procedural safeguards is sufficient to survive nondelegation challenges. In all these states, though, the approach mirrors the U.S. Supreme Court's traditional approach to identifying intelligible principles in regulatory statutes.

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140. *See infra* Section IV.B.

141. *See, e.g.*, State v. Williams, 583 P.2d 251, 253–54 (Ariz. 1978) (en banc); McQuay v. Ark. State Bd. of Architects, 989 S.W.2d 499, 501 (Ark. 1999); People v. Wright, 639 P.2d 267, 271 (Cal. 1982); Monsanto v. Off. of Env't Health Hazard Assessment, 231 Cal. Rptr. 3d 537, 550 (Cal. Ct. App. 2018); Redman v. Ohio Dep't. of Indus. Rel., 662 N.E.2d 352, 355–58 (Ohio 1996); Cap. Care v. Ohio Dep't. of Health, 153 Ohio St. 3d 362, ¶19–34, 2018-Ohio-2284, 787 N.E.2d 1185 (Ohio 2018); Lussier v. Md. Racing Comm'n, 684 A.2d 804, 804–07 (Md. 1996); Belmont v. Miss. State Tax Comm'n, 860 So.2d 289, 292 (Miss. 2003) (en banc); Citizens for Orderly Energy Pol'y v. Cuomo, 582 N.E.2d 568, 572–73 (N.Y. 1991); Salt Lake City v. Ohms, 881 P.2d 844, 847, 852 (Utah 1994); Robinson v. State, 20 P.3d 396, 400 (Utah 2001). While *State v. Williams* involved a successful nondelegation challenge, as discussed above, the court objected because the law at issue in that case adopted United States Department of Agriculture regulations defining welfare fraud by incorporation. *Williams*, 583 P.2d at 255. The Arizona Supreme Court was insistent that in most other contexts the approach to the nondelegation doctrine would be permissive of delegations to administrative bodies. *Id.* at 254. This list is not meant to be comprehensive.

142. See, for instance, People v. Lowrie, 761 P.2d 778, 781–82 (Colo. 1988); Christ v. Md. Dep't of Nat. Res., 644 A.2d 34, 40 (Md. 1994); Powers v. Sec'y of Admin., 587 N.E.2d 744, 748–49 (Mass. 1992); N.H. Dep't of Env't Serv. v. Marino, 928 A.2d 818, 825–26 (N.H. 2007); *In re* Blizzard, 42 A.3d 791, 794–96 (N.H. 2012); Panzer v. Doyle, 680 N.W.2d 666, 684–85 (Wis. 2004).

The Ohio case of *Redman v. Ohio Department of Industrial Relations*[143] is representative.[144] In that case, an oil company challenged a law enacted by the Ohio General Assembly which declared that "[n]o person shall drill a new well . . . without having a permit to do so issued by the chief of the [Ohio] [D]ivision of [O]il and [G]as [(ODOG)]."[145] If a proposed well was to be located in a coal-bearing township, the law required the chief of ODOG to transmit copies of the permit application to the chief of the Ohio Division of Mines (ODM).[146] The chief of ODM was required by law to notify the owner (or lessee) of any "affected mine" of the application, and if that owner (or lessee) objects, to disapprove the application "if in the opinion of the chief [of ODM] the objection is well-founded."[147] In short, the chief of ODM was required by the statute to determine whether there were any "affected mine[s]" and to disapprove of applications if their objections were "well-founded."[148]

Redman Oil Company alleged that these phrases constituted unlawful delegations of legislative power to the chief of ODM.[149] After acknowledging the importance and long history of the nondelegation doctrine in Ohio, the Ohio Supreme Court argued that "a rigid application of the nondelegation doctrine would unduly hamstring the administration of the laws."[150] Therefore, the court concluded, citing a previous case: "A statute does not unconstitutionally delegate legislative power if it establishes, through legislative policy and such standards as are practical, an intelligible principle to which the administrative officer or body must conform and further establishes a procedure whereby exercise of the discretion can be reviewed effectively."[151] After quoting from some general policy statements set forth at the beginning of the statute, the Ohio Supreme Court easily concluded, "[t]hese policy statements establish intelligible principles: the safety of persons; the conservation of property; the maximum utilization, development, and production of coal in an environmentally and economically proficient manner; and the prevention of physical and economic waste."[152] In sum, the Ohio Supreme Court determined that vague statutory goals such as "safety of persons," "prevention of physical and economic waste," and the like were

143. 662 N.E.2d 352 (Ohio 1996).

144. *Id.*

145. *Id.* at 356.

146. *Id.*

147. *Id.*

148. *See id.*

149. *Id.* at 356–57.

150. *Id.* at 357.

151. *Id.* at 358 (quoting Blue Cross of Northeast Ohio v. Ratchford, 416 N.E.2d 614, 618 (Ohio 1980)).

152. *Redman*, 662 N.E.2d at 360.

sufficient to establish that a statute contained intelligible principles and would survive nondelegation challenges.[153]

Ohio's application of the nondelegation doctrine in *Redman* is illustrative of the kind of weak nondelegation doctrine that most states apply to delegations of lawmaking authority to administrative agencies. The remainder of this section discusses the few states that enforce a more robust nondelegation doctrine.

B. Illinois Creates and Abandons a Nondelegation Test

One state is worthy of close attention despite the decline of its nondelegation doctrine into obsolescence. Until approximately forty years ago, the Supreme Court of Illinois was notorious for striking statutes on nondelegation grounds.[154] Thus, Professor Rossi classifies it as a "strong" nondelegation state.[155] Illinois's strong nondelegation test, established in the 1977 case of *Stofer v. Motor Vehicle Casualty Co.*,[156] contained three requirements for any statute facing a nondelegation challenge.[157] To be held valid, statutes had to identify "(1) [t]he 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."[158]

The court also identified principles that should guide the judicial inquiry at each prong of the test. As the court explained:

> (1) The legislature must do all that is practical to define the scope of the legislation, i.e., the persons and activities which may be subject to the administrator's authority . . . . (2) With regard to identifying the harm sought to be prevented, the legislature may use somewhat broader, more generic language than in the first element. It is sufficient if, from the language of the statute, it is apparent what types of evil the statute is intended to prevent . . . . (3) Finally, with regard to the means intended to be available, the legislature must specifically enumerate the administrative tools (e.g., regulations, licenses, enforcement proceedings) and the particular sanctions, if any, intended to be available.[159]

153. *Id.* at 360–61.

154. Louis Jaffe wrote that the Supreme Court of Illinois was "a veritable graveyard of delegation" during the New Deal period. Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 564 (1947). For a useful summary of the approach in Illinois up to the 1970s, see George Bunn, Kathleen Irwin & F. Kyra Sido, *No Regulation Without Representation: Would Judicial Enforcement of a Stricter Nondelegation Doctrine Limit Administrative Lawmaking?*, 1983 WIS. L. REV. 341, 348–51 (1983).

155. Rossi, *supra* note 30 at 1196.

156. 369 N.E.2d 875 (Ill. 1977).

157. *Id.* at 879.

158. *Id.*

159. *Id.*

Applying the test to the facts in *Stofer*, the court upheld an insurance statute from the 1930s that authorized the state's Director of Insurance to promulgate rules to promote uniformity in all basic fire and lightning insurance policies.[160] Two years later, however, in *Thygesen v. Callahan*,[161] the court used the *Stofer* test to invalidate a statute that authorized a Director of Financial Institutions to promulgate maximum rates for check-cashing and writing of money orders.[162] The court found that the statute satisfied the first prong of the *Stofer* test because the statute identified the persons and activities subject to regulation, namely currency exchanges.[163] The statute failed the second part of the test, however, because it did not identify the harm to be prevented.[164] Instead, the statute merely authorized the Director to promulgate "reasonable" rates.[165]

In the same year, the court applied the *Stofer* test in another case, this one involving allocations for municipalities to divert water from Lake Michigan under a rationing system.[166] The court applied the three-part test from *Stofer* and found that the law establishing the rationing system clearly identified the persons subject to regulation, the harm sought to be prevented, and the primary means to be employed.[167] It therefore upheld the allocations against nondelegation challenges from several municipalities.[168]

For reasons that have, to these authors' knowledge, never been fully explained by scholars, the Supreme Court of Illinois retreated to a more permissive test in the years following *Stofer* and *Thygesen*. That test was a generalized "intelligible standards" test that resembles the permissive intelligible principle test used in many states and by the U.S. Supreme Court. The "intelligible standards" test, from the 1966 case *Hill v. Relyea*,[169] merely requires "that intelligible standards be set to guide the agency charged with enforcement . . . and the precision of the permissible standard must necessarily vary according to the nature of the ultimate objective and the problems involved."[170] This test was used to uphold statutes authorizing regulation subject to a vague "public interest" requirement in the 1982 case of *People v.*

160. *Id.* at 880.
161. 385 N.E.2d 699 (Ill. 1979).
162. *Id.* at 701–02.
163. *Id.* at 701.
164. *Id.* at 701–02.
165. *Id.* at 702.
166. Vill. of Riverwoods v. Dep't of Transp., 395 N.E.2d 555, 557, 561 (Ill. 1979).
167. *Id.* at 561.
168. *Id.* at 563.
169. 216 N.E.2d 795 (Ill. 1966).
170. *Id.* at 797 (citations omitted).

Carter,[171] without any mention of the *Stofer* precedent or test.[172] *Stofer* seems to have disappeared as an authority in Illinois delegation cases and the state now applies a looser requirement. Although Illinois can no longer be categorized as a strict nondelegation state, it is nonetheless noteworthy that until recently it had devised and applied a workable, multipronged nondelegation test that policed the outer boundaries of legislative delegations to administrative bodies.

C. Ten "Robust" Nondelegation States

Unlike Illinois, several states continue to enforce a relatively vigorous nondelegation doctrine in the regulatory context. In these states, the nondelegation analysis asks whether statutes contain standards or guidelines that serve to limit agency discretion. Even in these states, however, it is difficult to determine whether the courts have applied the nondelegation doctrine consistently. These states are: Alaska, Florida, Kentucky, New Hampshire, Montana, Oklahoma, Pennsylvania, West Virginia, and Vermont.

1. Alaska

Alaska applies a "sufficient standards" test that requires a statute to contain sufficient standards to withstand scrutiny.[173] In *State v. Fairbanks North Star Borough*,[174] the Supreme Court of Alaska invalidated a gubernatorial impoundment of funds from the legislature's appropriation.[175] The decision was authorized by the state's Executive Budget Act, which enabled the governor to withhold appropriations in the face of a looming budget deficit.[176] The statute was invalidated by Alaska's Supreme Court as "an unconstitutional delegation of legislative power."[177]

171. 454 N.E.2d 189 (Ill. 1982).

172. *Id.* at 191. A delegation of authority to an agency merely to act in the "public interest" is likely as indeterminate as any delegation. Nevertheless, a vague "public interest" delegation has been upheld at the federal level. *See* Nat'l Broad. Co., v. United States, 319 U.S. 190, 216–17 (1943); *see also* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Unconstitutional?*, 53 FED. COMM. L.J. 427, 443–52 (2001) (discussing the legislative history leading to Congress's goals in the Communications Act of 1934 and the urge to have the courts reform the vague public interest standard).

173. Anchorage v. Anchorage Police Dep't Emps. Ass'n, 839 P.2d 1080, 1085 (Alaska 1992) ("A significant component of our analysis of the delegation issue . . . centers on the question whether sufficient standards exist to guide the arbitrator's exercise of the authority delegated by the Assembly.").

174. 736 P.2d 1140 (Alaska 1987).

175. *Id.* at 1144.

176. *Id.* at 1142.

177. *Id.* at 1143.

The court distinguished the broad discretion given to the governor from recent cases in which delegations were upheld.[178] This case was unique, the court claimed, because it was "a delegation of authority over the entire budget," because the law "articulated no principles, intelligible or otherwise, to guide the executive," and because it provided "no policy guidance as to how the cuts should be distributed."[179] In short, Alaska's Supreme Court only held the law invalid because it: (a) dealt with budgetary authority rather than regulatory authority, and (b) contained no guidance or intelligible principles.[180]

In Alaska, most delegations are upheld as long as the law does not grant authority over major policies with little to no guidance. Cases subsequent to *Fairbanks North Star Borough* have upheld delegations if the court can find some statement of purpose or policy in the law, however general.[181] There has not been a wave of litigation on the nondelegation doctrine in Alaska due to the court's decision in *Fairbanks North Star Borough*. Thus, even Alaska's status as a strong nondelegation state should be qualified: the primary precedent for this claim involves the specific question of delegating the power to make fiscal policy, rather than regulatory authority, and it contained no meaningful guiding standards. In most other contexts, Alaska resembles the weak nondelegation states.

2. Florida

Nine states in addition to Alaska—Florida, Kentucky, New Hampshire, Michigan, Montana, Oklahoma, Pennsylvania, West Virginia, and Vermont—have followed this same trend in cases over the past forty years: statutes sometimes ran afoul of the nondelegation doctrine, but these cases are rare, the circumstances were often extraordinary, and the invalidated statutes were typically crafted in extraordinarily vague terms. In Florida, the leading case is *Askew v. Cross Key Waterways*,[182] which invalidated a provision of the state's Environmental Land and Water Management Act that empowered an agency to designate areas of "critical state concern" for environmental protection.[183] Although the statute at issue more closely resembled an ordinary delegation of regulatory power than those analyzed in the other cases noted in this subsection, the Florida Supreme Court's analysis found the statute to be devoid of standards.[184]

178. *Id.*

179. *Id.*

180. *Id.* at 1142–43.

181. *See, e.g.*, Anchorage v. Anchorage Police Dep't Emps. Ass'n, 839 P.2d 1080, 1090 (Alaska 1992).

182. 372 So. 2d. 913 (Fla. 1978).

183. *Id.* at 914, 924.

184. *Id.* at 919.

The court's opinion suggested that one specific feature of the law resulted in its invalidation: "the absence of legislative delineation of priorities among competing areas and resources which require protection."[185] The decision noted similar legislation in other states, but with one critical difference: whereas the other states' statutes defined the geographic areas to be protected in the law, the Florida statute left the scope of the law to the administrative definition.[186] A connection might be drawn between the court's reasoning in *Askew* and the first prong of the Supreme Court of Illinois's test in *Stofer*.[187] In both cases, the law left the agency to determine the scope of the authority granted to it. This resembles delegations of authority to federal agencies, such as the U.S. Fish and Wildlife Service's authority to define the extent of a protected "critical habitat" in the Endangered Species Act.[188] When an agency receives the power to determine the scope of its own authority, these tests suggest that the nondelegation doctrine is especially implicated.

The Florida Supreme Court's reasoning in *Askew* also cited the lack of statutory standards as a reason for striking the statute. As the court concluded, "[w]hen legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law."[189] This more conventional nondelegation analysis was employed to invalidate another Florida statute in the high-profile case of Terri Schiavo.[190] In that case, the Florida Supreme Court invalidated "Terri's Law," which authorized the governor to issue a stay to prevent withholding nutrition and hydration from patients under certain circumstances, on the grounds that the law failed to provide any standards or purposes to guide the governor's discretion.[191]

In another Florida case, *Chiles v. Children A*, [192] decided in 1991, the state's supreme court invalidated a law that authorized the governor to establish an administrative commission to reduce state agencies' operating budgets in order to prevent a deficit.[193] The facts, in other words, were similar to those

185. *Id.*

186. *See id.* at 921–22 (contrasting the statute in *Askew* with statutes from California, Rhode Island, and New Jersey).

187. *See supra* note 159 and accompanying text.

188. Endangered Species Act, 16 U.S.C. § 1533 (1978).

189. *Askew*, 372 So. 2d at 918–19.

190. *See* Bush v. Schiavo, 885 So. 2d 321, 328, 332, 334–35 (Fla. 2004) (detailing the analysis the court employed to reach its conclusion).

191. *Id.* at 336.

192. 589 So. 2d 260 (Fla. 1991).

193. *Id.* at 267–68.

in the Alaska case of *Fairbanks North Star Borough*.[194] As with *Fairbanks North Star Borough*, the Florida court noted that the legislature's power to appropriate state funds was especially legislative and "is to be exercised only through duly enacted statutes."[195]

As one scholar has noted, many Florida laws have been challenged on nondelegation grounds since *Askew*, and some of those challenges have been successful.[196] However, at the same time, the doctrine has not led to wholesale invalidation of major regulatory programs in the state. The Florida Supreme Court continues to acknowledge the need for some delegation, which is possible even within the confines of a relatively strict nondelegation doctrine.[197] In other words, Florida's adoption of a somewhat robust nondelegation doctrine has not led to the hampering of administrative agencies.

3. Kentucky

As Benjamin Silver notes, the Supreme Court of Kentucky recently claimed that "in the area of nondelegation, Kentucky may be unsurpassed by any state in the Union."[198] In a case in 1996, the court invalidated a statutory provision involving billboard regulation by the state's Transportation Cabinet because the underlying provision was "unconstitutionally vague and overbroad."[199] That provision permitted roadside advertising devices that presented "public service information such as time, date, temperature, weather, or similar information."[200] The court declared that "the legislature has given no guidance to the Cabinet by defining the words 'public service information' and 'similar information.' This part of the statute amounts to an unconstitutional delegation of legislative power."[201] This case, *Flying J Travel Plaza v. Commonwealth Transportation Cabinet*,[202] is noteworthy because it involved a statutory delegation that is seemingly narrower in scope than those analyzed in other states in this section. Indeed, the term "public service information" was

194. *See supra* notes 174–180 (discussing State v. Fairbanks North Star Borough).

195. *Chiles*, 589 So. 2d at 265.

196. *See* John E. Fennelly, *Non-Delegation Doctrine and the Florida Supreme Court: What You See is Not What You Get*, 7 ST. THOMAS L. REV. 247 (1995).

197. *See id.* at 256–61 (describing several relevant cases).

198. *See* Silver, *supra* note 19, at 7 (citing Bd. of Trs. of Jud. Form Ret. Sys. v. Att'y Gen. of Commonwealth, 132 S.W.3d 770, 782 (Ky. 2003)).

199. Flying J. Travel Plaza v. Commonwealth Transp. Cabinet, 928 S.W.2d 344, 348 (Ky. 1996).

200. *Id.* at 347.

201. *See id.* at 350.

202. 928 S.W.2d 344 (Ky. 1996).

followed by a list of specific items: "time, date, temperature, weather."[203] Such a provision arguably limits the scope of "public service information" to matters that resemble those specified in the provision.[204]

4. Michigan

Until recently, Michigan has employed a weak nondelegation doctrine.[205] However, in *Midwest Institute of Health, PLLC v. Governor*,[206] the Michigan Supreme Court ruled the Emergency Powers of the Governor Act of 1945 (EPGA) was unconstitutional in its entirety because it "stands in violation of" the Michigan Constitution."[207] The court reached this conclusion by analyzing the scope of the delegation, the duration of the delegation, and the lack of statutory standards to guide the exercise of agency discretion.[208]

It is unclear whether the Michigan Supreme Court's decision in *Midwest Institute of Health* will serve as a foundation for further decisions striking statutes for violating the nondelegation doctrine, or whether the case's unique circumstances will confine the scope of the precedent. Michigan has generally been permissive with regard to the nondelegation doctrine,[209] but in light of *Midwest Institute of Health* we categorize Michigan as a relatively strong nondelegation state.

5. Montana

Montana may be the state with the largest number of statutes invalidated on nondelegation grounds in the past few decades. The Montana Supreme Court invalidated a statute in 1979 because it provided no standards for the

203. *Id.* at 347.

204. *Id.*

205. Greco categorizes Michigan as a loose nondelegation state, while Rossi calls Michigan a moderate state. *See* Greco, *supra* note 30, at 588, 592; *see also* Rossi, *supra* note 30, at 1198–99. Rossi acknowledges, however, that moderate states "do not always require specific standards," and the case he cites from Michigan upheld a delegation of power to a Board of Pharmacy to classify controlled substances. *See id.* at 1199; *see also* People v. Turmon, 340 N.W.2d 620, 622 (Mich. 1983). In other words, Rossi's analysis suggests that Michigan could be considered a relatively lenient nondelegation state, and more recent cases support that designation. *See* Blank v. Dep't. of Corr., 611 N.W.2d 530, 533–35 (Mich. 2000); Oshtemo v. Kalamazoo Cnty. Rd. Comm'n, 841 N.W.2d 135, 137–41 (Mich. Ct. App. 2013).

206. 958 N.W.2d 1 (Mich. 2020). Medical service providers sued the Governor of Michigan and Michigan Department of Health and Human Services Director challenging the Governor's executive order in response to COVID-19. *Id.* at 6–7.

207. *See id.* at 16.

208. *See generally id.* at 17–24.

209. *See* sources cited *supra* note 204.

Department of Business Regulation to apply when ruling on merger applications by savings and loan associations.[210] The statute merely authorized mergers "by and with the consent and approval" of the Department.[211] In striking the statute, the Montana Supreme Court acknowledged that "the trend is away from requiring that statutory standards or guides be specified" in legislation, but announced that "[w]hile this may be the trend under federal law and in some states, it is not Montana's position."[212] In this case, as in the *Schiavo* case in Florida[213] or *In Re Initiative Petition No. 366*[214] in Oklahoma, the statute simply failed to specify any standards. It "provides no standards or guidelines either expressed or otherwise ascertainable," merely requiring the consent and approval of the agency.[215]

The Montana Supreme Court has invalidated several other statutes since 1979. Almost a decade later, the court struck down a statute empowering a Science and Technology Board to make public investments in technology.[216] Although the statute contained an extensive list of criteria to guide the Board in making the investments (including "prospects for collaboration" between public and private sectors, "prospects for achieving commercial success," "job creation potential," and "involvement of existing institutional research strength"), the court claimed that the criteria did not "rise to the level of the objective criteria" contained in other statutes that were held constitutional.[217] Rather, "[t]hey are more akin to general policy considerations underlying the entire technology investment program."[218] While there appeared to be standards limiting the Board's discretion in making the technology investments, the court found them to be too subjective to serve as meaningful limits.[219] The opinion did not explain why these criteria were "policy considerations" rather than "objective criteria," though that distinction seems to have been pivotal in the statute's demise.

Finally, in the 2000 case of *Hayes v. Lame Deer High School District*,[220] the court invalidated a statute delegating authority to county school superintendents to rule on petitions to transfer territory among school

210. *In re* Auth. to Conduct Sav. & Loan Activities, 597 P.2d 84, 90 (Mont. 1979).

211. *Id.* at 86.

212. *Id.* at 89.

213. *See* Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004); *see also* text accompanying notes *supra* 189–190.

214. 46 P.3d 123 (Okla. 2002); *see also* discussion *infra* Section III.C.7.

215. *In re Authority to Conduct*, 597 P.2d at 89.

216. White v. State, 759 P.2d 971, 978 (Mont. 1988).

217. *Id.* at 976.

218. *Id.*

219. *Id.* at 977.

220. 15 P.3d 447 (Mont. 2000).

districts.[221] The law only required the superintendents to consider "the effects that the transfer would have on those residing in the territory proposed for transfer as well as those residing in the remaining territory of the high school district."[222] In the court's view, this broad standard "fails to provide any checks on the discretion of the county superintendent" and provided "no criteria for balancing the effects felt by the parties involved."[223]

Montana's Supreme Court, in brief, has invalidated several statutes on nondelegation grounds over the past few decades. In doing so, it has required not only that statutes contain standards, but that those standards are sufficiently objective that they can be measured and tested to determine whether the agency is following the law. Presumably, this would render some vague statutory phrases such as a "public interest" or "public convenience or necessity" standard vulnerable to nondelegation challenges, but it does not appear that Montana's Supreme Court has invalidated those sorts of provisions.

6. New Hampshire

The New Hampshire Supreme Court invalidated statutes on nondelegation grounds in two cases in the 1980s for a similar lack of sufficiently objective standards. The leading case, *Smith Insurance v. Grievance Committee*,[224] both articulated the test and held unlawful a delegation authorizing an insurance Grievance Committee to "order the insurance company to rescind termination" of an agency agreement between the company and an insurance agent.[225] The statute did not guide the Committee's discretion. It simply established the Committee and declared that it "shall hold hearings on grievances brought by insurance agents relating to termination of their contracts with insurance companies, and the committee may order the insurance company to rescind termination."[226] The court acknowledged the legitimacy of legislative delegations as long as they are accompanied by "a declared policy or a prescribed standard laid down by the legislature."[227] But here the law "neither declare[d] the legislative policies which underlay the enactment of the statute nor establishe[d] standards to guide the Grievance Committee in the exercise of its power."[228] In reaching this conclusion the court laid out a general

221. *Id.* at 451.
222. *Id.*
223. *Id.*
224. 424 A.2d 816 (N.H. 1980).
225. *Id.* at 818.
226. *Id.*
227. *Id.* at 819.
228. *Id.*

statement to guide nondelegation inquiries: the legislature "may not create and delegate duties and powers to an administrative agency if its commands are in such broad terms as to leave the agency with unguided and unfettered discretion in the assigned field of activity."[229]

Six years later, the court invalidated another statute authorizing a Director of Motor Vehicles to suspend or revoke any driver's license "for any cause which he may deem sufficient."[230] The court found that the statute granted this power "without *any* express or implied qualifications, and thus provides no aid for judicial construction."[231] But these broadly worded statutes are the exception, and most delegations are upheld under New Hampshire's relatively permissive test.[232] The court uses the doctrine to police delegations that are entirely standardless, which allows most statutes to survive scrutiny.

7. Oklahoma

Like New Hampshire, Oklahoma's highest court has held laws to be invalid only on rare occasions when no guidance accompanies a delegation to administrative officials. In a curious case from 1982, the Supreme Court of Oklahoma refused to compel the state's Attorney General (AG) to implement provisions of the Oklahoma Campaign Finance Act that the AG deemed unconstitutional.[233] The AG claimed that the law's provisions enabling funding of political parties violated the state constitution's requirement that funds be spent for public purposes.[234]

The court decided that to answer this question, it had to inquire into "the policy of the law as declared by the legislature" as well as "the standards to be followed by an agency in carrying out the policy."[235] But the law was deemed to contain no policy or standards; thus, "[t]he fundamental function of policy-making has been left by the Act to unbridled agency discretion. Power so to be exercised by an agency does not rest on constitutionally firm underpinnings."[236] The court determined that the case was "not presently justiciable" because "[a]bsent a declared policy with effective agency rules fashioned pursuant to a lawfully delegated authority, the Act is unfit for

229. *Id.* (internal citations and ellipses omitted).

230. Guillou v. State, 503 A.2d 838, 838 (N.H. 1986).

231. *Id.* at 840.

232. *See, e.g.*, N.H. Dep't of Env't Serv. v. Marino, 928 A.2d 818, 826 (N.H. 2007); *In re* Blizzard, 42 A.3d 791, 795, 797 (N.H. 2012).

233. Democratic Party of Okla. v. Estep, 652 P.2d 271, 278 (Okla. 1982).

234. *Id.* at 273.

235. *Id.* at 276.

236. *Id.* at 277.

implementation."[237] The court's opinion in *Estep* did not clearly identify the nondelegation doctrine as the reason for invalidating the statute. Rather, it used the nondelegation doctrine to conclude that the law's purposes cannot be gleaned, making the case nonjusticiable.

The Supreme Court of Oklahoma applied the nondelegation doctrine more conventionally in a 2002 case, *In re Initiative Petition No. 366*.[238] The case involved an initiative to designate English as Oklahoma's official language and require the use of English on all state documents and in state meetings and publications.[239] The petition contained an exception for educational institutions and granted rulemaking authority to the state's Board of Education and Board of Regents to implement that exception.[240] The court declared the petition invalid because, inter alia, the rulemaking authority violated the nondelegation doctrine.[241] While the petition's language authorized the rulemaking "to promote the following principles," no principles were articulated.[242] The petition, in the court's terse analysis, "fails to provide any principles."[243] With no principle or policy to guide the state's education officials in making rules regarding the state's official language, the court concluded, the law "leaves the fundamental policy-making function to the unbridled discretion of the State Board of Education and the Board of Regents for Higher Education."[244]

The court's analysis in *In re Initiative Petition No. 366* suggests that a statute delegating authority with no statement of policy or standards whatsoever will be vulnerable to a nondelegation challenge. Statutes containing even vague policy statements or standards, however, are commonly upheld.[245] Like New Hampshire's, Oklahoma's nondelegation doctrine is only employed rarely to strike statutes containing no intelligible principles at all.

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237. *Id.* at 278.

238. 46 P.3d 123 (Okla. 2002).

239. *Id.* at 125.

240. *Id.*

241. *Id.* at 129.

242. *Id.* at 128.

243. *Id.* at 128. The court appears to have been correct on this point. The grant of rulemaking authority "to promote the following principles" is the end of the section. *Id.* at 130. A preamble to the first section of the petition does announce a policy "to encourage every citizen of this state to become more proficient in the English language, thereby facilitating participation in the economic, political, and cultural activities of this state and of the United States," but that language did not "follow" the grant of rulemaking authority so is likely not among the "following principles" referred to in the section granting the authority. *Id.*

244. *Id.* at 129.

245. *See, e.g.*, Nelson v. Nelson, 954 P.2d 1219 (Okla. 1998); Tulsa Cnty. Deputy Sherriff's Fraternal Ord. of Police, Lodge No. 188 v. Bd. of Cnty. Comm'rs of Tulsa Cnty., 995 P.2d 1124 (Okla. 2000).

8. Pennsylvania

In similar fashion, the Supreme Court of Pennsylvania has articulated a standard for nondelegation cases that looks for adequate standards to guide agency discretion: "While the General Assembly may, with adequate standards and guidelines, constitutionally delegate the power and authority to execute or administer a law, the prohibition against delegation of 'legislative power' requires that the basic policy choices be made by the General Assembly."[246]

In the 1989 case from which this statement is drawn, *Blackwell v. Commonwealth State Ethics Commission*,[247] the court invalidated a state law sunsetting the state's ethics commission.[248] The law established a leadership committee (composed of members of the Pennsylvania General Assembly) and authorized it to postpone the sunsetting of any agency "if necessary."[249] Because the sunset law did not contain "adequate standards and guidelines" directing the leadership committee's discretion, it was "pure and simple, an unconstitutional exercise of the legislative power to make and enact laws."[250] Language authorizing an administrative body to do something "if necessary" did not have the effect of making the policy choice.[251] It did, however, fail to provide a standard, thereby leaving the administrators to make the policy choices.[252]

In 2005, the Supreme Court of Pennsylvania invalidated a law that established a Gaming Control Board but did not provide any standards to guide the use of its discretion.[253] The Board was authorized to preempt local zoning regulations, but it could "in its discretion consider such local zoning ordinances when considering an application for a slot machine license."[254] It was required to notify localities about applications, provide a sixty-day comment period, and consider "recommendations" from the locality regarding "impact on the local community" and "land use and transportation impact."[255]

Quoting *Blackwell*, the court granted that the state legislature could legally "delegate authority and discretion in connection with the execution and administration of a law; it may establish primary standards and impose upon

246. Blackwell v. Commonwealth State Ethics Comm'n, 567 A.2d 630, 637 (Pa. 1989) (citations omitted).

247. 567 A.2d 630 (Pa. 1989).

248. *Id.* at 637.

249. *Id.* at 635.

250. *Id.* at 637.

251. *Id.* at 635–37.

252. *Id.* at 637.

253. *See* Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d. 383 (Pa. 2005).

254. *Id.* at 415.

255. *Id.*

others the duty to carry out the declared legislative policy in accordance with the general provisions of the enabling legislation."[256] The court also cited numerous instances of delegations that were upheld under this standard. In this case, however, the law "allows the Board in its discretion to consider local zoning ordinances" but "the Board is not given any guidance as to the import" of those ordinances.[257] The law did not tell the Board what to do with the input that it received from local authorities, or even what general policy priorities to weigh in the consideration. The provision was therefore held invalid as a standardless delegation.[258]

9. West Virginia

West Virginia invalidated several laws over the past few decades on nondelegation grounds, but most of the cases came with a twist: the legislature gave power to the judiciary, not to an administrative agency. For example, in 1995 the Supreme Court of Appeals of West Virginia invalidated a law that authorized state circuit courts to issue concealed carry permits, citing several previous cases also involving delegations to the judiciary.[259] "In view of these holdings," the court declared, there was a well-settled "policy of strong adherence to the several constitutional provisions relating to the separation of powers . . . and particularly as to the jurisdiction of courts."[260] The court was concerned that the legislature authorized the judiciary to perform the ministerial task of issuing permits. As it explained, the law provides "nothing more than a judicial endorsement of a license application."[261] It "eviscerate[s] any judicial discretion when it compels the granting of the license if all qualifiers on the application are satisfied."[262] The court did not object to the lack of intelligible principles or standards in the legislation, but to the fact that the power given to the judiciary was not judicial in character.[263]

256. *Id.* at 417 (citing *Blackwell*, 567 A.2d at 636–37).
257. *Id.* at 418–19.
258. *Id.* at 419.
259. *In re* Dailey, 465 S.E.2d 601, 610–11 (W. Va. 1995).
260. *Id.* at 605.
261. *Id.* at 608.
262. *Id.* at 609.
263. *Id.* at 601.

In 1982, West Virginia's highest court struck down a law that granted the state's Public Service Commission the power of contempt.[264] But in doing so, the court emphasized the narrowness of its holding, stating:

> [w]e recognize that the Legislature may create an administrative agency and give it quasi-judicial powers to conduct hearings and make findings of fact without violating the separation of powers doctrine . . . . [In previous cases] we recognized that from a practical standpoint, it was often impossible to maintain a complete separation between the three branches of government.[265]

The court distinguished the contempt power from other powers that may be lawfully delegated to administrative bodies.[266] But transferring the contempt power, the court reasoned, was "a direct and fundamental encroachment by one branch of government into the traditional powers of another."[267] In effect, the nondelegation doctrine is imposed with some frequency to invalidate statutes in West Virginia, but only in relatively narrow circumstances that are not typical of delegations of regulatory power to administrative agencies.

10. Vermont

Vermont presents the most curious case of the ten (by this Article's count) states in which the nondelegation doctrine is still relevant in the lawmaking or regulatory context. Prior to 2000, Vermont could rightfully be classified as a weak nondelegation state.[268] In 2000, the Vermont Supreme Court decided *In re Handy*,[269] which invalidated a law that forbade town administrators, without the written consent of the town's legislative body, from issuing permits during a "pendency period" between the date of public notice of proposed amended zoning bylaws and their date of effect.[270] The court claimed that the law gave "town selectboards unbridled discretion to decide whether to review applications under the old or new zoning bylaws, with no standards to limit the exercise of that discretion."[271] *In re Handy*, however, does not appear to portend a resurgence of the nondelegation doctrine in Vermont and was most likely attributable to unique circumstances.

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264. Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va., 296 S.E.2d. 887, 892 (W. Va. 1982).

265. *Id.* at 889.

266. *Id.* at 889–90.

267. *Id.* at 889.

268. Greco classified Vermont as a loose standards case in 1994. *See* Greco, *supra* note 30, at 596. In support he cited the Vermont Supreme Court's decision in *Rogers v. Watson*, 594 A.2d 409 (Vt. 1991), which upheld a broad delegation to the state's Board of Health to regulate "all matters relating to the preservation of the public health."

269. 764 A.2d 1226 (Vt. 2000).

270. *Id.* at 1230.

271. *Id.*

IV. IMPLICATIONS

A. Differences in the Scholarly Assessments

To summarize: ten states (Alaska, Florida, New Hampshire, Kentucky, Michigan, Montana, Oklahoma, Pennsylvania, West Virginia, and perhaps Vermont) have enforced the nondelegation doctrine against legislative or regulatory delegations relatively robustly in the past several decades (since 1980).[272] With the possible exception of the Florida Supreme Court's decision in *Askew*,[273] the decisions in these state courts do not devise elaborate tests to distinguish permissible and impermissible delegations. Rather, they approach the doctrine in a similar manner to the U.S. Supreme Court's "intelligible principle" test, even though the articulation of their tests may not be precisely the same. They look to see if statutes provide adequate standards and policy guidance, so that the policy is established by the legislature, and the administrative agency is simply tasked with implementing that policy. This is still the reigning approach at the national level, but these state courts put teeth into the test, striking statutes on the outer edges, in which the law provides no standards or guidelines whatsoever.

The list of states where nondelegation is currently (relatively) robust bears some similarity to the states listed by Professors Greco and Rossi, but there are important differences.[274] Seven of the ten states categorized as relatively strong nondelegation states in this Article are similarly categorized by Greco and Rossi (Florida, New Hampshire, Kentucky, Montana, Oklahoma, Pennsylvania, and West Virginia). Two of the states categorized by Rossi and Greco as weak nondelegation states—Alaska and Vermont—have invalidated statutes on nondelegation grounds in the last forty years and are thus categorized here as strong nondelegation states.

The remaining states Greco and Rossi classify as strong nondelegation states are, for various reasons explained above, classified in this Article as weak states. Either, as in the cases of New York, South Carolina, and Texas, their leading nondelegation precedents are not actually nondelegation cases in the strict sense, or, as in the cases of Massachusetts, Nebraska, Nevada, Ohio, and Virginia, they were previously mischaracterized as strong by relying on precedents that did not actually invalidate statutes. Illinois, as discussed above, is wrongly classified by Rossi as a strong nondelegation state, because the state's highest court has retreated significantly from applying a strict approach to the doctrine since the 1970s.[275]

272. *See supra* Section III.C.

273. *See supra* notes 182–186.

274. *See supra* Section A.

275. *See supra* Section B.

Table 2 presents this Article's alternative classification of states based on cases decided since 1980. The first category contains states where the traditional nondelegation doctrine has been applied at least once to invalidate a statute. The second category contains states where the nondelegation doctrine has been applied to invalidate statutes in more narrow contexts such as private delegations, the tax power, or *ultra vires* questions. The first two categories are not mutually exclusive. A state might be both a relatively strong nondelegation state and also apply its nondelegation doctrine more strictly in specific contexts such as delegation to private actors. The third category contains weak nondelegation states.

Table 2: New Classification of State Nondelegation Doctrines

(Relatively) Strong Nondelegation States	Targeted Nondelegation States	Weak Nondelegation States
Alaska, Florida, Kentucky, Michigan, Montana, New Hampshire, Oklahoma, Pennsylvania, West Virginia, Vermont	Arizona, Idaho, Kansas, Louisiana, New York, North Dakota, South Carolina, Texas, Virginia, Wisconsin	Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Indiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Washington, Wyoming

B. Implications for Our Understanding of the Application of State Nondelegation Doctrines

This survey of the state nondelegation doctrines leads to three important conclusions. First, it suggests that the Supreme Court, in order to enforce the Constitution's separation of powers more faithfully, need not construct an elaborate new test to apply the nondelegation doctrine. Rather, the Supreme Court could put teeth into the nondelegation doctrine by more rigorously applying its existing precedents.

In *Schechter Poultry Corp. v. United States*,[276] for instance, without referring to the "intelligible principle" test established less than a decade earlier in the *J.W. Hampton, Jr.* decision,[277] the Supreme Court simply asked whether Congress's statute "has itself established the standards of legal obligation, thus performing its essential legislative function," or whether it has failed "to enact such standards" and "attempted to transfer that function to others."[278] The Supreme Court could abandon the "intelligible principle" language of *J. W. Hampton* in future cases, and follow *Schechter*'s formulation, which asks whether the relevant statute provides any guidance or standards to the agency. This would mimic the inquiry adopted in states such as Florida, Kentucky, Montana, Pennsylvania, Oklahoma, and Vermont.[279]

Alternatively, the Court can continue to apply the "intelligible principle" test, but apply it more robustly, as several of the strong nondelegation states described in this Article have done. However, there does not appear to be any material difference between an "intelligible principle" test and *Schechter*'s requirement that statutes contain adequate guidance or standards. It is not the name of the test that matters, but the way in which it is applied, that determines how a state is categorized.[280]

Second, these states suggest that reinvigorating the nondelegation doctrine would not lead to apocalyptic results. None of the states discussed in this section have hamstrung their governments by applying the doctrine more rigorously.[281] The doctrine has been used to strike the most egregious statutes rather than invalidate the majority, or even a sizeable portion of their regulatory programs. One recent empirical study finds little correlation between robust nondelegation doctrines and legislative drafting in the states.[282] Even in those states where the nondelegation doctrine has been used to strike statutes on multiple occasions over the past few decades, the state legislatures have not adjusted their behavior significantly.[283] As Daniel Walters shows in his forthcoming article on the state nondelegation doctrine, the evidence in the states suggests that even if the Supreme Court reinvigorates the

276. 295 U.S. 495 (1935).

277. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

278. *Schechter Poultry Corp.*, 295 U.S. at 530.

279. *See supra* Section C.

280. This is consistent with Walters's argument in his recent article on the state nondelegation doctrine. *See* Walters, *supra* note 19.

281. *See supra* Section C.

282. Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J.L. ECON. & ORG. 27 (2018).

283. Walters, *supra* note 19, at 36–37 (suggesting that state legislative behavior is unmoved by the stringency of the nondelegation doctrine).

nondelegation doctrine, it "will not fundamentally change anything about how courts approach the problem of delegation."[284]

Third, there does not seem to be an "ideological" nature to nondelegation challenges at the state level. The states where nondelegation challenges are successful in the lawmaking or regulatory context are not predominantly small or large, nor rural or urban, nor predominantly Democratic or Republican. Although it is common for legal scholars to claim that the use of the nondelegation doctrine is "all so transparently partisan," and that "by design [it] will frustrate Democratic efforts to govern," the history of the doctrine at the state level supplies evidence to refute such claims.[285] One study finds no relationship between such factors as the size of a state's economy or population and the robustness of its nondelegation doctrine, and a minor, statistically insignificant correlation between a state's political leaning and its nondelegation doctrine. Thus, the study concluded that "the same nondelegation regime, weak or strong, exists in roughly the same measure in different types of states, rich or poor, liberal or conservative, large or small."[286]

Most nondelegation challenges at the national level involve the delegation of lawmaking or regulatory authority to administrative agencies. In these types of cases at the state level, the conventional nondelegation doctrine appears in most cases to be not "alive and well"[287] but dead or on life support. The analysis in these states—all but ten, in this Article's analysis—tends to follow the same path as the Supreme Court's intelligible principle test: if the statutory provision at issue contains even vague standards or guidelines (or in many cases, merely procedural safeguards) to constrain the agency's discretion, it will be upheld.

That is not to say that the state courts' interpretations of their own state nondelegation doctrines afford no guidance to the Justices on the Supreme Court. They illustrate that a test that requires statutory standards does not have to be a dead letter. As explained above, some states have put teeth into the test, and have struck statutes that provide no guidance to administrative agencies.[288] Moreover, those states where the nondelegation doctrine continues to be enforced have not experienced incapable or inefficient government. If anything, the application of the nondelegation

284. Walters, *supra* note 19, at 3.

285. Nicholas Bagley, *A Warning From Michigan*, ATL. (Oct. 7, 2020), https://www.theatlantic.com/ideas/archive/2020/10/america-will-be-michigan-soon/616635/.

286. Stiglitz, *supra* note 282, at 34.

287. Iuliano & Whittington, *supra* note 19 at 620.

288. As Rossi explains, "[d]espite the doctrinal similarities" between the state and federal tests, many "state courts are much more likely to strike down statutes as unconstitutional than their federal counterparts." Rossi, *supra* note 30, at 1200. In other words, the doctrines are the same but are applied more strictly by the states.

doctrine at the state level should reassure those who are afraid that, in Justice Kagan's words, a revived doctrine means that "most of [g]overnment is unconstitutional."[289]

CONCLUSION

A change in the Supreme Court's approach to the nondelegation doctrine likely is on the horizon. Many scholars and commentators have suggested that this change would be momentous. Some even suggest that it would hamstring modern government fundamentally. Much of this response is based on a fear of the unknown since we have never witnessed a period in which the Supreme Court routinely, or even more than sporadically, enforced a conventional nondelegation doctrine by invalidating statutory delegations of power to administrative agencies.

To get a better sense of what a reinvigorated nondelegation doctrine might mean in practice, it is helpful to examine the current status of the nondelegation doctrine in the states. Although a more robust nondelegation doctrine is enforced in some states today, it has not dramatically affected the daily operation or functioning of government in these states. Nor has the application of the nondelegation doctrine mainly mirrored partisan or ideological divisions.

Finally, as other recent authors have observed, the specific doctrine a court adopts, or how it labels the doctrine, is less significant than how that doctrine is applied and enforced in practice. Indeed, in many of the states that, in practice, have relatively robust nondelegation doctrines, the test employed resembles the Supreme Court's current "intelligible principle" test. But in these states, the courts take the test to mean that legislation actually must set forth sufficiently specific standards that, intelligibly, provide guidance to the agencies granted authority.

289. Gundy v. United States, 139 S. Ct. 2116, 2130 (2019).