

# Decoding Nondelegation After *Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting

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# DECODING NONDELEGATION AFTER *GUNDY*: WHAT THE EXPERIENCE IN STATE COURTS TELLS US ABOUT WHAT TO EXPECT WHEN WE'RE EXPECTING

Daniel E. Walters\*

## ABSTRACT

*The nondelegation doctrine theoretically limits Congress's ability to delegate legislative powers to the executive agencies that make up the modern administrative state. Yet, in practice, the U.S. Supreme Court has, since the New Deal, shied away from enforcing any limits on congressional delegation. That may change in the near future. In Gundy v. United States, the Court narrowly upheld a delegation, and a dissent signaled deep doubts about the Court's longstanding "intelligible principle" standard and offered a new framework to replace it. Subsequent events strongly suggest that the Court is poised to move in the direction contemplated by the dissent in Gundy, drawing a line between policy discretion, which cannot be delegated, and authority to fill up details or find facts triggering policies, which can be. Whether observers' view of the prospect of Court-imposed limits on delegation is apocalyptic or euphoric, virtually everyone expects such limits to be highly consequential.*

*While these opinions about the nondelegation doctrine are understandable, they are ultimately speculative. This Article offers a more data-driven evaluation of what implementation of the Gundy dissent's line drawing would portend for administrative law. Using the underexamined laboratory of the nondelegation doctrine in the states, where the doctrine has always had more life than at the federal level, this Article shows that states that adhere closely to the lines drawn by the Gundy dissent are no more or less likely to invalidate statutes passed by state legislatures than states that adhere to the intelligible principle formulation. The lack of a relationship between doctrinal formulation and outcomes suggests we will only know whether a revolution is afoot based on what the Supreme*

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*Court actually does over a series of cases, not on what it says it is going to do. Moreover, the research findings suggest significant limitations on the ability of the Gundy dissent’s approach to provide any ex ante guidance to the lower courts, or even future Supreme Courts, about what the nondelegation doctrine prohibits—an observation that suggests significant logistical and institutional problems inherent in the entire project of resuscitating the doctrine.*

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## INTRODUCTION

Before *Gundy v. United States*,<sup>1</sup> the nondelegation doctrine was little more than an academic topic—the perfect device for teaching second- and third-year law students about the formative choices that had been made long in the past to enable the development of the modern administrative state. On paper, the doctrine stands for the proposition that Congress may not delegate any of the legislative power vested in Congress to any other actor, including the countless administrative agencies that make up our de facto fourth branch of government.<sup>2</sup> However, that paper requirement has only been observed in the breach. As a leading casebook proclaims, “[i]n some sense, the entire field known as ‘administrative law’ represents the efforts of courts and legislatures to come to terms with [the] fact” that the Court would not stand in the way of broad delegations of policymaking authority from Congress to administrative agencies.<sup>3</sup> Some never quite stopped believing that the nondelegation doctrine would yet bear fruit for opponents of the growing regulatory state. Legal scholar Gary Lawson famously described the nondelegation doctrine as “the Energizer Bunny of constitutional law: No matter how many times it gets broken, beaten, or buried, it just keeps on going and going.”<sup>4</sup> In point of fact, though, other than in two outlier cases in 1935,<sup>5</sup> the federal nondelegation doctrine has never been invoked to invalidate any federal statute delegating power to an agency, and it was, until quite recently, described as “dead.”<sup>6</sup>

After *Gundy*, all of that changed. Although the Court’s decision fit with the larger historical pattern of failed nondelegation challenges, there was

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<sup>1</sup> 139 S. Ct. 2116, 2121 (2019) (rejecting a nondelegation challenge to a provision in the Sex Offender Registration and Notification Act (SORNA)).

<sup>2</sup> *Id.* (“The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.”).

<sup>3</sup> RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JODY FREEMAN, *ADMINISTRATIVE LAW: CASES & MATERIALS* 16 (8th ed. 2020).

<sup>4</sup> Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002); *see also* Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL’Y 87, 89 (2010) (noting the “remarkable durability” of the nondelegation doctrine despite a remarkably bad track record).

<sup>5</sup> *Pan. Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>6</sup> Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 839 (1997); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 419 (2015); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 145 (2005). One could fill an entire volume collecting observations about the vitality of the doctrine. I’ll add a new one: it has essentially been a zombie doctrine since 1935. *Cf.* *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., dissenting) (claiming that *Auer* deference, which concerns deference to agency interpretations of their own ambiguous regulations, had been “zombified”).

considerably less consensus than the last time the Court decided a nondelegation case.<sup>7</sup> Speculation about where the Court might be going on nondelegation has since reached a fever pitch. It started with Justice Gorsuch's dissent in the case.<sup>8</sup> Not only did Justice Gorsuch make clear that his views on nondelegation had not changed a bit since his elevation to the Court,<sup>9</sup> and not only did he apparently persuade three of his colleagues<sup>10</sup>—including the generally cautious Chief Justice Roberts—of the righteousness of his cause,<sup>11</sup> but he also appeared to overcome one of the most significant barriers to a return of the nondelegation doctrine by articulating what appears to be a relatively justiciable three-part test to replace the capacious “intelligible principle” standard.<sup>12</sup> While Justice Kavanaugh did not participate in *Gundy*, he later indicated that he too was persuaded by Justice Gorsuch's dissent, bringing the count of interested justices to five.<sup>13</sup> With the passing of Justice Ginsburg and her replacement by Justice Barrett, who is likely sympathetic to Justice Gorsuch's views as well,<sup>14</sup> the “Energizer Bunny” seems like it might actually power a revolution this time around. All of this has left the field of administrative law in a state of debilitating

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<sup>7</sup> The Court had unanimously upheld a delegation of authority to the U.S. Environmental Protection Agency to set National Ambient Air Quality Standards at a level requisite to protect public health in *Whitman v. American Trucking Associations*, 531 U.S. 457, 486 (2001). In *Gundy*, the Court upheld the delegation to the Attorney General in SORNA by a vote of five to three, with a narrow concurrence from Justice Alito that indicated substantial sympathy for the dissent's position. *Gundy v. United States*, 139 S. Ct. 2116, 2121, 2130–31 (2019).

<sup>8</sup> *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

<sup>9</sup> See *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting) (arguing that the provision later reviewed in *Gundy* was unconstitutional as a “delegation of legislative authority”).

<sup>10</sup> Although Justice Alito did not join the dissent, and in fact voted with the majority to uphold the statute, he nevertheless indicated his sympathy for Justice Gorsuch's skepticism of congressional delegation. See *Gundy*, 139 S. Ct. at 2130–31 (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But . . . it would be freakish to single out the provision at issue here for special treatment.”).

<sup>11</sup> *Id.* at 2131 (Gorsuch, J., dissenting).

<sup>12</sup> *Id.* at 2135–37. See generally Jonathan Hall, Note, *The Gorsuch Test: Gundy v. United States, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 201–02 (2020) (discussing what Hall calls “the Gorsuch test”). The “intelligible principle” standard has been the go-to articulation of the doctrine since the 1920s and has been interpreted to impose almost no limits on Congress's ability to delegate. See *Gundy*, 139 S. Ct. at 2129 (plurality opinion) (explaining the intelligible principle test and opining that the standard is “not demanding”). What fundamentally distinguishes the intelligible principle formulation from Justice Gorsuch's preferred test, discussed *infra* notes 113–121 and accompanying text, is the idea that Congress need only provide a “general policy” and some “boundaries” on the discretion of the agency. See *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (explaining it is constitutionally sufficient for Congress to clearly delineate a public agency's general policy and boundaries).

<sup>13</sup> *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring).

<sup>14</sup> At the very least, Justice Barrett is likely to embrace “more targeted delegation-based arguments”—particularly those involving emergency suspensions of otherwise applicable laws. See Jonathan H. Adler, *Amy Coney Barrett's “Suspension and Delegation,”* VOLOKH CONSPIRACY (Oct. 18, 2020), <https://reason.com/volokh/2020/10/18/amy-coney-barretts-suspension-and-delegation/>.

limbo: will the modern administrative state survive a reinvigorated nondelegation doctrine?

This Article swims against the current in arguing that the changes in doctrinal formulation envisioned by a possible majority of the Court in and of themselves will not fundamentally change anything about how courts approach the problem of delegation.<sup>15</sup> This counterintuitive position is data-driven: this Article looks to the experience in state courts, where versions of Gorsuch's alternative test have been implemented in hundreds of cases analyzing the propriety of delegations of legislative power under state law, for evidence of how a changed approach in federal court might pan out.<sup>16</sup> At the state level, unlike in the federal courts, there is substantial variation in outcomes within and across states, making them a living laboratory for studying the likely impacts of an invigoration of the nondelegation doctrine at the federal level.<sup>17</sup> But this Article finds that the form of the doctrinal test or standard is not a predictor of these outcomes.<sup>18</sup> Moreover, none of the doctrinal formulations of the nondelegation doctrine has constrained massive changes over time in the pattern of decision-making in state courts as courts adjust to the conditions of a modern economy and a correspondingly more powerful state regulatory apparatus.<sup>19</sup> While this Article finds that, consistent with other studies of state cases, nondelegation challenges are far more likely to succeed across the board in state court,<sup>20</sup> this likely represents a kind of equilibrium in the distribution of power between the federal and state governments, not some kind of qualitatively different approach to the nondelegation doctrine.<sup>21</sup> Many states have a standard as liberal as the intelligible principle standard of the federal courts, insofar as they permit the delegation of policymaking discretion. Many other states, however, purport to draw a far more formalistic line between legislative and executive power, or permit only the delegation of discretion to determine "details" rather than "policies." No matter what approach state courts take to the

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<sup>15</sup> To be sure, other scholars have expressed general skepticism about how far reaching a revival of the nondelegation doctrine might be. *See, e.g.,* Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 88 GEO. WASH. L. REV. (forthcoming 2021) (manuscript at 5) (on file at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3863501](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3863501)); Jonathan H. Adler & Christopher J. Walker, *Nondelegation for the Delegates*, 43 REGUL. 14, 15 (2020) ("If the Court's practice with other revived constitutional doctrines is any guide, it may take more to curb delegation's reach."); Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 WIS. L. REV. 141, 147 (2020) (arguing for six possible futures in which the Court accomplishes little in the way of curbing delegation). However, this article is unique in taking a data-driven approach to the question.

<sup>16</sup> *See infra* Part II.

<sup>17</sup> *See infra* fig.3.

<sup>18</sup> *See infra* tbl.1, fig.4 & fig.5.

<sup>19</sup> *See infra* fig.2.

<sup>20</sup> *See infra* fig.2.

<sup>21</sup> *See infra* Parts II.D & III.A.

nondelegation problem, though, they converge on a fairly stable and meager invalidation rate, particularly in recent years.

These data points carry several lessons pertinent to the ongoing debate over the future of the nondelegation doctrine. The allure of Justice Gorsuch's dissent is its promise to provide a clear test for impermissible delegations of the legislative power, and one that promises to vindicate certain policy concerns and values that are otherwise allegedly unenforced by the current intelligible principle standard's permissiveness. Others have argued, though, that Justice Gorsuch's benchmarks look better on paper than they do in practice.<sup>22</sup> For instance, focusing on whether Congress has made all of the relevant policy questions and left only "details" for the agency to fill up raises the question of how one defines policies and differentiates them from details.<sup>23</sup> And much the same can be said about the criterion of allowing executive agencies to make the determination about whether a factual predicate to the operation of a rule otherwise set by Congress has occurred: one must then ask what factfinding is and whether it can be sequestered from policymaking.<sup>24</sup> The experience in the states provides more reason to suspect that Gorsuch's test is underspecified and unlikely to lead to consistent determinations—instead, other factors, such as ideology and the institutional capital of the Court, would be likely to do the heavy lifting.<sup>25</sup>

This, in turn, raises questions about what instituting the test would accomplish. The experience in the states suggests that Justice Gorsuch's test, as underdefined as it is, is unlikely to realize many of the benefits of hard-edged rules.<sup>26</sup> In the states, review remains irreducibly stochastic, subject to massive historical fluctuations, and ultimately perhaps unpredictable for legislators seeking to draft compliant statutes. These features of the doctrine undermine the

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<sup>22</sup> See Hall, *supra* note 12, at 202–06 (collecting practical concerns unaddressed by Justice Gorsuch's *Gundy* dissent).

<sup>23</sup> *Id.* at 211–12 ("The line between 'policy' and 'details' can be so easily blurred as to render the distinction almost unenforceable."); see also Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 82 (1985) (noting the distinction between vague and specific conferrals of authority is "not without its own difficulty" even though "the antidelegation commentary views the distinction as nonproblematic").

<sup>24</sup> Lawson, *supra* note 4, at 365 (describing the holding in *Field v. Clark*, 143 U.S. 649 (1892), in which the Court purportedly applied the basic rule that contingent legislation is constitutional to a tariff statute that was triggered by an executive factfinding that there were "unequal" or "unreasonable" trade restrictions imposed by another country but refused to explain how one can simply "find[]" that these conditions were present without divining the line between executive and legislative power).

<sup>25</sup> To be sure, it is a separate question of what drives court decision-making if not doctrine, and this Article only begins to scratch the surface of that inquiry. See *infra* notes 202–04.

<sup>26</sup> See *infra* Part III.



kind of structured dialogue between the Court and Congress that could lead to systemic changes in how the separation of powers system works. Instead, the uncertainty inherent in an invigorated nondelegation review suggests that the only impact such review could be expected to produce would be to provide occasional symbolic shocks to Congress. While this kind of “shot across the bow” approach might not be meaningless,<sup>27</sup> it represents a far less ambitious, and potentially much more dysfunctional, constitutional project. As such, these limitations suggest a rethinking may be in order about whether the juice is worth the squeeze when it comes to the nondelegation doctrine.

This Article begins in Part I with a review of the federal nondelegation cases, the arguments for and against the modern approach to nondelegation, and the *Gundy* decision’s injection of uncertainty. Part II turns to the states, building on recent work on the operation of state administrative law to draw insights for federal administrative law. It presents analysis of an original panel dataset of state nondelegation cases from the mid-1800s to present day that shows the impacts of doctrine both across and within states over time. Part III then draws lessons for contemporary debates over the nondelegation doctrine. In the end, this Article concludes that the project of giving life to the nondelegation doctrine would be more work than its supporters have often suggested.

## I. THE “NEVER-ENDING HOPE”

For many, invigoration of the nondelegation doctrine is a “never-ending hope.”<sup>28</sup> It is never-ending because, for nearly a century, the Supreme Court has refused to strike any delegation of legislative power to executive agencies. It is a hope because, according to critics of this state of affairs, breathing life into the doctrine might mean the return of a Constitution supposedly in exile since the New Deal.<sup>29</sup> But, almost invariably, the Court has disappointed those who wish to see it meaningfully constrain the growth of administrative power. This Part synthesizes caselaw and commentary on the nondelegation doctrine to underscore the burgeoning debate over the doctrine’s future and the need for the proponents of a renewed doctrine to articulate justiciable standards that cut

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<sup>27</sup> In parallel research, Elliott Ash and I explore how strong an effect the nondelegation doctrine has on state legislative behavior and we tentatively find that there is a statistically detectable effect on the propensity to delegate, though the effect is substantively quite small. See Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional Abdication* (Oct. 21, 2021) (unpublished manuscript) (on file with author).

<sup>28</sup> Kristin E. Hickman, *Gundy, Nondelegation, and Never-Ending Hope*, *REGUL. REV.* (July 8, 2019), <https://www.theregreview.org/2019/07/08/hickman-nondelegation/>.

<sup>29</sup> Douglas H. Ginsburg, *Delegation Running Riot*, 1 *REGUL.* 83, 83–84 (1995).

closer to the bone but do not fundamentally imperil modern government. Part I.A starts with an historical overview of the nondelegation doctrine's foundations—the Vesting Clause of Article I and early Supreme Court decisions that recognized the existence of such a doctrine. Part I.B recounts the subsequent history of the Court's nondelegation decisions from the late 1800s to the very recent past, showing how the Court has almost invariably shied away from enforcing the doctrine. Part I.C then summarizes the persistent lines of critique of this pattern of nonenforcement. Finally, Part I.D explains how *Gundy* has scrambled this area of the law by indicating a willingness to recalibrate the Court's role in nondelegation cases and offering a test purportedly capable of dividing unconstitutional delegations from constitutional delegations.

### *A. The Roots of the Nondelegation Doctrine*

The nondelegation doctrine reflects deep and unresolved ambiguities about the extent to which the U.S. Constitution requires that the three branches of government be hermetically sealed off from one another, subject to certain explicit exceptions where the framers chose to subject the exercise of one power to the checks of a coordinate branch of government.<sup>30</sup> Unlike many state constitutions,<sup>31</sup> the U.S. Constitution neither explicitly provides for the separation of powers nor prohibits the delegation of any of these powers to other actors. Instead, it implies as much through the vesting of powers in particular branches.<sup>32</sup> As conventionally understood, the nondelegation doctrine prohibits the subdelegation of quintessentially legislative powers—the power to make laws—to actors outside the legislative branch.

Until just the last twenty years, most observers accepted that there was, in fact, an implicit limitation on delegation of the legislative power in the framers'

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<sup>30</sup> See Farina, *supra* note 4, at 89–90 (noting that, while it is “typically accepted as given” that the Constitution bars delegation of legislative power, the “Constitution’s test is of little help, for it says nothing explicit about delegating the power Article I confers”); Lawson, *supra* note 4, at 335–36 (noting, but disagreeing with, Justice Stevens’s claim in *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001), that the Constitution’s silence about nondelegation means that it does not exist).

<sup>31</sup> Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190–91 (1999) (surveying the states and noting “[t]he overwhelming majority of modern state constitutions contain a strict separation of powers clause” in the sense that the clause “not only divides power between the various branches but also instructs that one branch is not to exercise the powers of any of the others”).

<sup>32</sup> U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); *id.* art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

original understanding, even if the boundaries of this limitation were murky in practice.<sup>33</sup> To strengthen the inference from textual silence, proponents of the nondelegation doctrine argue that the framers understood and self-consciously incorporated the thinking of constitutional theorists Locke and Montesquieu on the question.<sup>34</sup> However, even the idea that the nondelegation doctrine exists is no longer a matter of consensus. Recent scholarship examining the original understanding of the meaning of the vesting of legislative power in Congress has suggested that the nondelegation doctrine existed at the founding but had a drastically different scope and purpose than conventionally assumed. For instance, legal scholars Eric Posner and Adrian Vermeule argued that historical evidence suggests the nondelegation doctrine only barred the delegation of certain core institutional powers of Congress—namely, the power to vote on bills.<sup>35</sup> More recently, Professors Julian Davis Mortensen and Nicholas Bagley further unsettled the originalist case for the nondelegation doctrine with their argument that the original understanding, and even Locke’s thinking, evinces

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<sup>33</sup> Lawson, *supra* note 4, at 340 (“The Constitution clearly—and one must even say obviously—contemplates some such lines among the legislative, executive, and judicial powers. The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense otherwise.”); see also Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388, 1395 (2019) (arguing that, while the Vesting Clause alone may not clearly contemplate a nondelegation doctrine, the nondelegation doctrine can be sourced to “structural separation-of-powers principles” that “help ensure that the representative interests of people electing legislators from throughout the country are represented in policy proposals”). Since *Gundy*, a number of historical accounts have questioned whether the founders ever understood the nondelegation doctrine, even if understood as a thing, as prohibiting the kinds of delegation of coercive lawmaking authority that critics of delegation detest. See Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1327 (2020) (finding that Congress delegated capacious authority in early tax laws, and that this authority to make rules was “coercive,” contra efforts by originalist scholars to explain away other early congressional acts); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, GA. L. REV. (forthcoming 2021) (manuscript at 3–4) (on file at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3654564](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654564)). But these historical accounts do recognize the conventional wisdom that the nondelegation doctrine exists in principle. See Parrillo, *supra*, at 1299 (“At most, these other sources might possibly indicate that there is *some* abstract, unspecified limit on delegation (I assume arguing there is) . . .”).

<sup>34</sup> Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1518 (2021) (arguing the “nondelegation principle can be traced to John Locke’s *Second Treatise*, which was deeply influential on the Founding generation”); *id.* at 1526 (questioning whether it would have been possible for anyone not to understand Montesquieu’s statement—that “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty”—as an adoption of a nondelegation principle); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1297 (2003) (citing JOHN LOCKE, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 265, § 141 at 363 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)); *id.* at 1317 (linking James Madison’s Federalist No. 47 with Montesquieu’s separation of powers principle).

<sup>35</sup> Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1756 (2002).

only a concern that the legislature not *permanently* delegate (i.e., *alienate*) its authority to legislate.<sup>36</sup>

Notwithstanding these rear-flank attacks on the pedigree of the principle, the Court has long acted as if there is such a thing as the nondelegation doctrine—one that encompasses and restricts, at least in theory, the temporary assignment of discretionary policymaking authority to other actors, namely executive agencies—although there is some debate about when, exactly, this understanding emerged. The earliest U.S. Supreme Court case in this area, *The Cargo of the Brig Aurora*,<sup>37</sup> largely sidestepped a nondelegation argument against Congress’s commitment of discretion to the President to determine whether to lift an embargo on France and Britain depending on whether they had come to agreeable terms with the United States.<sup>38</sup> The Court did seem to imply that there would be no impermissible delegation of legislative authority if the only discretion to be exercised was a factual determination of whether a predicate condition for the operation of the policy set by Congress was satisfied,<sup>39</sup> but nothing about the opinion suggests that delegation would be limited to those circumstances.

Several years later, the Court returned to the question in *Wayman v. Southard*, where challengers argued that the Judiciary Act of 1789 had impermissibly delegated authority to federal courts to adopt by reference state rules of civil procedure.<sup>40</sup> Here, unlike in *Brig Aurora*, the Court explicitly acknowledged the existence of the nondelegation doctrine with respect to “powers which are strictly and exclusively legislative,” but simultaneously acknowledged a line “has not been exactly drawn” separating subjects of “less interest” in “which a general provision may be made, and power given to those

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<sup>36</sup> Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 308–11 (2021). Mortenson and Bagley’s article inspired several responses attempting to rehabilitate the originalist pedigree of the nondelegation doctrine. See, e.g., Wurman, *supra* note 34, at 1493–94; Aaron Gordon, *Nondelegation Misinformation: A Rebuttal to “Delegation at the Founding” and Its Progeny 2* (Mar. 25, 2020) (unpublished manuscript) (on file at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3561062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561062)).

<sup>37</sup> 11 U.S. (7 Cranch) 382, 382 (1813) (reviewing the constitutionality of the Non-Intercourse Act of 1809).

<sup>38</sup> Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 393–94 (2017) (“[T]he Court left the President’s statutorily specified role in triggering the trade embargo to the side and focused on the legislature’s power to exercise its own discretion to extend the embargo conditionally ‘upon the occurrence of any subsequent combination of events.’” (citing *Brig Aurora*, 11 U.S. (7 Cranch) at 388)).

<sup>39</sup> *Id.* at 394 (“Implicitly, the framing of the opinion suggested that the President acted simply as a fact-finder, not as a lawmaker.”).

<sup>40</sup> 23 U.S. (10 Wheat.) 1, 3–4 (1825).

who are to act under such general provisions to fill up the details.”<sup>41</sup> The Court nevertheless held that the delegation was well within the outer boundaries of permissible delegations, all without attempting to provide meaningful guidance on the “precise boundary” line.<sup>42</sup> Thus, whatever the framers’ understanding might have been, by 1825 the Marshall Court had recognized the basic contours of the modern nondelegation problem and endorsed the theoretical existence of constitutional constraints on delegation, all while refusing to provide any meaningful guidance about its understanding of the limits of the principle.

### *B. The Maturation of the Nondelegation Doctrine*

Despite this fairly early recognition of a recognizably modern understanding of the nondelegation problem, the doctrine was virtually absent for nearly a century, as Congress engaged in substantial delegation of legislative power to a burgeoning administrative state.<sup>43</sup> Even when the doctrine was at its height of raw potentiality, many of the most novel and sweeping delegations of authority never found their way to the U.S. Supreme Court<sup>44</sup>—an oddity that surely casts doubt on the contemporary bar’s understanding of the stringency, or at least the enforceability, of the nondelegation doctrine. The Court finally returned to the doctrine in 1892 in *Field v. Clark*,<sup>45</sup> a case involving similar facts to *Brig Aurora* and resulting in a similar decision. The Court held that there was no constitutional problem with a statute that delegated to the President the power to raise tariffs on nations that did not engage in fair terms of commerce with the United States.<sup>46</sup> The delegated discretion did “not, in any real sense, invest the President with the power of legislation,” but merely gave the President power to “ascertain[] the existence of a particular fact” that served as a predicate to the operation of the policy set by Congress.<sup>47</sup>

As Professors Keith Whittington and Jason Iuliano have recently shown, *Field* ended the long hiatus of the nondelegation doctrine at the Court, touching off a spate of nondelegation challenges—many returning to the scenario of

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<sup>41</sup> *Id.* at 42–43.

<sup>42</sup> *Id.* at 43, 46.

<sup>43</sup> See, e.g., Parrillo, *supra* note 33, at 1327; Chabot, *supra* note 33.

<sup>44</sup> See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 285–86 (2012) (arguing that “our failure to engage with the realities of administration in the first century of the Republic caused us to misunderstand the administrative law of that period—indeed to ignore the administrative constitution that was forged between the Founding and the passage of the Interstate Commerce Act of 1887”).

<sup>45</sup> 143 U.S. 649 (1892).

<sup>46</sup> *Id.* at 692.

<sup>47</sup> *Id.* at 692–93.

*Wayman*, where cases clearly involved the exercise of policymaking discretion, and none of which leveraged the doctrine to strike an Act of Congress.<sup>48</sup> Yet it was another tariff case where the Court made it clear that, while the nondelegation doctrine exists as an academic matter, its purview is narrow. In *J.W. Hampton, Jr. & Co. v. United States*, the Court held that the delegation of authority to adjust tariffs so as to eliminate inequities in the prices of goods as they fluctuated in commerce did not violate the nondelegation doctrine.<sup>49</sup> In applying the nondelegation doctrine, the Court emphasized a functionalist inquiry focused on the “common sense” and “inherent necessities of the governmental co-ordination,” and stated that the nondelegation doctrine would not be violated “[i]f Congress shall lay down by legislative act an intelligible principle” to which the delegatee could “conform” its discretionary acts.<sup>50</sup> The “intelligible principle” standard came to be the dominant formulation of the nondelegation doctrine and was never thought to be particularly onerous.<sup>51</sup> All Congress needs to do is provide some general guidance about how delegatee agencies should exercise their discretion (e.g., what kinds of considerations are relevant and what the subject matter limits on the delegation are).<sup>52</sup> Congress need not actually make the policy decisions, nor eliminate agency discretion.

The inexorable retreat of the nondelegation principle came to an abrupt pause, however, in 1935, in two cases involving unprecedentedly broad delegations in New Deal statutes. For the first time—and, as it turns out, the last—the Court held that Congress impermissibly delegated its legislative authority to an executive agency.<sup>53</sup> The first case, *Panama Refining Co. v. Ryan*, involved the constitutionality of Section 9(c) of the National Industrial Recovery

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<sup>48</sup> Whittington & Iuliano, *supra* note 38, at 397–401 (discussing *St. Louis Consol. Coal Co. v. Illinois*, 185 U.S. 203 (1902), *Buttfield v. Stranahan*, 192 U.S. 470 (1904), *Union Bridge Co. v. United States*, 204 U.S. 364 (1907), *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911), *United States v. Grimaud*, 220 U.S. 506 (1911), *Interstate Com. Comm’n v. Goodrich Transit Co.*, 224 U.S. 194 (1912), *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230 (1915), *Mahler v. Eby*, 264 U.S. 32 (1924), *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266 (1933), *Wisconsin v. Illinois*, 278 U.S. 367 (1929), and *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932)).

<sup>49</sup> 276 U.S. 394, 409 (1928).

<sup>50</sup> *Id.* at 406, 409.

<sup>51</sup> Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 236 (2005) (noting that the intelligible principle standard is the “dominant modern formulation” and that the standard is treated as a “nullity” by the courts).

<sup>52</sup> Hickman, *supra* note 15 (manuscript at 9) (“The only requirement, according to the [*J.W. Hampton*] Court, was that Congress provide some degree of guidance to cabin Executive Branch discretion.”).

<sup>53</sup> The Court did strike a delegation to private actors in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (“This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”).

Act (NIRA), which addressed falling prices of petroleum products by allowing the President to remove such products from interstate commerce through regulations.<sup>54</sup> The implementing regulations required producers to keep and file records relating to petroleum product sales.<sup>55</sup> The Court, reviewing its nondelegation precedents, noted that “in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend.”<sup>56</sup> It then held that Section 9(c) “goes beyond those limits” because “Congress has declared no policy, has established no standard, has laid down no rule.”<sup>57</sup> The second case, *A.L.A. Schechter Poultry Corp. v. United States*,<sup>58</sup> similarly involved a provision of the NIRA, this time Section 3, which gave the President the authority to approve codes of fair competition for entire industries.<sup>59</sup> These codes were to be drafted by industry trade associations and approved if the President was satisfied that they were consistent with the overarching policy of the NIRA, defined in Section 1 as including the goals of removing obstructions to the “free flow of interstate” commerce, to “provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision,” and “to eliminate unfair competitive practices,” among other open-ended aims.<sup>60</sup> The Court again rejected this delegation, stating the following:

Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact

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<sup>54</sup> 293 U.S. 388, 406 (1935). Section 9(c) reads as follows:

The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed \$1,000, or imprisonment for not to exceed six months, or both.

*Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 430.

<sup>57</sup> *Id.* Notably, Justice Cardozo dissented, finding in other provisions of the NIRA the policy the majority found lacking. *Id.* at 434 (Cardozo, J., dissenting) (conceding the need for a standard in the Act “to uphold the delegation” but “deny[ing] that such a standard is lacking in respect of the prohibitions permitted by this section when the act with all its reasonable implications is considered as a whole”).

<sup>58</sup> 295 U.S. 495 (1935).

<sup>59</sup> *Id.* at 534–35.

<sup>60</sup> *Id.*

determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one.<sup>61</sup>

This time, even Justice Cardozo did not hold out, stating that “[t]he delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant.”<sup>62</sup>

Whether *Panama Refining* and *Schechter Poultry* represent a brief reversion to a more formalistic approach to nondelegation cases than cases like *J.W. Hampton* had suggested was appropriate, or an articulation of a new rule to govern just the exceptionally broad delegations in the NIRA, is a debatable point. Professor Cary Coglianese has argued that these cases reflect the doctrinal principle, consistently adhered to ever since (if only because Congress has never again attempted to delegate so broadly), that judges should “invalidate only those statutory grants of lawmaking authority that approximate one of Congress’s enumerated powers.”<sup>63</sup> On this account, the NIRA provisions struck in these cases fell at the outer bounds of what is theoretically possible in their combination of delegated discretion and power, and essentially forced the Court’s hand, since the Court had acknowledged there must be some line ever since *Wayman v. Southard*. The other major explanation involves politics: the Court briefly resisted the expansion of federal regulatory power during the New Deal before acceding to it.<sup>64</sup> It is difficult to discern which of these explanations fits the data better, in part because the record since has been so lopsided—never again has the Court struck down an Act of Congress for violating the nondelegation doctrine by delegating legislative power to an agency, even though Congress has routinely come quite close to the line identified by Coglianese. Just four years after *Panama Refining* and *Schechter Poultry*, the Court resumed upholding New Deal statutes against nondelegation challenges,

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<sup>61</sup> *Id.* at 541.

<sup>62</sup> *Id.* at 551.

<sup>63</sup> Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019); see also Whittington & Iuliano, *supra* note 38, at 402 (“The Court thought the early New Deal statutes were unique in establishing ‘no requirement, no definition of circumstances and conditions in which’ the President should or should not act.”).

<sup>64</sup> David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL’Y 213, 229–30 (2020) (opining that “the Justices did seek to insulate the Court from political turmoil” by using the “unmanageability of the intelligible principle test” to “sidestep the potentially troublesome issue of delegation”).



finding that they did not “abdicate, or . . . transfer to others, the essential legislative functions with which [Congress] is vested by the Constitution.”<sup>65</sup>

That is not to say there have not been flirtations. In the early 1980s, Justice Rehnquist, in the *Benzene Case*<sup>66</sup> and then again in the *Cotton Dust Case*,<sup>67</sup> tried but ultimately failed to revive the doctrine in the context of a delegation of authority to the Occupational Safety and Health Administration to regulate worker exposure to a standard that “most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity.”<sup>68</sup> In 1989, Justice Scalia dissented from the majority’s opinion in *Mistretta v. United States*, which upheld a delegation of authority to the U.S. Sentencing Commission to set sentencing guidelines, arguing that the nondelegation doctrine should not be so toothless as to allow Congress to create a “junior-varsity Congress” that flouted the separation of powers.<sup>69</sup> Around the turn of the century, a lower court held that a construction of Section 109(b) of the Clean Air Act violated the nondelegation doctrine.<sup>70</sup> The provision instructed the Environmental Protection Agency (EPA) to set ambient “air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect public health,” but it did not permit the consideration of costs.<sup>71</sup> The Supreme Court in *Whitman v. American Trucking Associations* disagreed with the lower court that there was a nondelegation violation, holding that “[t]he scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents,”<sup>72</sup> even though it excluded consideration

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<sup>65</sup> *Currin v. Wallace*, 306 U.S. 1, 15 (1939); *see also* *United States v. Rock Royal Coop.*, 307 U.S. 533, 574 (1939) (stating that “Congress needs specify only so far as is reasonably practicable”); *Mulford v. Smith*, 307 U.S. 38, 49 (1939) (holding that an agency’s authority to make adjustments to marketing quotas was governed by instructions about the “considerations which are to be held in view in making these adjustments”); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398–99 (1940) (upholding an agency’s discretion to set maximum prices and stating that “the effectiveness of both the legislative and administrative processes would become endangered if Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription here”); *Yakus v. United States*, 321 U.S. 414, 423–24 (1944) (upholding a delegation of authority to set commodity prices and stating that Congress “has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established”).

<sup>66</sup> *Indus. Union Dep’t v. Am. Petrol. Inst. (Benzene Case)*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring).

<sup>67</sup> *Am. Textile Mfrs. Inst. v. Donovan (Cotton Dust Case)*, 452 U.S. 490, 543–44 (1981) (Rehnquist, J., dissenting).

<sup>68</sup> 29 U.S.C. § 655(b)(5).

<sup>69</sup> 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

<sup>70</sup> *Am. Trucking Ass’ns v. EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999) (per curiam).

<sup>71</sup> *Id.* at 1057 (reviewing EPA’s construction of 42 U.S.C. § 7409(b)(1)).

<sup>72</sup> 531 U.S. 457, 474 (2001).

of costs and called on the EPA to set a standard for non-threshold pollutants that, as a scientific matter, had no known safe level of exposure.<sup>73</sup>

And, of course, it is possible to hear echoes of the central concerns of the nondelegation doctrine in other, less freighted contexts. Legal scholar Cass Sunstein, for instance, identified “nondelegation canons” at work in the Court’s ordinary statutory interpretation cases, with the Court adopting saving interpretations of statutes to avoid a head-on collision with the nondelegation line of cases.<sup>74</sup> More recently, some have seen echoes in the emerging concept of the major questions approach to *Chevron* cases.<sup>75</sup> And then there is the closely related domain of review for unconstitutional vagueness.<sup>76</sup>

Yet, by the time of *Whitman*, frontal assaults on the administrative state through the nondelegation doctrine began to feel like shadow boxing. Vermeule describes it well:

[W]hen it came time to *act*, as opposed to venting one’s constitutional frustrations in concurrence and dissents—well, it never did quite happen. Justice Scalia’s *Mistretta* dissent became his brusque opinion in *Whitman v. American Trucking*, sweeping aside a serious nondelegation challenge to the Clean Air Act. Jam yesterday (yesterday being 1935), and jam tomorrow, but never jam today.<sup>77</sup>

### C. *The Increasingly Fraught Debate Over Nondelegation*

Over the same few decades that the Court seemed to abandon any judicially administrable limit on Congress’s power to delegate to agencies, academic critics began to sharpen their blades and lay the intellectual foundation for an eventual change in the Court’s approach. These efforts take several forms, but Professor Joseph Postell groups them into three buckets: 1) arguments from a

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<sup>73</sup> *Id.* at 475.

<sup>74</sup> Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) (emphasis omitted); see also John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 224–28 (2000) (identifying a trend toward narrowly interpreting statutes to avoid nondelegation problems, but critiquing that trend as inconsistent with the purposes of the nondelegation doctrine to “ensure that Congress makes important statutory policy”).

<sup>75</sup> See Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2044 (2018) (arguing that the “major questions doctrine is a clear statement rule which reinforces the nondelegation doctrine”).

<sup>76</sup> See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1248 (2018) (Thomas, J., concurring) (noting a possible argument that the “vagueness doctrine is really a way to enforce the separation of powers—specifically, the doctrine of nondelegation,” but rejecting that understanding of the source of the rule since the Vesting Clauses provide a basis for the nondelegation doctrine that is more inclusive than the Due Process Clause).

<sup>77</sup> Adrian Vermeule, *Never Jam Today*, YALE J. ON REGUL. (June 20, 2019), <https://www.yalejreg.com/nc/never-jam-today-by-adrian-vermeule/> (citations omitted).

position of separation of powers formalism; 2) arguments about political accountability, or the lack thereof, in a world with unconstrained delegation; and 3) arguments from fiduciary principles and a theory of popular sovereignty.<sup>78</sup>

Briefly, the first argument from separation of powers formalism starts from the theory that there must be limits to Congress's ability to delegate its power, because otherwise the separation of powers would be a sham and could be eviscerated by reshuffling the distribution of power through ordinary legislation.<sup>79</sup> While that starting premise has carried the day in other contexts—most notably in the context of the legislative veto—where the constitutional text provides harder lines,<sup>80</sup> it has not won over many converts here, where the textual hooks for the doctrine are minimal. The second argument about political accountability has found more traction. The argument here, largely developed by political scientists like Ted Lowi<sup>81</sup> and Morris Fiorina,<sup>82</sup> and picked up by legal scholars like David Schoenbrod,<sup>83</sup> John Hart Ely,<sup>84</sup> Peter Aranson, Ernest Gellhorn, and Glenn Robinson,<sup>85</sup> is that allowing Congress to delegate freely allows it to claim responsibility for the act of delegating—as if it were the same as the actualization of policy—and then avoid responsibility for the actions of the delegee when things go wrong, diminishing both democratic control and social welfare.<sup>86</sup> The delegation, by obscuring who is doing the real work of

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<sup>78</sup> Joseph Postell, *The Nondelegation Doctrine After Gundy*, 13 N.Y.U. J.L. & LIBERTY 280, 283–90 (2020).

<sup>79</sup> Lawson, *supra* note 4, at 340 (stating that if delegation were permissible, the “Vesting Clauses, and indeed the entire structure of the Constitution” would “make no sense”).

<sup>80</sup> See *INS v. Chadha*, 462 U.S. 919, 957–59 (1983) (invalidating a one-house legislative veto of executive immigration determinations as a violation of the bicameralism and presentment clauses of the U.S. Constitution); *Clinton v. City of New York*, 524 U.S. 417, 448 (1998) (invalidating a line-item veto authorization as a violation of the Presentment Clause of the U.S. Constitution).

<sup>81</sup> THEODORE J. LOWI, *THE END OF LIBERALISM* 92 (1st ed. 1969).

<sup>82</sup> MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (2d ed. 1989).

<sup>83</sup> DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 10 (1993).

<sup>84</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132–33 (1980).

<sup>85</sup> Peter H. Aranson, Ernest Gellhorn & Glenn O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 56 (1982).

<sup>86</sup> It is worth noting Professor Jerry Mashaw's important critique of the accountability-based logic for strict limits on delegation. In essence, Mashaw argued that the executive branch, due to its national electorate and other institutional features, is more accountable to the people than is Congress. On this account, broad delegation to the executive branch actually enhances political accountability, even if it comes at the expense of legislative power. Mashaw, *supra* note 23, at 95–99. This point has been foundational to one prominent theory of administrative law—presidential administration—that stands in some tension with a Congress-centric model. See Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1954, 1957 (2015) (positing that presidential administration—as advocated by Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001), and supported by broad delegations of the kind Mashaw supported—represents a triumph of a “process” tradition in administrative law over a “positivist”

governance, breaks the chain of accountability that allows the voting public to determine whether it approves of the direction of public policy and to make a change if it does not. Finally, and more recently, critics working with fiduciary law principles and a notion of popular sovereignty have posited a third argument that, while delegation from the sovereign people to administrative agencies is not per se objectionable, further “subdelegation” of that sovereign legislative power by a mere trustee (Congress) violates principles of constitutional self-governance.<sup>87</sup> On this theory, the nondelegation doctrine is essentially absolute in its command because the agent or trustee simply has only those powers that are explicitly delegated to it by the principal, We the People.<sup>88</sup> On this account, the lack of a textual hook might even be thought to cut in favor of a sweeping nondelegation doctrine—there is no nuanced linguistic formulation to allow exceptions to creep in.

As influential as they have been, arguments in this milieu have not convincingly addressed a serious problem with the nondelegation doctrine—that its (re)birth would have serious, if not fatal, implications for modern regulatory governance.<sup>89</sup> Some 300,000 statutes currently on the books, many of them regulatory super-statutes,<sup>90</sup> might be vulnerable to challenge under a changed

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tradition that privileges legal formalisms, and that this development subverted a “grand synthesis” between these two warring traditions).

<sup>87</sup> Postell, *supra* note 78, at 287–90 (citing, as a principal proponent of this view, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 377–402 (2014), and GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017)). The bar on further subdelegation is often supplemented by reference to the Latin phrase *delegate potestas non potest delegari*, which describes the agency law principle that “[o]ne, who has a bare power or authority from another to do an act, must execute it himself, and cannot delegate his authority to another.” Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L. REV. 168, 168 (1929) (citation omitted). *But see* Farina, *supra* note 4, at 91–92 (“Yet this rule—captured in the *delegate potestas maxim*—only begins the analysis. A second general rule is that ‘authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it.’”).

<sup>88</sup> Postell, *supra* note 78, at 290 (“By focusing on the fact that the people are the only rightful possessors of political authority, the Framers implicitly argued that government could not alter the Constitution’s organization of political authority.”).

<sup>89</sup> *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (opining if the delegation at issue in *Gundy* “is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs”); *see also* Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 VA. L. REV. 1229, 1233 (2018) (noting that none of the arguments in favor of a stricter nondelegation doctrine “can easily reconcile the nondelegation principle with the existence of the modern administrative state; at least, not without either hollowing out the nondelegation principle or demanding radical reorganization of government”).

<sup>90</sup> William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (defining a super-statute as a law that establishes “a new normative or institutional framework for state policy,” sticks in the “public culture,” and, as a result, has a “broad effect on the law—including an effect beyond the four corners of the statute”). Elsewhere, Eskridge and Ferejohn have included regulatory statutes in their definition of super-

nondelegation doctrine.<sup>91</sup> Even the threat of litigation could lock up the gears of government.<sup>92</sup> This is particularly problematic in light of the many existential policy challenges facing the nation. Addressing climate change, for instance, agencies have relied on decades-old delegations of authority to do what they can at the margins.<sup>93</sup> This is not something agencies prefer to do; it would be far easier to be able to cite a brand-new statute explicitly authorizing the EPA to implement a national cap-and-trade system rather than to rely on authorities that were crafted with different problems in mind. But if new legislation was not possible in 2009, when Congress considered but failed to pass such a statute, it is hard to see how it is remotely possible now, in an even more gridlocked and polarized environment.<sup>94</sup> In this situation, opening the floodgates to court review of the delegations agencies necessarily rely on to do incremental work is tantamount to taking a stance against climate policy in general.<sup>95</sup> Perhaps closer to home for those affected by COVID-19, agencies from the Food and Drug Administration to the Centers for Disease Control and Prevention used existing delegations of authority, some quite open-ended, to take some of the most crucial emergency actions throughout the pandemic, such as the initial response to the rollout of vaccines.<sup>96</sup> While the response from these agencies can certainly be

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statutes. See WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 169 (2010) (applying the theory of super-statutory entrenchment to America's "green constitution," which includes various environmental regulatory statutes such as the Clean Air Act and Clean Water Act).

<sup>91</sup> Hall, *supra* note 12, at 178 ("If the Court chooses to adopt a stricter nondelegation test, it could imperil an estimated three hundred thousand rules that resemble the standard disputed in *Gundy*.").

<sup>92</sup> Hannah Mullen & Sejal Singh, *The Supreme Court Wants to Revive a Doctrine that Would Paralyze Biden's Administration*, SLATE (Dec. 1, 2020, 12:56 PM), <https://slate.com/news-and-politics/2020/12/supreme-court-gundy-doctrine-administrative-state.html>; Coan, *supra* note 15, at 146–47 ("A large fraction of existing delegations of power . . . could plausibly be said to violate the nondelegation doctrine as Justice Gorsuch understands it. The uncertainty about which will actually fail his constitutional test is likely to precipitate considerably more litigation . . .").

<sup>93</sup> Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1942–44 (2020) (describing efforts by EPA to adapt the decades-old Clean Air Act to the challenge of climate change regulation).

<sup>94</sup> Peggy Otum & Shannon Morrissey, *What a Biden Administration Will Mean for U.S. Climate Change Policy*, WILMERHALE (Nov. 9, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20201109-what-a-biden-administration-will-mean-for-us-climate-change-policy> ("[T]he prospect of a divided Congress makes significant climate change legislation unlikely. The administration thus will likely be limited to actions that the executive branch can take alone—including rulemaking and executive orders—to implement its climate agenda.").

<sup>95</sup> Mark P. Nevitt, *The Remaking of the Supreme Court: Implications for Climate Change Litigation and Regulation*, 42 CARDOZO L. REV. 101 (forthcoming 2021) (manuscript at 114) (on file at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3717893](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3717893)) ("Future presidential administrations that seek bold agency action on climate must be particularly careful not to exceed existing delegated authority, and future Congresses must be mindful of the doctrine when enacting comprehensive climate legislation, whether cap-and-trade, carbon tax, or some version of the Green New Deal.").

<sup>96</sup> See, e.g., Connor Raso, *Emergency Rulemaking in Response to COVID-19*, BROOKINGS (Aug. 20,

criticized,<sup>97</sup> it was surely more effective than tasking Congress with the details of the emergency response at a moment's notice. As Professor Nicholas Bagley observes, “[d]elegations of power pervade modern American governance” and the “reason is simple: Legislatures aren’t equipped to resolve every question for themselves. Nor are they nimble enough to confront every new challenge as it arises. Sometimes, they need to draw on the executive branch’s expertise and dispatch.”<sup>98</sup>

But this is where *Gundy* comes in: it is best understood as an effort to operationalize the nondelegation doctrine in a form that is cabined enough to at least potentially avoid grinding governance to a halt. It is also hard-edged enough to meaningfully correct for perceived lapses in the constitutional framework and the democratic political economy.<sup>99</sup> Critics of the Court’s historically lax approach to the nondelegation doctrine know that drawing lines in the space between legislative and executive power is difficult,<sup>100</sup> but they consistently insist that the seeds of a judicially manageable approach—one focused on the importance of the substance of a statute—can be calibrated based on the Court’s pre-New Deal decisions.<sup>101</sup>

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2020), <https://www.brookings.edu/research/emergency-rulemaking-in-response-to-covid-19/>.

<sup>97</sup> See, e.g., Phillip A. Wallach & Justus Myers, *The Federal Government’s Coronavirus Response—Public Health Timeline*, BROOKINGS (Mar. 31, 2020), <https://www.brookings.edu/research/the-federal-governments-coronavirus-actions-and-failures-timeline-and-themes/>; Ed Yong, *How the Pandemic Defeated America*, THE ATLANTIC, <https://www.theatlantic.com/magazine/archive/2020/09/coronavirus-american-failure/614191/> (Aug. 4, 2020).

<sup>98</sup> Nicholas Bagley, *A Warning from Michigan*, THE ATLANTIC (Oct. 7, 2020), <https://www.theatlantic.com/ideas/>

[archive/2020/10/america-will-be-michigan-soon/616635/](https://www.theatlantic.com/ideas/archive/2020/10/america-will-be-michigan-soon/616635/); see also *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (noting “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives”).

<sup>99</sup> William D. Araiza, *Toward a Non-Delegation Doctrine that (Even) Progressives Could Like*, 3 AM. CONST. SOC’Y: S. CT. REV. 211, 237 (2018–2019) (describing the Court in *Gundy* as pushing “for a revived non-delegation doctrine that promises to do something, but not too much, and to do it in a judicially-manageable way”).

<sup>100</sup> Lawson, *supra* note 4, at 353 (“The difficulty of drawing this line . . . drives much of the suspicion of a constitutionally meaningful nondelegation doctrine. Justice Scalia, who in his academic guise toyed with the idea of a reinvigorated nondelegation doctrine, reconsidered that position when it required formulating a concrete, judicially enforceable standard.”).

<sup>101</sup> *Id.* at 376 (“Thus far, all roads have led back to Chief Justice Marshall’s seemingly unsatisfying formulation for improper delegations. In essence, the formulations examined so far all reduce to the proposition that Congress must make whatever decisions are sufficiently important to the relevant statutory scheme that Congress must make them.”); *id.* at 395 (“The charge that no workable standard for judging delegations can be formulated is also false. . . . Drawing a line between execution and lawmaking is no harder, and indeed is probably considerably easier, than drawing a line between reasonable and unreasonable searches and seizures.”).

#### D. *Gundy and the Future of the Nondelegation Doctrine*

The question in *Gundy* was not particularly hard under the Court's nondelegation precedents. At issue was Section 20913(d) of the Sex Offender Registration and Notification Act (SORNA), which delegated authority to the Attorney General to decide whether the SORNA's registration provisions would apply at all to so-called "pre-Act offenders."<sup>102</sup> While this is a sweeping delegation on its face, Justice Kagan, writing for a plurality of four justices, made quick work of it, finding that the statute's declaration of purposes, the legislative history, and the Court's own prior interpretation of that provision all sufficed to support a narrowed construction of the statute's open-ended language.<sup>103</sup> On this reading, the Attorney General did not have unfettered discretion to choose, but instead was basically expected to promulgate regulations to make pre-Act offenders subject to registration requirements.<sup>104</sup> Whether the unreconstructed statute would have survived intelligible principle review is an academic point,<sup>105</sup> but given the Court's precedents, it is difficult to see how it would have been imperiled. As it is, the reconstructed statute easily cleared the intelligible principle hurdle.<sup>106</sup>

In a normal case, that would have been the end of it, but the real action was in the accompanying opinions. For instance, concurring in the judgment only, Justice Alito wrote that "[i]f a majority of this Court were willing to reconsider the approach we have taken for the past [eighty-four] years, I would support that effort."<sup>107</sup> Count him in the reform column. Most importantly, Justice Gorsuch dissented and gained the votes of both the Chief Justice and Justice Thomas in calling for an immediate rejection of the intelligible principle test.<sup>108</sup> According to Justice Gorsuch, the delegation in Section 20913(d) "can only be described as

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<sup>102</sup> 34 U.S.C. § 20913(d).

<sup>103</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2123–24 (2019) ("The text, considered alongside its context, purpose, and history, makes clear that the Attorney General's discretion extends only to considering and addressing feasibility issues.").

<sup>104</sup> *Id.* at 2125 ("On that understanding, the Attorney General's role under § 20913(d) was important but limited: It was to apply SORNA to pre-Act offenders as soon as he thought it feasible to do so.").

<sup>105</sup> *See id.* at 2123 ("The provision, in *Gundy*'s view, 'grants the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders . . . . If that were so, we would face a nondelegation question. But it is not.' (citations omitted)).

<sup>106</sup> *Id.* at 2129 ("The question becomes: Did Congress make an impermissible delegation when it instructed the Attorney General to apply SORNA's registration requirements to pre-Act offenders as soon as feasible? Under this Court's long-established law, that question is easy. Its answer is no.").

<sup>107</sup> *Id.* at 2131 (Alito, J., concurring).

<sup>108</sup> *Id.* at 2131–48 (Gorsuch, J., dissenting). Justice Alito apparently did not want to join the dissent, despite his apparent views on nondelegation, because "it would be freakish to single out the provision at issue here for special treatment" before a majority chooses to change the approach writ large. *Id.* at 2131 (Alito, J., concurring).

vast,”<sup>109</sup> and the Attorney General’s policy choice “unbounded.”<sup>110</sup> But Justice Gorsuch’s point was not just that this delegation violated the intelligible principle standard—that would be a hard case to make, given the equally sweeping delegations upheld by the Court in prior cases.<sup>111</sup> Gorsuch also used the opportunity to argue for a change of standard and an abandonment of the intelligible principle framework, which he argued had become “mutated” to mean something different than even Chief Justice Taft intended it to mean, and “ha[d] been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional.”<sup>112</sup> In making this case, Justice Gorsuch pushed all of the relevant buttons: he argued that permissive delegation undermined clear lines of accountability among voters, elected representatives, and public policy;<sup>113</sup> he likewise argued that, under our Constitution, “sovereignty belongs not to a person or institution or class but to the whole of the people” and that the vesting of legislative power in an institution ruled out further subdelegation;<sup>114</sup> and he tied all of these various strands together to argue that delegation threatens liberty.<sup>115</sup> Indeed, he came close to stating that the purpose of instituting a heightened standard of review for delegations is largely to prevent the proliferation of excess laws and

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<sup>109</sup> *Id.* at 2132 (Gorsuch, J., dissenting).

<sup>110</sup> *Id.* at 2133.

<sup>111</sup> *See id.* at 2129 (majority opinion) (noting that the Court had “approved delegations to various agencies to regulate in the ‘public interest,’” “sustained authorizations for agencies to set ‘fair and equitable’ prices and ‘just and reasonable’ rates,” and “affirmed a delegation to an agency to issue whatever air quality standards are ‘requisite to protect the public health.’” (citations omitted)).

<sup>112</sup> *Id.* at 2139–40 (Gorsuch, J. dissenting).

<sup>113</sup> *Id.* at 2134.

<sup>114</sup> *Id.* at 2133 (“Through the Constitution . . . the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement.”).

<sup>115</sup> *Id.* at 2134 (“Some occasionally complain about Article I’s detailed and arduous processes for new legislation, but to the framers these were bulwarks of liberty.”). Relatedly, Justice Gorsuch tied this concern to protection of minority rights against majority tyranny:

Because men are not angels and majorities can threaten minority rights, the framers insisted on a legislature composed of different bodies subject to different electorates as a means of ensuring that any new law would have to secure the approval of a supermajority of the people’s representatives. This, in turn, assured minorities that their votes would often decide the fate of proposed legislation. Indeed, some even thought a Bill of Rights would prove unnecessary in light of the Constitution’s design; in their view, sound structures forcing “[a]mbition [to] . . . counteract ambition” would do more than written promises to guard unpopular minorities from the tyranny of the majority.

*Id.* (alteration in original).



regulations,<sup>116</sup> precisely because these regulatory restrictions are anathema to liberty.<sup>117</sup>

The central contribution of Justice Gorsuch’s analysis, though, is his articulation of a new test—what some have termed the “Gorsuch test”<sup>118</sup>—that purportedly could do the hard work of drawing justiciable lines between legislative policymaking and execution that would give teeth to the nondelegation doctrine but not threaten to make governance impossible.<sup>119</sup> On this account, Congress may not delegate any legislative authority unless the delegation can be fitted into one of three categories of exceptions.<sup>120</sup> First, Justice Gorsuch argued that delegations of legislative authority were proper if all they did was authorize another branch of government to “fill up the details” left after Congress announces the “controlling general policy.”<sup>121</sup> Stated somewhat differently, Justice Gorsuch believes that delegation is permissible so long as Congress “set[s] forth standards ‘sufficiently definite and precise to enable Congress, the courts, and the public to ascertain’ whether Congress’s guidance has been followed.”<sup>122</sup> Second, Gorsuch argued that “once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.”<sup>123</sup> As Professor Shalev Roisman has shown, “presidential factfinding” is actually a central part of the job description, although it easily bleeds over into “mixed fact and policy powers” and “pure discretion powers” that theoretically violate Justice Gorsuch’s articulation of this basis for valid delegation.<sup>124</sup> Third and finally, Gorsuch acknowledged that, in practice, constitutional powers are not hermetically sealed off from one

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<sup>116</sup> *Id.* at 2134 (arguing that the “federal government’s most dangerous power was the power to enact laws restricting the people’s liberty,” that “[a]n ‘excess of law-making’ was . . . one of ‘the diseases to which our governments are most liable,’” and that “the framers went to great lengths to make lawmaking difficult”).

<sup>117</sup> There is a strong presence in Justice Gorsuch’s dissent of what others have termed “libertarian administrative law”: a presumption in favor of liberty and against government regulation and an understanding that the very purpose of administrative law is to asymmetrically reinforce that thumb on the scale. For further discussion, see generally Sunstein & Vermeule, *supra* note 6.

<sup>118</sup> Hall, *supra* note 12, at 201–02.

<sup>119</sup> See Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 177 (2019) (describing Gorsuch’s approach as “more categorical”); Mike Rappaport, *A Nondelegation Doctrine the Court Can Believe In*, L. & LIBERTY (Dec. 11, 2020), <https://lawliberty.org/a-nondelegation-doctrine-the-court-can-believe-in/> (articulating a version of the Gorsuch test focused on prohibiting delegation of policymaking discretion and claiming that it is a “judicially manageable nondelegation doctrine”).

<sup>120</sup> *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (arguing that Congress alone has the power to create “generally applicable rules of conduct governing future actions by private persons”).

<sup>121</sup> *Id.* at 2136.

<sup>122</sup> *Id.* (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944)).

<sup>123</sup> *Id.*

<sup>124</sup> Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 847–52 (2019).

another, and so if Congress delegates its power but a coordinate branch has overlapping power in that domain, the delegation is either illusory or permissible.<sup>125</sup> There seems to be little debate that this articulation of a standard would be stricter than the intelligible principle standard.<sup>126</sup>

Subsequent developments with respect to Justice Kavanaugh, along with Justice Ginsburg's replacement in Justice Barrett, seem to suggest that the votes are there for Justice Gorsuch's approach. Not surprisingly, then, litigants have begun appealing to the nondelegation doctrine at an historically abnormal clip, hoping the Court will take the step it has forecasted.<sup>127</sup> Interestingly, some of the most prominent of these cases are being brought on behalf of what would be considered conventionally liberal or progressive causes. For instance, two such cases challenged Trump Administration decisions surrounding the border wall expansion. The first, *Center for Biological Diversity v. McAleenan*, argued that Congress's unrestricted delegation of the power to waive environmental laws that might apply to the Secretary of Homeland Security violated the nondelegation doctrine.<sup>128</sup> The second, *El Paso County v. Trump*, similarly argued that the National Emergencies Act's delegation of authority to the President to declare an emergency at the border, and thereby redirect military funding appropriate for other purposes, was an unconstitutional delegation of legislative authority.<sup>129</sup> So far, neither argument has made its way to the Court's merits docket: in *McAleenan*, the Court denied review,<sup>130</sup> and in *El Paso*, the district court declined to rule on the issue and instead held that the redirection of funds was prohibited by the 2019 Consolidated Appropriations Act.<sup>131</sup>

Separately, Professor Alan Morrison—a progressive litigator who had previously tried to invigorate the nondelegation doctrine in cases like *Bowsher v. Synar* and *Mistretta v. United States*—petitioned for a writ of certiorari in a case challenging the Trump Administration's imposition of tariffs on steel and aluminum imports under Section 232 of the Trade Expansion Act of 1962.<sup>132</sup>

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<sup>125</sup> *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

<sup>126</sup> Hall, *supra* note 12, at 179 (arguing “the Gorsuch test is stricter than any prior version and, if adopted, would severely curtail Congress’s ability to give agencies power, thus limiting the administrative state”).

<sup>127</sup> Alan B. Morrison, *The Supreme Court’s Non-Delegation Tease*, YALE J. ON REGUL. (July 29, 2020), <https://www.yalejreg.com/nc/the-supreme-courts-non-delegation-tease-by-alan-b-morrison/> (discussing two serious nondelegation challenges presented to the Court in a single year).

<sup>128</sup> 404 F. Supp. 3d 218, 224 (D.D.C. 2019), *cert. denied*, 141 S. Ct. 158 (2020).

<sup>129</sup> 982 F.3d 332, 370 n.8 (5th Cir. 2020) (Dennis, J., dissenting).

<sup>130</sup> *Ctr. for Biological Diversity v. Wolf*, No. 19-975 (June 29, 2020) (order list: 591 U.S.).

<sup>131</sup> David Bookbinder, *The Nondelegation Panic*, NISKANEN CTR. (Dec. 18, 2019), <https://www.niskanencenter.org/the-nondelegation-panic/>.

<sup>132</sup> Morrison, *supra* note 127 (referencing *Am. Inst. for Int’l Steel, Inc. v. United States*, 806 F. App’x 982 (Fed. Cir. 2020), *aff’g* 376 F. Supp. 3d 1335 (Ct. Int’l Trade 2019)).

Morrison argued that in his case, unlike in *Gundy*, “the Government did not dispute our construction of the applicable statute” and that “the Government was never able to identify a single act that the President could not take regarding imports that would violate Section 232, including restricting imports of peanut butter or denying income tax deductions for the 25% tariffs paid.”<sup>133</sup> Nevertheless, the Court denied the petition.<sup>134</sup>

Most recently, *Gundy* has been cited in cases challenging emergency measures in the states in response to the COVID-19 pandemic.<sup>135</sup> Surprisingly, some of these challenges were successful, blocking emergency public health measures and stoking the fears of those who believe that the approach in *Gundy* would effectively destroy government capacity to protect the public from harms that are not addressed through private initiative.<sup>136</sup> Although Justice Gorsuch made a point of arguing that enforcing limits on delegation would not “spell doom” for regulation and that, even under his test, Congress would be “hardly bereft of options to accomplish all it might wish to achieve,”<sup>137</sup> the COVID-19 emergency orders cases in the states may be viewed by some as a forecast of what is to come.

These cases, though, like the pandemic that gave rise to them, might be (and hopefully are) *sui generis*. And they also point to a potential laboratory for studying how much doctrinal changes in the nondelegation space matter to actual outcomes—the states. The next part of this Article uses that laboratory to cut through the speculation about what *Gundy* and the U.S. Supreme Court’s future nondelegation cases might mean for administrative law.

## II. AN EMPIRICAL ANALYSIS OF STATE COURT NONDELEGATION DECISIONS

Perhaps the main reason that the nondelegation doctrine inspires such strong reactions is because its effects are almost entirely unknown. The lack of significant variation in outcomes and approaches over time makes it difficult to discern even basic facts, like whether embracing the test articulated by Justice Gorsuch in *Gundy* would actually imperil most federal statutes.<sup>138</sup> In this

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See, e.g., Wis. Legislature v. Palm, 942 N.W.2d 900, 932 (Wis. 2020) (Kelly, J., concurring); *In re Certified Questions from W.D. Mich.*, S. Div., 958 N.W.2d 1, 13 (2020).

<sup>136</sup> Bagley, *supra* note 98.

<sup>137</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting).

<sup>138</sup> Hall, *supra* note 12, at 202–06 (attempting to discern the likely effects of the Gorsuch test by applying it counterfactually in cases decided under the intelligible principle standard). Separate from the question of how articulations of the nondelegation doctrine would control outcomes, which is the focus in this Article, there are

empirically impoverished environment, it becomes far too easy to characterize a robust nondelegation doctrine as a panacea or as a bogeyman, as one pleases.

Although it is often overlooked, every state has its own nondelegation doctrine that applies to state legislation. Unlike at the federal level, there is substantial variation in terms of approach and outcome. In fact, many states employ the main features of the Gorsuch test from *Gundy*, and have been doing so for a long time, while others adhere to something closer to the intelligible principle test in permitting the delegation of policymaking discretion. Moreover, because each state is independent, each state's application of the nondelegation doctrine in actual cases varies substantially, both from one another and over time. The diversity of approaches and outcomes at the state level furnishes an ideal setting to study what a different articulation of the constitutional limitations on delegation might mean at the federal level. While states differ on many dimensions from the federal government,<sup>139</sup> the similarities are substantial enough to make the differences informative, and some of the most innovative and promising work in the fields of administrative law and public administration makes use of the analogy to draw lessons for the federal side.<sup>140</sup> In that spirit, this Article turns to an examination of the nondelegation doctrine's experience in the states.<sup>141</sup> This Article is by no means the first to examine the nondelegation doctrine in the states,<sup>142</sup> although it is, to my knowledge, the first to examine

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many other hypothesized effects on Congress's behavior, most of them anticipating a reinvigoration of Congress's work ethic. See Mashaw, *supra* note 23, at 82 (collecting arguments); Postell, *supra* note 78, at 283–90 (collecting arguments). I reserve empirical examination of these questions for separate work. See Walters & Ash, *supra* note 27.

<sup>139</sup> See *infra* Part II.D.

<sup>140</sup> Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 490–91 (2017) [hereinafter Seifter, *Gubernatorial Administration*] (arguing “gubernatorial administration deepens our understanding of executive power” by “provid[ing] a reference point of a stronger and less constrained executive than the modern presidency to date”); Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1542 (2019) (arguing that attention to state agency independence can illuminate ambiguities about independence in the federal context).

<sup>141</sup> In focusing on what the state experience foretells about the impending federal nondelegation experiment, I bracket important normative or prescriptive questions about whether federal and state nondelegation doctrines should be the same or different, and to what extent they might be calibrated to complement each other. Cf. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 173–90 (2018) (urging a renaissance of state constitutional law development to allow rights to reflect local preferences); Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 271–72 (2019) (theorizing how states could interact with presidential administration at the federal level); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 902, 905–06 (2021) (noting that states and the federal government may complement each other in the degree to which they permit majoritarian preferences to shape public policy).

<sup>142</sup> See, e.g., Rossi, *supra* note 31, at 1170–71; Whittington & Iuliano, *supra* note 38, at 381; Postell, *supra* note 78, at 281–82; Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J.L. ECON. & ORG. 27, 29 (2018); Randolph J. May, *The Nondelegation Doctrine Is Alive and Well in the States*,

empirically how different articulations of the doctrine might affect outcomes in subsequent nondelegation cases.

This Part proceeds in several subparts. Part II.A begins by classifying states according to the way that the state's supreme court formulates the nondelegation doctrine, showing how many states employ something very close to Justice Gorsuch's proposed test from *Gundy*. Part II.B describes the main data used to test the hypothesis that the formulation employed by states is associated with different outcomes. Part II.C presents the main analysis. Part II.D considers a potential objection to generalizing from the experience in the states to likely outcomes in federal court. Finally, Part II.E summarizes the empirical findings and takeaways.

### A. *Surveying the States: The Varying Formulations of the Nondelegation Doctrine*

As one casebook describes it, “[t]he nondelegation doctrine has much greater practical significance at the state level than at the federal level.”<sup>143</sup> In terms of raw numbers, this does appear to be the case. Professors Keith Whittington and Jason Iuliano collected nondelegation decisions in the state courts from the Founding Era to 2015.<sup>144</sup> They found over 2,100 such cases from 1789 to 1940,<sup>145</sup> and, sampling at five-year intervals after 1940 up until 2015, they found 919 cases, which extrapolates to over 4,000 cases over the period.<sup>146</sup> They also found a large disparity between the invalidation rate in federal court (three percent) and the invalidation rate in state court (sixteen percent).<sup>147</sup> Contra claims that the nondelegation doctrine has faded in significance since an apotheosis in 1935, Whittington and Iuliano conclude that “[t]he narrative of decline that has dominated the past eighty years is wrong. The nondelegation doctrine did not die during the New Deal but rather persists to this day,”

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REGUL. REV. (Oct. 15, 2020), <https://www.theregreview.org/2020/10/15/may-nondelegation-doctrine-alive-well-states/>.

<sup>143</sup> MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 450 (4th ed. 2014).

<sup>144</sup> Whittington & Iuliano, *supra* note 38, at 383 (compiling data from cases between 1789 and 1940); Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 635 (2017) [hereinafter Iuliano & Whittington, *The Nondelegation Doctrine*] (collecting data from cases between 1940 and 2015).

<sup>145</sup> Whittington & Iuliano, *supra* note 38, at 418 (finding 2,506 state and federal cases during this period, eighty-five percent of which were state decisions).

<sup>146</sup> Iuliano & Whittington, *The Nondelegation Doctrine*, *supra* note 144, at 635–36. I arrive at the number 4,000 by multiplying 919 by 5, which assumes that the sample every five years is stable.

<sup>147</sup> *Id.*

particularly in state courts; it's just that it *never* played a *major* role in limiting delegation.<sup>148</sup>

Although these trends (or the lack thereof) are interesting by themselves insofar as they suggest that the nondelegation doctrine is not (and has never been) completely illusory in state courts, as it seemingly has been in federal courts,<sup>149</sup> the aggregate numbers mask much of what is notable about the state arena. As a growing number of studies have documented, state courts approach the nondelegation doctrine in unique and variable ways. Legal scholar Gary Greco provided the first systematic study of state nondelegation doctrine, grouping states into one of three categories: 1) “strict” nondelegation states, in which courts require the state legislature to “provide definite and clear standards with the delegation”;<sup>150</sup> 2) “loose” nondelegation states, in which courts require only that a statute “contains a general rule to guide the agency in exercising the delegated power”;<sup>151</sup> and 3) “procedural safeguards” states, in which the courts eschew analysis of the standards laid down by the legislature in favor of an analysis of the adequacy of the procedures to constrain the exercise of discretion.<sup>152</sup> According to Greco, the “loose” nondelegation doctrine predominated in the states.<sup>153</sup> The consideration of adequate procedural safeguards—procedural requirements, internal norms, self-limiting interpretations of statutes, and the like—as a cure for broad delegation, while fairly common in the states,<sup>154</sup> is almost entirely absent in the federal cases.<sup>155</sup>

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<sup>148</sup> *Id.* at 645. Others have pushed back on this claim, arguing that in the pre-New Deal Era, the nondelegation doctrine, as applied to delegations to executive branch agencies, was widely understood to be, and in fact was, more robust than Whittington and Iuliano suggest. See Postell, *supra* note 78, at 303–04.

<sup>149</sup> See Iuliano & Whittington, *The Nondelegation Doctrine*, *supra* note 144 (making this point and focusing much effort on identifying variation in challenges and outcomes based on the type of delegation involved).

<sup>150</sup> Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 579–80 (1994).

<sup>151</sup> *Id.* at 588.

<sup>152</sup> *Id.* at 598.

<sup>153</sup> *Id.* at 575.

<sup>154</sup> See Rossi, *supra* note 31, at 1191–93 (finding six states explicitly adopted the procedural safeguards approach). The procedural safeguards approach can be sourced to administrative law scholar Kenneth Culp Davis, who argued that the attempt to define the nondelegation doctrine by reference to the specificity of legislation had failed and that the courts should shift their focus to encouraging agencies to self-limit their discretion. See Ronald M. Levin, *The Administrative Law Legacy of Kenneth Culp Davis*, 42 SAN DIEGO L. REV. 315, 332 (2005).

<sup>155</sup> In fact, the U.S. Supreme Court has apparently definitively ruled out this approach. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) (holding that “[t]he idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory” because “[w]hether the statute delegates legislative power is a question for the courts, and an agency’s voluntary self-denial has no bearing upon the answer”). But see Merrill, *supra* note 86, at 1957, 1960–61 (understanding the general nonenforcement of the nondelegation doctrine as a “grand synthesis”

Building on Greco's work, Professor Jim Rossi classified states into weak, moderate, and strong categories. Similar to Greco, Rossi found that a plurality of states employs a moderate version of the nondelegation doctrine, although states with a strong doctrine (twenty of the fifty states) were not far behind.<sup>156</sup>

Justice Gorsuch's dissent in *Gundy* provides a new opportunity to assess where states stand. With the aid of a research assistant, I examined statements from state supreme court cases involving nondelegation challenges to classify states' nondelegation doctrines according to Gorsuch's conceptualization of the inquiry. Specifically, I attempted to discern whether any states (a) borrow the language "fill up the details"<sup>157</sup> or some equivalent attempt to prohibit the delegation of policymaking authority in the drafting of rules; (b) specify that executive agencies can identify whether facts are present that would trigger a policy set by the legislature; or (c) recognize that delegation may be saved by the fact that the executive branch inherently shares overlapping power in that domain.<sup>158</sup> I also tracked whether states recognized a consideration of procedural safeguards to be relevant to the nondelegation inquiry. Table 1 compares my classifications with those of Greco and Rossi.

For my purposes, the most important observation is that twenty-two states appear to fully adopt something close to Justice Gorsuch's "fill up the details" standard,<sup>159</sup> with twenty-eight states retaining something that more generally resembles the intelligible principle standard in only requiring a high-level

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involving the partial substitution of process for positive law).

<sup>156</sup> Rossi, *supra* note 31, at 1193–201.

<sup>157</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

<sup>158</sup> These, again, map to the three prongs of the Gorsuch test. See Hall, *supra* note 12, at 201–02.

<sup>159</sup> To take one example, and one where the state had been previously classified by Rossi and Greco as a "weak" or "procedural safeguards" state, Iowa adheres substantially to the Gorsuch test. See, e.g., *Wall v. Cnty. Bd. of Educ. of Johnson Cnty.*, 249 Iowa 209, 228 (1957) ("Authority as to details and promulgation of rules and regulations to carry out legislative directions and policies may be delegated."). The focus on legislative rules and policies and administrative details tracks the first prong of the Gorsuch test closely. Iowa has rearticulated the rule over the years but still retains a focus on "clear delineation of legislative policy and substantive standards to guide the agency in its implementation of that policy." *In re C.S.*, 516 N.W.2d 851, 859 (Iowa 1994). Another state that quite clearly uses the Gorsuch verbiage is Kansas. See, e.g., *Kan. One-Call Sys., Inc. v. State*, 274 P.3d 625, 634 (Kan. 2012) (requiring consideration of the "specific standards set out in the [legislature's] delegation" to distinguish whether it "has delegated legislative power or administrative power," and permitting the legislature to "delegate to administrative bodies discretion to 'fill in the details,' provided there are definite standards to guide the exercise of authority"); *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cnty.*, 955 P.2d 1136, 1148 (Kan. 1998) ("In other words, the legislature may enact general provisions and delegate to an administrative body the discretion to 'fill in the details' if the legislature establishes 'reasonable and definite standards to govern the exercise of such authority.'"); *Consumers' Sand Co. v. Exec. Council of State of Kan.*, 268 P. 123, 126 (Kan. 1928) ("[A] statute which vests discretion in an administrative body or public officer, conferring arbitrary power to regulate the conduct of a lawful business or the lawful use of private property, without prescribing a rule of action for the guidance of such board or officer, is unconstitutional and void.").

statement of the goals or policy of the statute.<sup>160</sup> Less common is recognition of the second exception articulated by Justice Gorsuch: only nine states seem to recognize that contingent legislation—that is, legislation that is triggered by a finding of fact by an executive official—can be consistent with the principle of nondelegation.<sup>161</sup> Only one state—Missouri—recognized Justice Gorsuch’s nebulous third category.<sup>162</sup> Overall, Justice Gorsuch’s approach is not foreign to the states.

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<sup>160</sup> For instance, Kentucky, despite being classified by Rossi and Greco as having a “strong” or “strict” nondelegation doctrine, follows the intelligible principle standard, citing it by name. *See, e.g., Brewer v. Commonwealth*, 478 S.W.3d 363, 375 (Ky. 2015) (“Practicality recognizes that the General Assembly cannot accomplish all its duties without help. Similar to the federal ‘intelligible principle’ rule, the General Assembly may delegate its authority in those limited circumstances where it ‘lay[s] down policies and establish[es] standards’ to which the body directed to act must conform.”). The same is true of Ohio. *See, e.g., Blue Cross of Ne. Ohio v. Ratchford*, 416 N.E.2d 614, 618 (Ohio 1980) (“We hold that 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.”). Arkansas also exemplifies the general guidelines or intelligible principle approach, although it does not use the federal language. The Arkansas Court “has held that discretionary power may be delegated by the legislature to a state agency as long as reasonable guidelines are provided.” *Bakalekos v. Furlow*, 410 S.W.3d 564, 571 (Ark. 2011) (“This guidance must include appropriate standards by which the administrative body is to exercise this power.”).

<sup>161</sup> *See, e.g., State v. Ariz. Mines Supply Co.*, 484 P.2d 619, 625 (Ariz. 1971) (“[T]he decisions display an increasing tendency, due to the complexity of our social and industrial activities, to hold as nonlegislative the authority conferred upon commissions and boards to formulate rules and regulations and to determine the state of facts upon which the law intends to make its action depend.”); *Gunderson v. State, Ind. Dep’t of Nat. Res.*, 90 N.E.3d 1171, 1186 (Ind. 2018) (“First, ‘the legislature cannot delegate the power to make a law.’ It can only ‘make a law delegating power to an agency to determine the existence of some fact or situation upon which the law is intended to operate.’” (citations omitted)), *cert. denied sub nom. Gunderson v. Indiana*, 139 S. Ct. 1167 (2019).

<sup>162</sup> *State v. Cushman*, 451 S.W.2d 17, 20 (Mo. 1970) (“[T]he General Assembly, having established a sufficiently definite policy, may authorize an administrative officer to make rules, regulations or orders relating to the administration of enforcement of the law. In other words, administrative power, as distinguished from legislative power, constitutionally may be delegated by the General Assembly.”).



Table 1: Classifications of State Nondelegation Doctrines

State	Greco	Rossi	Gorsuch Test		
			Fill in Details	Executive Factfinding	Overlap Executive Powers
Alabama	Loose	Moderate	Yes	No	No
Alaska	Loose	Moderate	No	No	No
Arizona	Strict	Strong	Yes	Yes	No
Arkansas	NA	Weak	No	Yes	No
California	Proc. Safeguards	Weak	No	No	No
Colorado	Loose	Moderate	No	No	No
Connecticut	Loose	Moderate	Yes	No	No
Delaware	Loose	Moderate	No	No	No
Florida	Strict	Strong	Yes	No	No
Georgia	Loose	Moderate	No	No	No
Hawaii	Loose	Moderate	Yes	No	No
Idaho	Loose	Moderate	Yes	Yes	No
Illinois	Loose	Strong	No	No	No
Indiana	Loose	Moderate	Yes	Yes	No
Iowa	Proc. Safeguards	Weak	Yes	No	No
Kansas	Loose	Moderate	Yes	No	No
Kentucky	Strict	Strong	No	No	No
Louisiana	Loose	Moderate	Yes	Yes	No
Maine	Loose	Moderate	No	No	No
Maryland	Proc. Safeguards	Weak	No	No	No
Massachusetts	Strict	Strong	Yes	No	No
Michigan	Loose	Moderate	No	No	No
Minnesota	Loose	Moderate	No	No	No
Mississippi	Loose	Moderate	Yes	Yes	No
Missouri	Loose	Moderate	Yes	Yes	Yes
Montana	Strict	Strong	Yes	No	No
Nebraska	Strict	Strong	Yes	No	No
Nevada	Strict	Strong	Yes	Yes	No
N. Hampshire	Strict	Strong	Yes	No	No
New Jersey	Loose	Moderate	No	No	No
New Mexico	Strict	Strong	No	No	No
New York	Strict	Strong	Yes	No	No
N. Carolina	Loose	Moderate	No	No	No
North Dakota	Loose	Moderate	No	Yes	No
Ohio	Strict	Strong	No	No	No
Oklahoma	Strict	Strong	Yes	No	No
Oregon	Proc. Safeguards	Weak	No	No	No
Pennsylvania	Strict	Strong	Yes	No	No
Rhode Island	Loose	Moderate	No	No	No
S. Carolina	Strict	Strong	Yes	No	No
South Dakota	Strict	Strong	No	No	No
Tennessee	Loose	Moderate	No	No	No
Texas	Strict	Strong	No	No	No
Utah	NA	Strong	No	No	No
Vermont	Loose	Moderate	No	No	No
Virginia	Strict	Strong	Yes	No	No
Washington	Proc. Safeguards	Weak	No	No	No
West Virginia	Strict	Strong	No	No	No
Wisconsin	Proc. Safeguards	Weak	No	No	No
Wyoming	Loose	Moderate	No	No	No

As Table 1 shows, my own classifications of states' nondelegation doctrines under the Gorsuch test yields some notable changes in the general tenor of the review in a handful of states. This is to be expected: I am focused on features of the standards that are now more clearly relevant in the aftermath of *Gundy* than they were when Greco and Rossi compiled their lists. In addition, coding states involves judgment calls where the language used by the court is ambiguous or does not fit perfectly, and that was the case even with Greco's and Rossi's studies.<sup>163</sup> I have attempted to review a selection of cases and find a statement of the state's nondelegation doctrine that is fairly complete and explicit. It is no doubt possible to find individual cases that seem not to fit the classification, but the tradeoff of some detail allows for more systematic quantitative analysis of general trends and impacts.

My review of the cases also uncovered another dividing line between states' approaches to the nondelegation doctrine. Most states frame the inquiry around discerning whether a standard of some kind has been delineated by the state legislature, and the question is simply whether that inquiry demands very little be left over for agencies or permits the exercise of discretion so long as a general standard exists to guide that discretion. But some states explicitly use what amounts to a sliding scale approach wherein the need for specificity in the statutory delegation varies as the context of the delegation varies.<sup>164</sup> For instance, in Alaska, statutes governing technical or narrow matters can delegate broad discretion to agencies, but when more fundamental policy questions are at issue, more specificity is required.<sup>165</sup> While this kind of thinking is not entirely unheard of in the federal cases<sup>166</sup> and is implicit in "major questions" thinking in general<sup>167</sup> and some models of the nondelegation problem,<sup>168</sup> it has never been

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<sup>163</sup> See Greco, *supra* note 150, at 579 n.66 ("Obviously the categories will have some overlap . . .").

<sup>164</sup> See, e.g., N.C. State Bd. of Educ. v. State, 814 S.E.2d 54, 64 (N.C. 2018).

<sup>165</sup> State v. Fairbanks N. Star Borough, 736 P.2d 1140, 1143 (Alaska 1987).

<sup>166</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.").

<sup>167</sup> See generally Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479, 480 (2016) (arguing that under the major questions doctrine "a court will not defer to an agency's interpretation of a statutory provision in circumstances where the case involves an issue of deep economic or political significance"); Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 358 (2016) (arguing the major questions doctrine "says that when the legal stakes are sufficiently high, agency interpretations of law carry little or no weight, contrary to the standard rule in everyday cases where those interpretations are often determinative"). It also may be implicit in the way the Court has operationalized the intelligible principle standard. See Sullivan, *supra* note 89, at 1234 (articulating a theory of the intelligible principle standard based on a sliding scale where the degree of specificity required varies based on whether Congress has the ability to ensure agencies will act in the way contemplated by the delegation).

<sup>168</sup> See Coglianese, *supra* note 63, at 1876 fig.1 (depicting how federal nondelegation doctrine only

so explicitly incorporated into the doctrine as it is in several states. That said, states that incorporate a sliding scale element do not uniformly focus on the same contextual factors as indicating less need for specificity. For instance, in Delaware, a statute that focuses on “public morals, health, safety or general welfare” is given “more latitude”—essentially the opposite of the major questions doctrine, as traditionally conceived.<sup>169</sup> Overall, this more fluid understanding of the reach of the nondelegation doctrine is an interesting twist on the federal arena, where such attempts to tailor the doctrine to context have yielded to a static “intelligible principle” standard.<sup>170</sup> This may be explained by the states’ greater need for limits on the justiciability of nondelegation challenges, given that many recognize a more robust nondelegation doctrine than exists at the federal level. In the analysis that follows, I draw on each of these classificatory schemes on the theory that, among them, the measures capture something real about the flavor of review in various states.

### *B. An Overview of the State Nondelegation Case Dataset*

As discussed above, the main question I seek to answer is whether the variation among states’ approaches to the nondelegation doctrine can explain the variation in outcomes. In essence, I ask whether employing a relatively “strict” doctrine corresponds to higher rates of invalidations of statutes. To answer that question, it is necessary to collect data on nondelegation cases. Although Professors Whittington and Iuliano collected a complete dataset for the period from 1789 to 1940,<sup>171</sup> their more recent data only covers cases sampled every fifth year.<sup>172</sup> Seeking a more complete sample, especially for more recent decades, I set out to collect every state supreme court case involving a challenge to a delegation of legislative authority to the Executive Branch, including delegations to the governor’s office itself or to executive agencies.<sup>173</sup> To do so, I used the Westlaw key system to identify the universe of potentially relevant

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prohibits delegation when there is a high amount of both discretion and power).

<sup>169</sup> *Lamberty v. State*, No. 232, 2014, 2015 WL 428581, at \*3 (Del. Jan. 30, 2015) (quoting *Raley v. State*, No. 95,1991, 1991 WL 235357, at \*2 (Del. Sept. 16, 1991)).

<sup>170</sup> See *infra* Part I.B (discussing the Court’s endorsement of the intelligible principle standard and reviewing the almost uniformly deferential results it has yielded).

<sup>171</sup> Whittington & Iuliano, *supra* note 38, at 418.

<sup>172</sup> Iuliano & Whittington, *The Nondelegation Doctrine*, *supra* note 144, at 635.

<sup>173</sup> I sought to exclude cases involving delegations of authority to municipalities, courts, and private individuals or entities. While these are important categories of nondelegation cases, particularly in the states, I am most interested in what can be gleaned from state cases for the application of the federal nondelegation doctrine, and most federal nondelegation cases involve delegations of legislative authority to the executive branch.

cases.<sup>174</sup> To ensure that I was not missing relevant cases, I cast a wide net.<sup>175</sup> This search returned 4,001 cases ranging from 1830 to 2019.<sup>176</sup> Not all of these cases were true nondelegation challenges, though. It is fairly common for courts to make note of nondelegation principles as general background, even in cases where the court did not resolve the case on nondelegation grounds.<sup>177</sup> Even after reducing the pool of included cases to those where two coders agreed the case should be included, it is apparent that many states regularly hear at least one or two nondelegation cases every year, as Figure 1 demonstrates.

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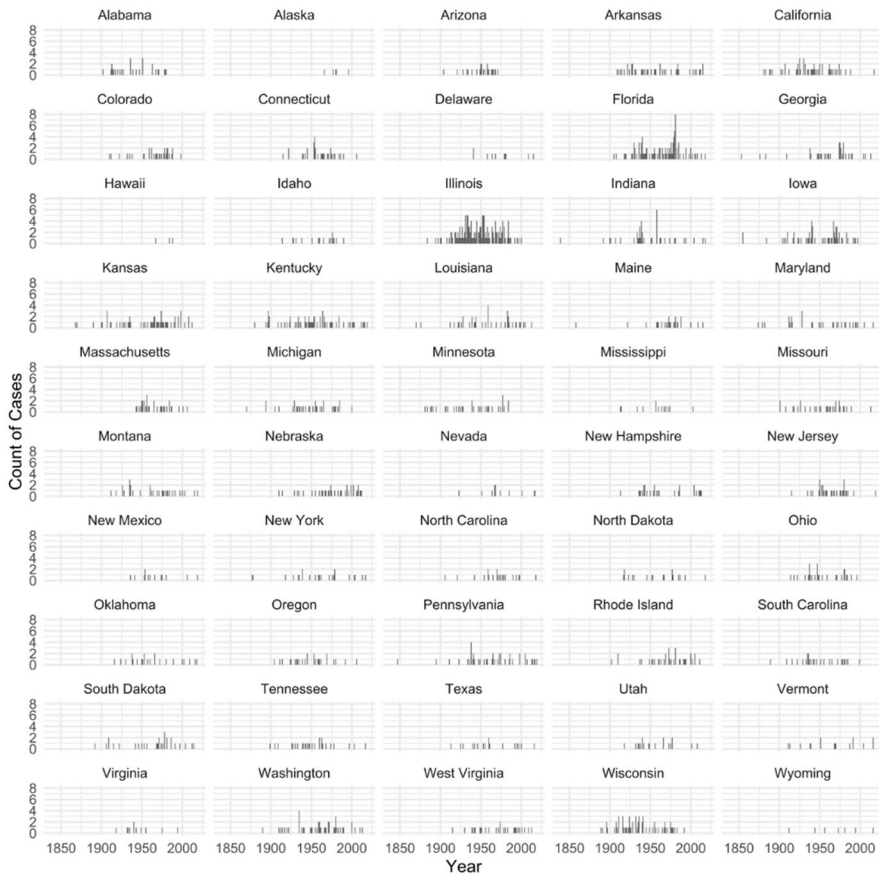
<sup>174</sup> Westlaw's key system may in some sense be both "overinclusive and underinclusive." David Zaring, *Toward Separation of Powers Realism*, 37 *YALE J. ON REGUL.* 708, 739 n.189 (2020). I have attempted to minimize overinclusiveness by having research assistants read opinions to determine whether nondelegation was actually at issue. Underinclusiveness is less addressable, but there is no better way to identify relevant cases. *See id.* at 739 (noting that, although there are "some limitations" to Westlaw searches, "it is unlikely to miss any separation of powers case purporting to overrule" a statute—i.e., the most important cases).

<sup>175</sup> While key numbers 92k2405 through 92k2432 purport to focus on the cases of interest—delegations of legislative power to the executive branch—I collected cases from the broader set of keys concerning legislative power, including delegations to other actors, such as courts, on the theory that some of these cases might still present issues of delegation to the executive as well. A research assistant thus compiled the full set of cases returned under the following keys: "XX. Separation of Powers. (B) Legislative Powers and Functions. 4. Delegation of Powers, k2400-2449."

<sup>176</sup> The search was conducted in early 2020 and, rather than have an incomplete population of cases for 2020, I elected to confine the search to December 31, 2019 or earlier. The number of "hits" returned by the search was significantly higher than 4,001 cases, but this was because a single case could appear under several different headnote keys. A first step in processing the data was thus to eliminate duplicate cases.

<sup>177</sup> For my purposes, I treated statutory interpretation cases, in which the court appeared to adopt a narrow construction of a statute to avoid nondelegation problems, as true nondelegation cases. This accords with the scholarly literature's emphasis on interpretive canons as doing some work that the nondelegation doctrine might otherwise do. *See* Sunstein, *supra* note 74, at 316 ("[C]ertain canons of construction operate as nondelegation principles."); Manning, *supra* note 74, at 223 ("The nondelegation doctrine, in other words, now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions.").

Figure 1: Case Counts by State and Year



Likewise, some cases did not concern delegation of legislative authority to executive branch actors, but instead concerned delegation to courts or other actors. To cull only cases where there was presentation and resolution of the kind of nondelegation challenge that is typically at issue in the federal system, it was necessary to read each case and determine whether the case should be included. I assigned two research assistants to read each case and code whether the case should be included, as well as whether the statute was invalidated. Using the independent determinations by these coders allows for analysis of more conservative and more inclusive datasets of cases: for instance, the most conservative list of cases involves those where both coders agreed that the case should be included, while a more inclusive (but potentially overinclusive) list

involves those where at least one coder thought the case should be included. I do not analyze cases where both coders agreed the case should not be included, and I only present results from the cases where both coders agreed the case should be included. The results are generally comparable using the entire set of cases where at least one coder thought the case should be included. Notably, the coders achieved perfect agreement on the outcome variable—usually courts are quite clear when they invalidate a statute or adopt a limiting construction to avoid a constitutional infirmity.

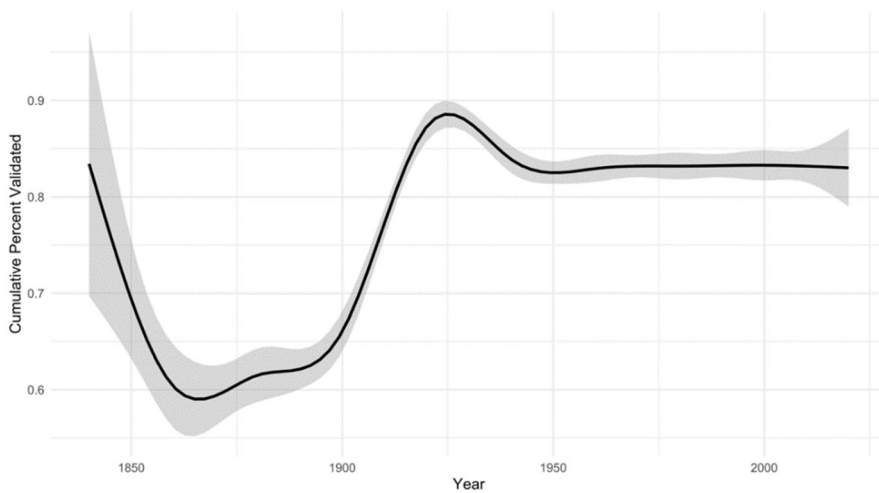
### *C. Analysis of the State Cases*

I now turn to the main empirical analysis, starting with a descriptive overview of the dataset before moving to an analysis of the relationship between doctrinal standards and outcomes.

#### *1. Trends Over Time*

A starting point for the analysis is describing the general trends in the data. Figure 2 presents a smoothed average across all states of the cumulative percentage of cases resulting in validation of the statute. When the line is going down over time, that indicates that the courts are invalidating more statutes than they are validating; a line moving up means that courts are validating more statutes than they are invalidating. When the line is flat, as it essentially has been since roughly 1950, that means that the courts are, on average, stable.

Figure 2: Cumulative Percent Validated Across All States



The trends displayed in Figure 2 are informative on several levels. First, on the whole, the validation rate of 81.3% is noticeably more stringent in practice than the federal nondelegation doctrine. These findings are consistent with prior studies, which estimate an invalidation rate in the high teens. Second, with recent history excepted, the apparent stringency of the nondelegation doctrine in the states has been quite volatile. The earliest cases were, overall, fairly close to the modern average validation rate, albeit with a greater variance in outcomes across states. Then, in the mid- to late-1800s, the courts began a drastic tightening of their approach, driving the average validation rate down to around 60% of cases. Courts again changed their approach around the turn of the twentieth century, driving the average validation rate to almost 90% by the 1920s. The courts then leveled off over the New Deal years, settling at an 83.1% validation rate for the period running from 1950 to 2019. These findings largely correspond to previous findings,<sup>178</sup> but not entirely. There is clearly more volatility in the validation rate than previous research has shown.<sup>179</sup>

This volatility has yet another dimension: individual states have had wildly different experiences over time, often deviating substantially from the national average. Figure 3 shows the same basic statistic—the cumulative rate of

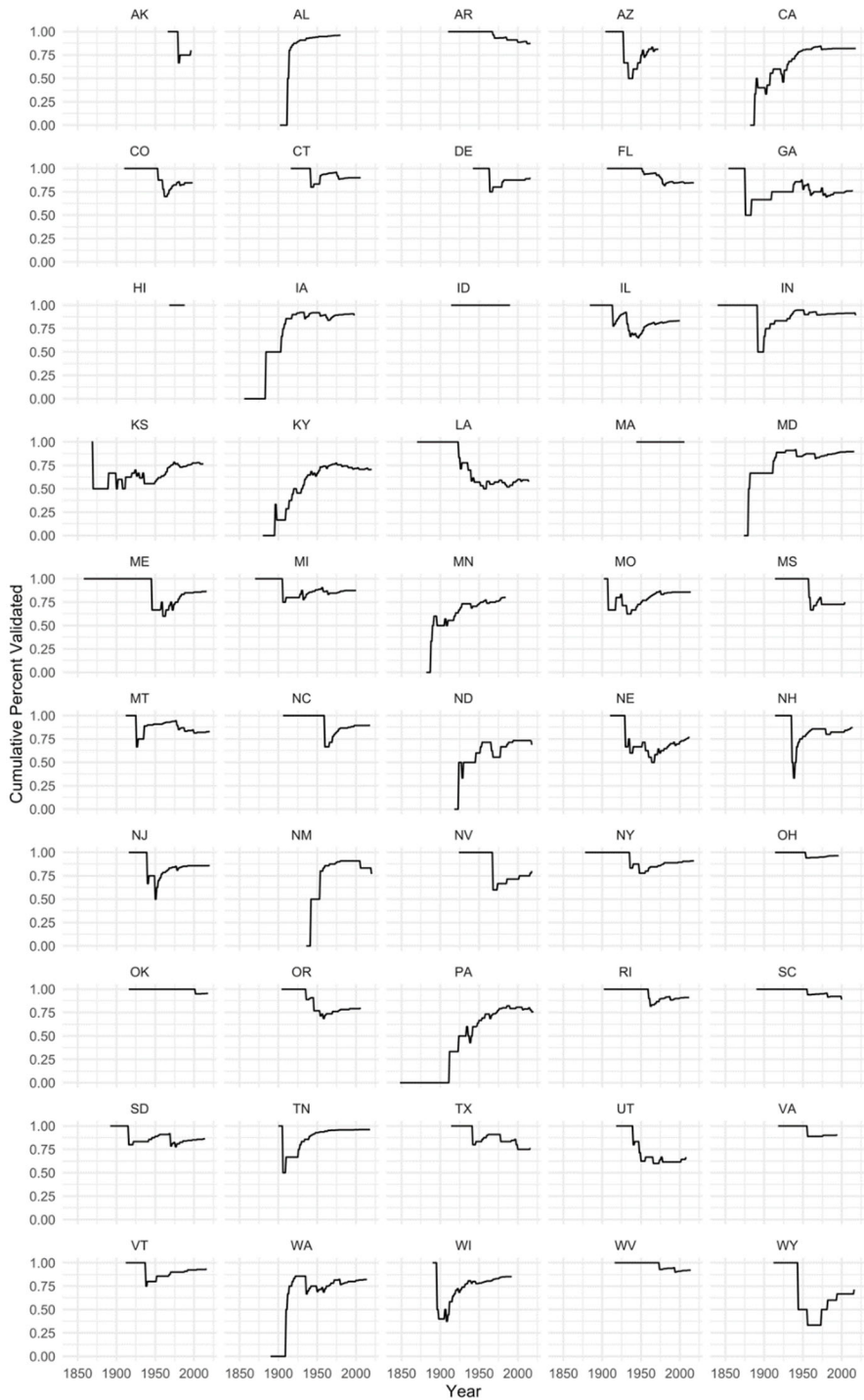
<sup>178</sup> See Whittington & Iuliano, *supra* note 38, at 419–20 (finding that “[n]ondelegation cases surged at the opening of the twentieth century,” but “the number of judicial invalidations hardly budged”).

<sup>179</sup> See Iuliano & Whittington, *The Nondelegation Doctrine*, *supra* note 144, at 633 (finding that “the success rate has remained markedly stable over the past century”).

validation—but breaks it out by state. Compared to Figure 2, several states show distinctive changes in the validation rate over time. A common pattern, exemplified by New Hampshire, North Carolina, and New Jersey, among others, is a “V-shape” trend: these states start with a high or even perfect validation rate, abruptly tighten their review, and then almost as abruptly revert to a higher level of deference. Another common pattern, exemplified by California, Kentucky, and Pennsylvania, is a somewhat gradual but consistent slide from extremely low validation rates to generally higher rates. Previous studies of state nondelegation decisions focused on the aggregate level, missing the stark variation in the way the nondelegation doctrine has been deployed by particular states at particular times. Overall, Figure 3 suggests a high degree of malleability in the application of the doctrine: indeed, the doctrinal articulation of the nondelegation principle generally does not change fundamentally within states but the revealed stringency of the doctrine clearly does. On its face, this malleability in application highlights concerns that the nondelegation doctrine is not mechanical enough to provide a predictable baseline against which to legislate, and that the doctrine is driven by extra-legal considerations, like politics.



Figure 3: Cumulative Percent Validated by State



## 2. *Analyzing Doctrinal Constraint*

The question the data inevitably raises is whether doctrinal differences across states explain a meaningful portion of this variation. Do the states that use a test closer to Justice Gorsuch's test in *Gundy* invalidate statutes at a higher rate? And, if so, how much higher?

Table 2 presents the simplest test of the hypothesis that doctrine matters for outcomes. Cross-tabulations reveal that there is no obvious difference in the frequency of invalidation across states employing different forms of the nondelegation doctrine. Chi-square tests confirm that the differences that do exist do not rise to the level of statistical significance. That is, we cannot distinguish these differences from random variation. The closest any doctrinal formulation comes to statistical significance is the second prong of the Gorsuch test—that is, the principle that executive actors may be permitted to make factual findings that trigger a policy determination that the state legislature has already made. For states that did not recognize this aspect of the Gorsuch test, the validation rate was 86.2%, and for states that did recognize it, the validation rate was 83.3%, a difference that could well be random ( $p=.207$ ).

Table 2: Cross-Tabulations of Outcomes by Doctrine

	Validate	Invalidate	Chi-Square	p-value
<b>Rossi</b>				
<i>Weak</i>	268	55	0.26	.878
<i>Moderate</i>	497	104		
<i>Strong</i>	609	135		
<b>Greco</b>				
<i>Procedural Safeguards</i>	231	49	0.43	.805
<i>Loose</i>	617	137		
<i>Strict</i>	476	96		
<b>Gorsuch Test</b>				
Fill in Details				
<i>No</i>	783	166	0.27	.869
<i>Yes</i>	591	128		
Executive Factfinding				
<i>No</i>	1184	245	1.59	.207
<i>Yes</i>	190	49		
Overlap with Executive				
<i>No</i>	1348	289	0.05	.825
<i>Yes</i>	26	5		
<b>Procedural Safeguards</b>				
<i>No</i>	940	194	0.66	.418
<i>Yes</i>	434	100		

This simple analysis cannot account for a variety of factors that might plausibly affect outcomes. Perhaps after these factors are accounted for, the variation across doctrinal formulations will matter more. To that end, I turn to a multivariate regression analysis of individual decisions.

Several factors could plausibly lead a state with a more stringent or less stringent doctrinal formulation of the nondelegation doctrine to make different decisions than the doctrine might suggest. For instance, certain delegations regarding special topics might be especially likely to draw or evade scrutiny. Nondelegation cases involving criminal justice are widely suspected to be

treated with relative skepticism because of their extreme impacts on individual liberty,<sup>180</sup> and some courts say as much.<sup>181</sup> Cases involving delegations concerning local matters, taxes, and public utilities, by contrast, might be more likely to be given a relatively light version of review, given that they raise complicated questions about federalism, government funding, and technical matters that courts may wish to avoid. In addition, the prior propensity of a state legislature to delegate, as well as the court's own history of review, might shape individual decisions. Additionally, as others have noted, the degree to which states institutionalize or codify the separation of powers can vary,<sup>182</sup> which may affect the operation of the nondelegation doctrine—perhaps by taking away some of the perceived need for enforceable judicial limits on the delegation decision. Finally, as Figure 2 demonstrated, state courts have, in the aggregate, changed direction at various points in time. These periodic changes might drive individual decisions as much as doctrine, as courts adjust their approach to conform to their peer courts in other states.

I control for these potentially confounding factors by estimating multivariate logistic regressions predicting the outcome in individual cases—validate (0) or invalidate (1). A positive coefficient estimate indicates that a variable increases the probability that a case would result in invalidation of a statute under the nondelegation doctrine; a negative coefficient indicates the opposite. The main predictor variables are, as in Table 1, doctrinal. Specifically, Figure 4 focuses on whether the state recognizes any of the prongs of the Gorsuch test, as well as whether the state recognizes that procedural safeguards can suffice to validate a delegation of legislative power. To these predictors I add variables corresponding to each of the categories above. For the special topic category, I include simple indicator variables noting that the case was coded by research assistants as involving special topics—*criminal* matters, *local* matters, *tax* matters, or *public utilities* matters—which could lead to a lower or higher chance of invalidation. For the delegation history category, I include a battery of textual

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<sup>180</sup> See, e.g., Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 817 (2019) (noting Justice Gorsuch has indicated that a stricter nondelegation rule could apply in criminal law); Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 115 n.367 (2008) (explaining that delegation under a federal law establishing national sex offender registry has a “unique normative importance affecting the liberty of individual citizens”); Jenny Roberts, Gundy *and the Civil-Criminal Divide*, 17 OHIO ST. J. CRIM. L. 207, 209 (2019) (“[O]ne choice the Court may confront is whether it should treat delegation in the criminal law context differently from delegation in the civil law context.”).

<sup>181</sup> See, e.g., *People v. Holmes*, 959 P.2d 406, 410 (Colo. 1998) (en banc) (“In the context of a criminal statute, the nondelegation doctrine requires a closer examination of the legislature’s actions.”).

<sup>182</sup> Rossi, *supra* note 31, at 1190–91 (outlining “three basic approaches” to state codification of the separation of powers doctrine).

measures of delegation from state session laws<sup>183</sup> and measures capturing the degree to which that court had intervened to review and stop delegations in the past.<sup>184</sup> Specifically, *delegation current year* measures the total number of delegations to the executive branch in a particular state's session laws in the calendar year that the case was decided;<sup>185</sup> *delegations last 10 years* computes a moving average of the total number of delegations in that state over the past ten years; *cumulative delegations* captures the extent of accumulated delegations by measuring the total number of delegations in a particular state by the year in which the case was decided; *cumulative cases* measures the total number of nondelegation cases, as measured by my nondelegation cases dataset, in a particular state up to the year in which the case was decided; and, finally, *cumulative share validated* measures the percent of nondelegation cases to date resulting in validation of a statute. In the structural features category, I draw upon existing scholarship to capture important institutional design features in particular states: *executive review* is an indicator for whether a particular state in a particular year had some form of gubernatorial review of regulations, as documented by Miriam Seifter in her work on gubernatorial administration;<sup>186</sup> *line item veto* likewise indicates whether a particular state in a particular year had some form of gubernatorial line item veto, again drawing on Seifter's work;<sup>187</sup> and finally, relying on Jim Rossi's tabulation of state constitutional provisions concerning the separation of powers (abbreviated "SOP" for convenience),<sup>188</sup> I include a factor variable for whether a particular state had *no SOP clause*, a *weak SOP clause*, or a *strict SOP clause* (the *weak SOP clause* category serves as the reference point in the estimation). The final category of controls comprises a single factor variable indicating in which of four periods the case was decided. These periods were drawn from the basic change points indicated in Figure 2: *pre-1900* indicates the fairly volatile period before the year 1900, *progressive* indicates the period running from 1900–1934, *new deal* indicates the period running from 1935–1949, and *modern* indicates the period

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<sup>183</sup> Matia Vannoni, Elliot Ash & Massimo Morelli, *Measuring Discretion and Delegation in Legislative Texts: Methods and Applications to US States*, 29 POL. ANALYSIS 43, 46–47 (2020) (developing context-sensitive computational linguistic measures of delegation in a complete corpus of state session laws).

<sup>184</sup> I simply calculate the cumulative percentage of cases resulting in validation of a statute on a yearly basis. The percentage in any given year represents the record to date in nondelegation challenges in the court hearing the case.

<sup>185</sup> See Vannoni et al., *supra* note 183, at 46–47.

<sup>186</sup> Miriam Seifter, *Gubernatorial Administration: Appendices*, at app.A (Univ. Wis. Legal Stud. Rsch. Paper Series, Paper No. 1407, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2934671](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2934671).

<sup>187</sup> *Id.* at app.C.

<sup>188</sup> Rossi, *supra* note 31, at 1201 tbl.1.

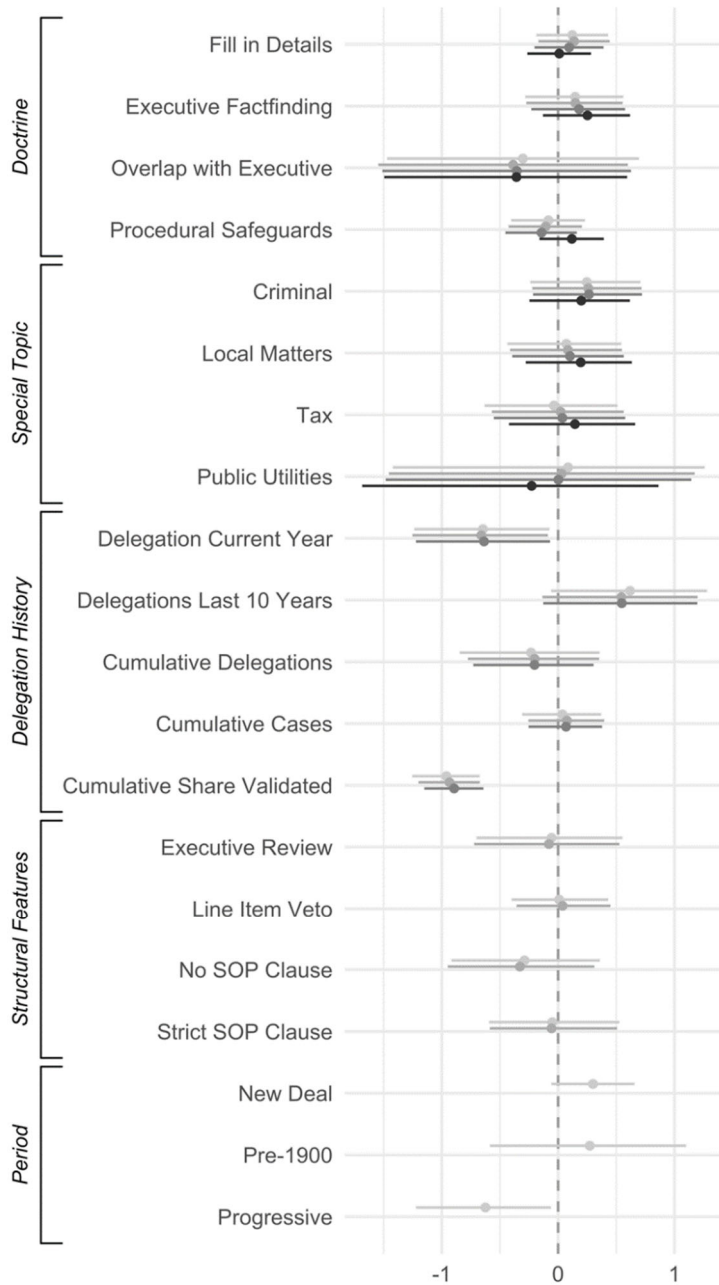
running from 1950–2019 (here, the reference point in the estimation is the *modern* period).<sup>189</sup>

The results of four separate models are reported in Figure 4. The first model includes the main predictor variables measuring doctrinal features of a state's approach to the nondelegation doctrine and adds the special topics variables (darkest gray); the second model repeats the first but adds the delegation history variables (second darkest gray); the third model repeats the second but adds the structural features variables (second lightest gray); and the fourth model includes all variables, including the controls for the period (lightest gray). The dot shows the point estimate, while the whiskers indicate the 95% confidence interval. A point estimate whose whisker falls to the left or the right of the dashed vertical line is statistically significant.

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<sup>189</sup> The indicators for historical period perform similar to the role of fixed effects for temporal variation common to all states. Actual fixed effects at the year level reveal similar results, but I do not display them here because the application I used to produce dot and whisker plots does not support the application I used to estimate fixed effects logistic regressions.

Figure 4: Logistic Regression Models of the Decision to Invalidate a State Statute in a Nondelegation Challenge



None of the models should change the interpretation of the results from Table 1. Accounting for other factors, the doctrinal formulation existing in a state is not a meaningful predictor of case outcomes in individual cases. At the same time, a handful of the control variable outcomes are statistically significant, or at least very nearly statistically significant, which provides some insight into what might be driving decisions. For instance, *delegation current year* is associated with a lower probability of invalidation, as is *cumulative share validated*. By contrast, the moving average of total delegations over the ten years leading up to the decision is very nearly statistically significant across three model specifications and appears to be associated with a greater chance of invalidation. Together, these variables suggest that, even accounting for static doctrine, courts adjust their behavior to the environment for delegation in which they operate. Not surprisingly, given the volatility indicated in Figure 2, relative to the modern era's 16.9% invalidation rate, courts were less likely to invalidate statutes during the *progressive* era (and more likely to invalidate statutes in the *new deal* era, at least at the  $p < 0.1$  level).

The results in Figure 4, and really any models based on observational data and simple regression, are susceptible to questions about equilibrium effects. If litigants make strategic decisions about whether to bring cases based on the strength of their case under current doctrine, it is possible that, over time, the composition of cases will change based on the current doctrine, leading the probability of invalidation to remain the same even with a doctrine that is meaningfully more or less stringent than another jurisdiction's.<sup>190</sup> The same might be said about legislative behavior: assuming that the legislature pays close attention to the state supreme court's nondelegation decisions, any adjustment might induce a change in statutory drafting that would make nondelegation doctrine challenges more or less likely to succeed.<sup>191</sup> A not dissimilar problem arose in the context of the U.S. Supreme Court's decisions in *Bell Atlantic v. Twombly*<sup>192</sup> and *Ashcroft v. Iqbal*,<sup>193</sup> which imposed heightened "plausibility" pleading requirements in general civil litigation, where empirical legal scholars

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<sup>190</sup> This is essentially the "Priest-Klein" model of dispute resolution, which posits that rational and strategic decisions about whether to elevate a dispute to full-on litigation leads to coin-flip odds in the court's final decision. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984). For a more recent review of the literature and critique of the Priest-Klein model, see Yoon-Ho Alex Lee & Daniel Klerman, *The Priest-Klein Hypotheses: Proofs and Generality*, 48 INT'L REV. L. & ECON. 59, 59, 70 (2016).

<sup>191</sup> The parallel research I am conducting on legislative responses to the nondelegation doctrine shows that this effect may exist, but it is likely quite small—at most, leading to about a five percent change in delegations across the board. See Walters & Ash, *supra* note 27.

<sup>192</sup> 550 U.S. 544 (2007).

<sup>193</sup> 556 U.S. 662 (2009).



attempted to test the hypothesis that the heightened pleading standard disadvantaged plaintiffs in subsequent cases.<sup>194</sup> While this problem is difficult to resolve completely, there are reasons to believe it is not as serious a problem as it was in the pleading context.

When it comes to primary legislative behavior, research suggests that statutory drafters are highly inattentive to the details of the U.S. Supreme Court's decisions. Professors Abbe Gluck and Lisa Bressman extensively surveyed legislative staffers who draft the bulk of statutes and found that major administrative law doctrines are “not getting through to Congress,” as evidenced by drafters' general unfamiliarity with all but the well-known *Chevron* rule.<sup>195</sup> Even when the signal gets through, Congress frequently ignores the Court's pronouncements, as it has in continuing to include one-house legislative veto provisions in legislation even after the Court's decision in *INS v. Chadha*.<sup>196</sup> It is therefore not obvious at all that primary legislative behavior would change much based on the stringency of the doctrine. In general, the existing research in the nondelegation context suggests that the effect is either nonexistent<sup>197</sup> or substantively small.<sup>198</sup>

Similarly, while individual litigants often have incentives to assess the probability of success, those incentives may well be attenuated in this context—it is otherwise difficult to understand why, despite a vanishingly small probability of success in federal courts over more than 200 years, litigants continue to bring cases. Indeed, nondelegation cases are often brought not by individual claimants, but by, or with the support of, institutional repeat players who have incentives delinked from the immediate probability of success.<sup>199</sup>

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<sup>194</sup> See Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 *YALE L.J.* 2270, 2276 (2012) (“[T]he existing empirical literature cannot settle disagreements over the effects of switching from *Conley* to *Twombly/Iqbal*.”).

<sup>195</sup> Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *STAN. L. REV.* 901, 994 (2013).

<sup>196</sup> See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 *L. & CONTEMP. PROBS.* 273, 273 (1993) (“In response to *Chadha*, Congress eliminated the legislative veto from a number of statutes. The legislative veto continues to thrive, however, as a practical accommodation between executive agencies and congressional committees. More than two hundred new legislative vetoes have been enacted since *Chadha*.” (referencing *INS v. Chadha*, 462 U.S. 919 (1983))).

<sup>197</sup> Stiglitz, *supra* note 142, at 30 (“[T]he presence or absence of a strong nondelegation doctrine appears essentially unrelated to the drafting practices in state legislatures.”).

<sup>198</sup> See *supra* note 27. In addition, some of the controls in Figure 4, *supra*, address the possibility of changing legislative behavior. Specifically, both the average number of delegations over the past ten years and the number of delegations in the year the case was decided capture changes in the baseline.

<sup>199</sup> Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *L. & SOC'Y REV.* 95, 97–100 (1974) (noting “repeat players”—litigants with long-term incentives or needs to use the litigation system—can withstand losses strategically in advancing long-term interests incrementally).

These kinds of actors are interested in a change in the law, which by definition requires discounting, at least to some extent, the actual probability of success (though of course the litigant always has an incentive to present the best possible case). Moreover, the Priest-Klein model has had little predictive success in the appellate courts, where the costs of litigation are relatively low.<sup>200</sup> For all these reasons, it is likely that even strategic litigants will not change their propensity to litigate nondelegation claims based on a perception of how stringent the doctrine is.

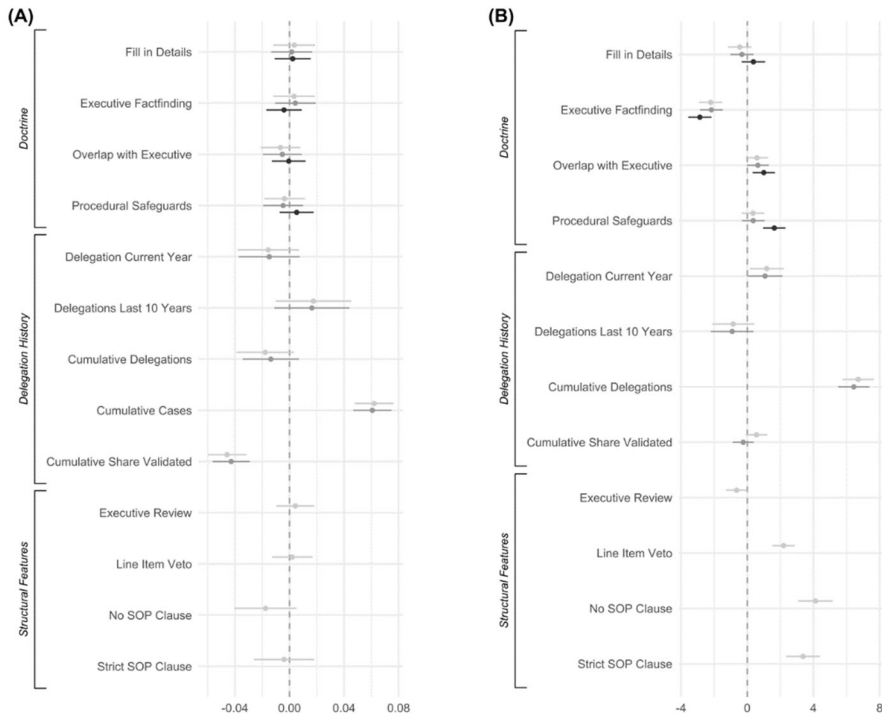
However, it is possible to use the data to address the concern that even residual strategic considerations might change the equilibrium enough to influence the results in Figure 4. Case counts may be more revealing than individual probabilities of success in a given case because, assuming strategic litigation occurs in the context of stable legislative behavior, weak regimes should encourage less litigation (and less successful litigation, in particular) than in strong regimes. Figure 5 thus presents two robustness checks modeling case counts instead of individual probabilities of success in a case.<sup>201</sup> Figure 5(A) models the number of invalidations of statutes observed in a given state in a given year, while Figure 5(B) models the total number of cases presenting a nondelegation challenge, regardless of outcome.

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<sup>200</sup> Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 46–47 (2011).

<sup>201</sup> Except for the changed outcome variable, I use much the same setup for these models as before, including many of the same covariates. Instead of indicators for the historical period, I can display the results of linear models with fixed effects at the year level. In addition, I drop the *cumulative cases* variable from the predictor variables in Figure 5(B) because it serves as the substitute outcome variable.

Figure 5: Count Models of Nondelegation Cases



The results in Figure 5(A) are the more direct robustness check of the results in Figure 4, and the results are quite similar. None of the doctrinal classification variables indicates any relationship with the volume of invalidations under the nondelegation doctrine. In other words, total invalidations are consistent across states, even after controlling for the total volume of delegations and the total volume of cases. These findings are more striking in light of the results in Figure 5(B), which indicate that litigants are induced to bring more nondelegation challenges by a variety of factors but not by the presence of key features of the Gorsuch test. In fact, the presence of the *fill in the details* formulation is not associated with any change in the propensity to litigate (and we would expect more cases), and the states that emphasize Justice Gorsuch’s focus on *executive factfinding* actually experience significantly lower volumes of nondelegation litigation—a finding which, again, survives the addition of controls. Two of the other doctrinal variables are worth noting in this specification as well: First, the *overlap with executive* variable is significant in the first model, but the addition

of controls eliminates this association. Second, the *procedural safeguards* approach, which is widely viewed as the most delegation-friendly formulation of the doctrine, is statistically significantly associated with increased litigation in the first model, but it too fades in significance when controls are added. If it is true that weaker regimes discourage litigation and stronger regimes encourage litigation, all else equal, then the results in Figure 5 suggest that key features of the Gorsuch test are either weak features or, at the very least, no different than other formulations, such as the intelligible principle approach or the procedural safeguards approach.

One final point bears mentioning. As political scientists have long understood, the U.S. Supreme Court's decisions can be explained, at least in part, by the ideological preferences of the justices.<sup>202</sup> One might wonder if the findings above fail to account for the possibility that the courts might not always prefer, on a purely ideological level, to invalidate statutes. It may be the case, for instance, that left-leaning justices prefer not to use the nondelegation doctrine to invalidate legislation because they generally support regulation, while right-leaning justices are more open to the nondelegation doctrine because they oppose regulation. If a state supreme court is relatively liberal, then perhaps it would not be likely to use even the Gorsuch test to invalidate statutes, and vice versa. To test this possibility, I added a control to the models reported above that captures the median ideology of the state supreme court at the time of the decision.<sup>203</sup> Neither a court's ideology alone nor the interaction between the court's ideology and the ideology of the other branches of government resulted in any statistically significant relationship with outcomes, and the inclusion of these variables does not change the results reported above. Although a full exploration of the role of ideology in nondelegation decisions at the state level is beyond the scope of this Article, the data casts doubt on the idea that the current U.S. Supreme Court's strong conservatism would somehow override the findings above and lead the Court to deploy the Gorsuch test more aggressively than the states have.<sup>204</sup> Even when state supreme courts are relatively

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<sup>202</sup> See, e.g., TOM S. CLARK, *THE SUPREME COURT: AN ANALYTIC HISTORY OF CONSTITUTIONAL DECISION MAKING* 20 (2019) (“[E]mpirical scholarship has often argued that a simple unidimensional model of judicial preferences is sufficient to understand most meaningful variation in judges’ voting patterns—or, at least, the votes of the justices on the US Supreme Court.”).

<sup>203</sup> The median ideology scores are computed using common-space data from Adam Bonica & Michael J. Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 *J.L. ECON. & ORG.* 472, 488 (2015). These scores are available only for a subset of time covered in the nondelegation case dataset—namely, 1990 through 2012—so the analysis discussed above only applies to those years. *Id.*

<sup>204</sup> It is somewhat reassuring to find some evidence that the ideology of courts does not appear to be a predictor of outcomes in nondelegation cases, as that suggests that perhaps the doctrine will not become completely politicized. But it is important to keep in mind that this is a preliminary test and more detailed analysis

conservative, they are no more likely to invalidate statutes, regardless of whether they employ the Gorsuch test.

*D. External Validity: Can the States Shed Light on Federal Law?*

As the previous subsection demonstrates, the Gorsuch test has no statistical relationship with outcomes or litigation trends that would suggest that is meaningfully more stringent than the intelligible principle standard. But the question remains: Can the states furnish lessons that are applicable to federal law? This is the problem of external validity. States are in many ways unique, starting with the fact, controlled for in the models above, that many of them have explicit separation of powers provisions in their constitutions.<sup>205</sup> In addition, as Professors Jessica Bulman-Pozen and Miriam Seifter have noted, state constitutions also profess a much more explicit commitment to majoritarian democracy than does the U.S. Constitution.<sup>206</sup>

One could add to this list for quite a while, but for the purposes of assessing how well implementation of doctrinal formulations at the state level would translate to the federal level, only certain kinds of differences are likely to be relevant. Two new studies overviewing the doctrinal landscape in the nondelegation doctrine highlight the kinds of differences that potentially matter, together contending that much of what passes for nondelegation doctrine in the states is not really comparable to the classic nondelegation situation in federal courts. Professor Joseph Postell, for instance, surveys cases in the states and concludes that nondelegation cases are not a “monolithic category” at the state level.<sup>207</sup> States examine a wide variety of delegations—delegations of the taxing power, delegations to private actors, delegations to other institutions besides regulatory agencies, and even delegations “back to the people through initiative petitions.”<sup>208</sup> Likewise, legal scholar Benjamin Silver observes that “what little state scholarship there is often misses the breadth and depth of state nondelegation jurisprudence.”<sup>209</sup> Indeed, Silver reinforces Postell’s conclusion

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would be necessary to rule out attitudinal explanations entirely. That project is beyond the scope of this article.

<sup>205</sup> Rossi, *supra* note 31, at 1190.

<sup>206</sup> Bulman-Pozen & Seifter, *supra* note 141, at 894–95. Of course, this commitment to democracy has been illusory at best and a sham at worst through many periods of history. See Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 MICH. L. REV. 1, 11–12 (2020) (discussing episodes of states acting more as bastions of racism, inequality, and minority rule than as great beacons of democracy).

<sup>207</sup> Joseph Postell, *The Myth of the State Nondelegation Doctrines 12–13* (unpublished manuscript) (on file with author).

<sup>208</sup> *Id.*

<sup>209</sup> Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. (forthcoming 2022) (manuscript at 4) (on file at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3758233](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3758233)).

that “states apply nondelegation to many different types of delegates and in a variety of contexts, sometimes with little coherence on the surface.”<sup>210</sup>

This Article avoids some of these barriers to external validity by focusing on delegations of legislative authority to executive branch actors, such as the governor, agencies, or other institutions exercising what would conventionally be understood as policymaking or regulatory power. To the extent that other categories unearthed by Postell and Silver might make extrapolation to the federal context difficult—for instance, arguments that the legislature has delegated taxing power to an executive branch actor—I control for these specific categories of cases in the models above. While it is certainly the case that state nondelegation cases are less cookie cutter than they are in the federal context, these efforts to zero in on the cases that largely resemble the kinds of cases the U.S. Supreme Court hears should reassure.

One obvious difference between state and federal nondelegation cases that might initially suggest caution in drawing lessons from this data is the drastically different baseline invalidation rates between the two sovereigns. Even if a state’s specific doctrinal articulation does not seem to influence outcomes, it remains the case that state courts invalidate almost 19% of the statutes they review in nondelegation doctrines<sup>211</sup>—hardly a trivial amount compared to the almost nonexistent set of statutes invalidated by the U.S. Supreme Court under the federal doctrine. However, these differences may not be so puzzling once one considers that the federal government and the state governments maintain fairly different policy portfolios. The federal government deals much more regularly with foreign policy and national security, which may explain in part why the U.S. Supreme Court has so far steered toward very low baseline invalidation rates, given the deference typically afforded policymakers in this arena and the risk that a strong baseline invalidation rate would bleed over into cases implicating these concerns. Indeed, the high number of nondelegation cases in federal court touching on national security and foreign policy, particularly in the context of tariffs, lends some support to this interpretation that the mix of subjects in nondelegation cases could change the baseline invalidation rate. This change in the baseline may be significant, but the impact of doctrinal formulation on this baseline rate would presumably be the same—the change in baseline has no bearing on the ability of doctrinal formulations to decide concrete cases.

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<sup>210</sup> *Id.*

<sup>211</sup> *See supra* fig.2 and accompanying text.

For all these reasons, questions about external validity, while important to consider, are not likely to impair the implications of the empirical analysis. The state nondelegation cases are by far the best evidence available for shedding light on what to expect for the U.S. Supreme Court.

*E. Summary of the Empirical Analysis*

Looking at an original dataset of all state supreme court decisions in nondelegation cases from roughly the middle of the nineteenth century to the present, we see that several big patterns and findings emerge.

First, and consistent with prior research on the state nondelegation doctrine, the doctrine does in fact play a much more consistently important role in the state courts than it does in the federal courts. In the U.S. Supreme Court, nondelegation challenges are few and far between, and they are almost invariably unsuccessful.<sup>212</sup> In the state courts, by contrast, 18.7% of the 1,668 challenges were successful. To be sure, there are many states and many years covered in the dataset, so there is still fewer than one nondelegation challenge per state per year, but this is quite different than the experience in the federal courts.

Second, I find a significant amount of volatility in the outcomes of these cases over time, as well as significant differences across states in the shape of the historical pattern. The existing research on the subject has not documented this level of volatility, instead characterizing the approach in the state courts as relatively consistent over time.

Third and finally, a multivariate analysis of the determinants of individual case outcomes revealed no relationship with the doctrinal formulation a state maintains. Indeed, the only factors that seem to matter at all relate to the context in which the court operates vis-à-vis actual delegations and nondelegation challenges. The analysis revealed that courts were less likely to invalidate statutes in individual cases when delegation was occurring at a high rate in that state and when the court had historically deferred, but it also suggested that a recent history of state legislatures delegating leads courts to respond with a greater chance of invalidation, albeit not at a statistically significant level. Overall, though, the key finding is a null finding: even when courts apply core features of the Gorsuch test, they are no more or less likely to invalidate statutes

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<sup>212</sup> Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 330 (1999) (noting the federal nondelegation doctrine has had one good year and more than two hundred bad ones).

than they are when applying tests much more similar to the intelligible principle standard that the federal courts have employed.

### III. THE GORSUCH DILEMMA

What can the findings in Part II tell us about what the U.S. Supreme Court might do with the nondelegation doctrine, and how successfully it might do it? In this Part, I elaborate on two implications, although there may well be more.

First, I contend that the results dampen the prospects that a simple change of doctrine will usher in a systematic, stringent change in practice—a conclusion that will disappoint those who see in Justice Gorsuch’s dissenting opinion in *Gundy* a genuine opportunity to rebalance the power between the legislature and the executive, but that will comfort those who worry about that project. The Gorsuch test is not unique, and its track record suggests that courts are perfectly capable of avoiding deploying it to invalidate all or most statutes delegating power to the executive. Moreover, the intelligible principle approach that Justice Gorsuch maligns in *Gundy* is inherently malleable enough to support the invalidation of statutes at a higher rate than has historically been the case. The lack of a relationship between doctrinal formulation and case outcomes suggests that whether a revolution is afoot will show in what the Court does, not in what it says it is doing. And there are very good reasons to believe that the Court will not be willing to do much of anything.<sup>213</sup>

Second, this limitation on what doctrine can accomplish also has significant implications for how the Court would more vigorously police Congress’s legislative behavior. Given persistent and unavoidable institutional limitations on its capacity to oversee the implementation of doctrine in the court system, the Court would undoubtedly prefer to operationalize its understanding of the constitutional limitations on delegation in the form of a hard-edged rule—hence, the attempt to formulate the Gorsuch test in terms of a formalistic line between policymaking discretion, which cannot be delegated, and articulation of details and factfinding, which can be. The findings from Part II suggest that the line is not clear enough to guide decision-making, and without a doctrinal formulation that can provide *ex ante* rules that reliably produce the desired level of heightened scrutiny, the only real option is to rely on *ad hoc* symbolic invalidations of legislation under a more chimerical rule or standard. This

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<sup>213</sup> Cf. Zaring, *supra* note 174, at 745 (“Separation of powers claims so often fail because of what Laurence Tribe has characterized as the ‘settled expectations’ check on the logic of constitutional law and that I call the part-of-the-furniture doctrine.”).



gesticular approach may succeed in changing Congressional behavior, but it is likely to carry many imprecisions and undesirable side effects.<sup>214</sup>

Overall, the empirical analysis adds to the questions raised about whether the juice is worth the squeeze in invigorating the nondelegation doctrine. At this point, the nondelegation doctrine has become a symbolic battle in fights over the future of the administrative state, and many actors, including Supreme Court Justices, have a vested interest in seeing that project completed. Yet, if it is concrete and tangible results that we care about and not some form of separation of powers virtue signaling, then the findings in Part II provide some reason to doubt whether there will be much of a real payoff (or a real threat), as even the courts that start from the *Gundy* baseline fail to take it to its logical endpoint.

#### A. *The Futility of a Doctrinal Shift for Changing Court Behavior*

It is almost received wisdom that enforcement of the nondelegation doctrine would imperil the administrative state. As one commentator put it, “the movement to expand the nondelegation doctrine doesn’t seek a healthier relationship between Congress and the administrative state. Instead, it hopes to roll back the administrative state itself.”<sup>215</sup> Even Justice Kagan seems to believe that a battle between modern government and a nondelegation doctrine with hard edges would be a battle whose outcome is already decided before it is fought; as she put it in *Gundy*, “if SORNA’s delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.”<sup>216</sup>

States would beg to differ. State governments, just like the federal government, have become modern administrative states in their own right. As other scholars have documented, state governments are involved in substantial regulatory policymaking.<sup>217</sup> Moreover, as Professor Miriam Seifter demonstrates, they have done so in much the same mode that the federal government has—that is, with a powerful executive branch that relies heavily

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<sup>214</sup> See Walters & Ash, *supra* note 27 (finding a small effect of nondelegation decisions on state legislative behavior, but also noting that a decrease in delegation may not be desirable on social welfare metrics).

<sup>215</sup> Matt Ford, *The Plot to Level the Administrative State*, NEW REPUBLIC (Jan. 14, 2020), <https://newrepublic.com/article/156207/plot-level-administrative-state>.

<sup>216</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).

<sup>217</sup> Seifter, *Gubernatorial Administration*, *supra* note 140, at 485–86; Bulman-Pozen, *supra* note 141, at 271; Brian J. Gerber & Paul Teske, *Regulatory Policymaking in the American States: A Review of Theories and Evidence*, 53 POL. RSCH. Q. 849, 851 (2000); Susan Webb Yackee, *Invisible (and Visible) Lobbying: The Case of State Regulatory Policymaking*, 15 STATE POL. & POL’Y Q. 322, 330–31 (2015).

on delegations of authority from the state legislatures.<sup>218</sup> This has all occurred despite the fact that a substantial number of states employ elements of Justice Gorsuch's strict approach to nondelegation,<sup>219</sup> including a requirement that state legislatures only leave details to be filled in by governors, and that they permit only executive factfinding and not executive lawmaking. The use of these doctrinal forms has not prevented the development of effective and powerful executive institutions in the states.<sup>220</sup> How could this be?

Ultimately, the findings suggest that Justice Gorsuch's test is just as irreducibly ambiguous as the intelligible principle standard.<sup>221</sup> Even conservative or libertarian proponents of the nondelegation doctrine have recognized as much.<sup>222</sup> There are countless examples from the states of relatively lenient implementation of these categorical distinctions, as well as relatively strict applications of standards that resemble the intelligible principle standard. Take just a few:

- **Massachusetts:** Despite having a strict separation of powers clause in its state constitution,<sup>223</sup> being classified by others as a "strict" or "strong" nondelegation state by others,<sup>224</sup> and clearly adhering to a hard and fast line between delegation of policymaking authority versus details of implementation,<sup>225</sup> Massachusetts did not see its supreme court invalidate a statute under the nondelegation doctrine during the period of study. Exemplifying this doctrine-defying pattern is the relatively recent case *Commonwealth v. Clemmey*, in which the Court

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<sup>218</sup> Seifter, *Gubernatorial Administration*, *supra* note 140, at 487.

<sup>219</sup> *See supra* tbl.1.

<sup>220</sup> *See supra* fig.3.

<sup>221</sup> Hickman, *supra* note 15, at 37 ("Which subjects are important, and which are of less interest, often will be subjective. . . . Likewise, seemingly minor alterations or additions to regulatory schemes often yield massive legal or economic liabilities or substantial unintended consequences."); Coan, *supra* note 15, at 146 (describing the Gorsuch approach as a "combination of exceedingly mushy standards"); Sunstein, *supra* note 74, at 327 (arguing "the overwhelming likelihood is that judicial enforcement of the doctrine would produce ad hoc, highly discretionary rulings," so much so that "we might even say that judicial enforcement of the conventional doctrine would violate the conventional doctrine—since it could not be enforced without delegating, without clear standards, a high degree of discretionary lawmaking authority to the judiciary").

<sup>222</sup> Michael Rappaport, for instance, described Gorsuch's test as "pretty indeterminate" and argued for a stricter approach that distinguishes between (1) "traditional areas of executive responsibility, such as foreign and military affairs, spending, and the management of government property," and (2) other areas involving domestic private rights. Rappaport proposed to categorically limit delegation in the latter. Michael B. Rappaport, *A Two Tiered and Categorical Approach to the Nondelegation Doctrine 2* (San Diego Legal Stud., Paper No. 20-471, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3710048](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3710048).

<sup>223</sup> MASS. CONST. pt. I, art. 30.

<sup>224</sup> Rossi, *supra* note 31, at 1191.

<sup>225</sup> *See supra* tbl.1.

entertained but rejected an argument that the state legislature delegated legislative authority to the Department of Environmental Protection to define the contents of an agricultural exemption from wetlands protections.<sup>226</sup> The statute in question stated a general prohibition on the altering of wetlands, but it also provided that these prohibitions do not apply to “work performed for normal maintenance or improvement of land in agricultural use.”<sup>227</sup> According to the state legislature, the exemption was “necessary to balance the need to protect wetlands and other fragile habitats with the ‘future economic viability of . . . farms [in the Commonwealth].’”<sup>228</sup> However, the legislature did not attempt to define any of these terms in a way that would determine the actual content of that balancing policy, instead expressly delegating that task to the executive.<sup>229</sup> Nevertheless, the Massachusetts Supreme Court brushed aside the argument that the legislature had left a policy question for the agency, stating the following:

The Legislature was quite clear as to the policy decision it had made and wanted implemented. That policy was that the interests of environmental protection and agriculture were to be balanced in a way that protected “routine and long standing farm operations.” The delegation of the definitions of “land in agricultural use” and “normal maintenance or improvement” of such land simply directed the department to work out the details necessary to the implementation of the policy.<sup>230</sup>

- **Nevada:** Nevada adheres to the second prong of the Gorsuch test, holding that it is not a delegation of policymaking authority for the state legislature to give executive actors the “power to determine some fact and state of things upon which the law . . . makes its own operation depend.”<sup>231</sup> In *Clark County v. Luqman*, the Nevada Supreme Court considered whether provisions of the Uniform Controlled Substance Act, which allowed the state pharmacy board to “classify drugs into various schedules according to the drug’s propensity for harm and abuse,” violated the nondelegation doctrine.<sup>232</sup> The Court held that, while “the standards for classifying drugs into specific schedules are

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<sup>226</sup> 849 N.E.2d 844, 848 (2006).

<sup>227</sup> *Id.* (quoting MASS. GEN. LAWS ch. 131, § 40).

<sup>228</sup> *Id.* at 849 (citation omitted).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 856 (citations omitted).

<sup>231</sup> *State ex rel. Ginocchio v. Shaughnessy*, 217 P. 581, 583 (Nev. 1923).

<sup>232</sup> 697 P.2d 107, 110 (Nev. 1985).

phrased in general terms,” ultimately the board was “placed into the role of a fact finder” and had “merely been delegated the duty of applying its findings to the legislative scheme.”<sup>233</sup> While the Court made this conclusion sound relatively mechanical, it is patently obvious that this delegation left all of the important policy questions about criminalization of particular controlled substances to the board, blurring the line between legislative and executive authority.

- **California:** California employs a more liberal approach to nondelegation, requiring only that the legislature resolve “fundamental” policy questions and provide “adequate direction” for administrative agencies’ exercise of “quasi-legislative” authority.<sup>234</sup> But in *Clean Air Constituency v. California State Air Resources Board*, the California Supreme Court adopted a narrowed interpretation of an exception to pollution control regulations to avoid a delegation problem.<sup>235</sup> The California Air Resources Board (CARB) had promulgated regulations of nitrogen oxides pollution from vehicles pursuant to legislative command. The same statute authorized CARB to delay the regulations for “extraordinary and compelling reasons only.”<sup>236</sup> After the onset of the energy crisis, CARB attempted to delay the effective date of the regulations, citing the “extraordinary and compelling reasons” provision.<sup>237</sup> In holding that the extraordinary and compelling reasons provision delegated discretion to delay only for “reasons which relate to the effective implementation of the installation program and to the clearly expressed purposes of the Air Resources Act,” the California Supreme Court held that the provision would “constitute an invalid delegation of powers if its scope were not limited to reasons relating to the purposes of the act.”<sup>238</sup>
- **Kentucky:** In *Board of Trustees of Judicial Form Retirement System v. Attorney General of the Commonwealth*, the Kentucky Supreme Court acknowledged Kentucky’s traditional adherence to the federal intelligible principle standard.<sup>239</sup> Nevertheless, the court struck a highly

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<sup>233</sup> *Id.*

<sup>234</sup> *Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.*, 405 P.3d 1087, 1100 (Cal. 2017).

<sup>235</sup> 523 P.2d 617 (Cal. 1974).

<sup>236</sup> *Id.* at 619.

<sup>237</sup> *Id.* at 620.

<sup>238</sup> *Id.* at 624.

<sup>239</sup> 132 S.W.3d 770, 785 (Ky. 2003).

technical statute reforming the judicial retirement system,<sup>240</sup> concluding that it had never applied the intelligible principle standard in so “toothless” a fashion as the federal courts and bragging that “Kentucky holds to a higher standard.”<sup>241</sup>

These cases are, of course, only cherry-picked examples of instances where the state courts were able to reach a result at odds with the more general tenor of the state’s nondelegation doctrine. I do not offer them as representative samples, but rather as exemplars of the interminable discretion available to judges attempting to implement them in concrete cases. They illustrate why, notwithstanding real differences in how state courts understand the nondelegation doctrine, there is no systematic difference in outcomes, as well as why most individual states have not exhibited anything approaching consistency in their invalidation rate over time. The doctrinal categorizations are so flimsily defined that it is possible to reason to any result one wishes in individual cases without doing violence to the more general statement of the rule.<sup>242</sup>

There are, of course, several important caveats to this interpretation of the cases and the data. First, a problem with any observational data on court decisions is that the inputs might not be constant over time.<sup>243</sup> State supreme courts respond to the cases that are brought to them, and these cases may vary in their composition due to any number of factors (e.g., the legislature engages in more or less bold delegation over time, or the cases that challenge delegations are an unrepresentative sample, perhaps because of selection bias or strategic considerations).<sup>244</sup> To some extent, I control for these kinds of problems in the empirical analysis by accounting for past and current delegating behavior by the state legislature<sup>245</sup> and by examining models where the outcome variables are counts of cases and invalidations, which should not be as susceptible to equilibrium effects.<sup>246</sup> However, these controls and robustness checks are not perfect, and the chance that the decided nondelegation cases do not represent

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 782.

<sup>242</sup> *Accord* Sunstein, *supra* note 74, at 326–27 (arguing “[t]he distinction between ‘executive’ and ‘legislative’ power cannot depend on anything qualitative; the issue is a quantitative one. The real question is: How much executive discretion is too much to count as ‘executive’? No metric is easily available to answer that question”).

<sup>243</sup> *See supra* notes 190–201 and accompanying text.

<sup>244</sup> This may be less of a problem before the 1900s, before state high courts shifted to a primarily discretionary docket. *See* Stephen L. Wasby, *State Court Discretionary Jurisdiction and Federal Habeas Corpus*, 21 JUST. SYS. J. 89, 89 (1999).

<sup>245</sup> *See supra* notes 183–85 and accompanying text.

<sup>246</sup> *See supra* notes 190–201 and accompanying text.

how the court would have resolved other challenges that could have been brought but were not remains an important limitation on the implications of the analysis.

Second, there is also a generally higher rate of invalidation at the state level (18.7%), which might suggest that the nondelegation doctrine, whatever the precise articulation, is hardwired for more stringent application and that federal courts are outliers in treating the intelligible principle standard as a de facto categorical rule of deference. On some level, this actually reinforces the point that the various doctrinal articulations are essentially capable of any use, but it may well be true that the federal courts are an outlier. Yet there are good reasons to believe that this generally higher invalidation rate at the state level primarily reflects the general divisions of labor in a federalist system rather than something inherent about how courts in general resolve nondelegation problems.<sup>247</sup> The federal government has taken the lead on many issues of policymaking, including in some areas where the states simply have no authority, which could heighten the stakes of invalidation of federal statutes compared to invalidations of state laws. As some have suggested, state courts might even be contributing to this division of authority precisely by using the nondelegation doctrine more aggressively at the state level, foisting more responsibility on the federal Congress to pick up the slack and the federal courts to sign the permission slip.<sup>248</sup> After all, problems must be solved by one sovereign or another.

Notwithstanding these caveats, the overwhelming implication from the data, along with even a casual engagement with individual cases, is that doctrine places very few constraints on judges as they review the propriety of delegations of state legislative authority. The alternatives to the intelligible principle standard, including the Gorsuch test, do not yet have a sufficiently definite meaning to lend themselves to consistent application. In some sense, this is not an earth-shattering point: others have pointed out the fundamental ambiguity of

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<sup>247</sup> Cf. Rick Hills, *Attack of the Clones: How State Courts' Adoption of SCOTUS' Constitutional Doctrinal Disputes Defeats the Purpose of Federalism*, BALKINIZATION (Oct. 4, 2020), <https://balkin.blogspot.com/2020/10/attack-of-clones-how-state-courts.html> (critiquing the Michigan Supreme Court's decision in *In re Certified Questions From W.D. Mich., S. Div.*, 958 N.W.2d 1 (2020), as "studiously oblivious about the distinctive practical and legal problems and opportunities created by executive power in state governments" and noting how that should shape the nondelegation doctrine's application in the states); see also Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 557 (2014) (noting that *Chevron* deference has "not been embraced with enthusiasm or consistency in state administrative law" and that this is likely due to the fact that *Chevron* is better suited to features of the federal regulatory system).

<sup>248</sup> Cf. Saiger, *supra* note 247, at 557 (arguing that, from a federalist standpoint, there are good reasons for both a heightened nondelegation standard in the states and a lightened nondelegation standard—but, at any rate, plenty of reason to think the doctrine should be different to reflect different circumstances).

the lines that the Gorsuch test attempts to draw between legislative power and executive power.<sup>249</sup> What the empirical analysis in Part II adds is real-world evidence of this ambiguity in the form of wildly varying patterns of decision-making across the states. These data make it very difficult to maintain any hope that the Court's adoption of Justice Gorsuch's test will deliver a return of an exiled Constitution or foreshadow the end of administrative government.

### *B. The Judicial Economy of Nondelegation*

This observation raises important questions: Why is it that Justice Gorsuch wants to frame his test as a sort of foil to the intelligible principle test? Why not simply begin to strike down more statutes under the intelligible principle test (that is, move the line for what counts as “intelligible”)? Perhaps one answer is that Justice Gorsuch believes that the line between “policy” and “details” (or “facts”) is more determinate *ex ante*—and therefore more judicially administrable—than the line between “intelligible enough” and “not intelligible enough.” That is, Justice Gorsuch may believe that he has identified a line that qualifies as a rule, as that category is defined by the literature on rules and standards.<sup>250</sup> If this is a correct account of what is motivating Justice Gorsuch, it is understandable why he would want to push this narrative. The Court must not only consider what it would do in the cases that come before it, but also how what it says will shape congressional behavior *ex ante* and how lower courts (or even future Supreme Courts) will implement whatever line the Court chooses. One can see this concern bubbling to the surface in the *Gundy* decision itself, where Justice Alito expressed deep discomfort with singling out SORNA's pre-

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<sup>249</sup> See Hickman, *supra* note 28 (“But finding a better and more rigorous standard for discerning between acceptable from unacceptable grants of rulemaking authority is very, very hard. . . . Justice Gorsuch's first effort, contrasting ‘mere ‘details’ with rules governing final conduct, seems too susceptible to the whim of the moment.”); see also Lawson, *supra* note 4, at 361 (criticizing a version of the standard as “pretty lame” and “almost absurdly self-referential” and therefore not “manageable”); Hall, *supra* note 12, at 179 (discussing the Gorsuch test's “lack of doctrinal clarity”); Sunstein, *supra* note 74, at 338 (noting the “difficulty of drawing lines between prohibited and permitted delegations”).

<sup>250</sup> The literature here is voluminous, but it mostly treats the distinction between rules and standards as inhering in the extent to which they provide answers to regulated parties before or after adjudication—that is, the extent to which they limit *judicial* discretion. See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE*, at xvii (Tony Honor & Joseph Raz eds., 1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992) (defining rules as legal commands that can be understood *ex ante*—that is, before a judicial determination—and standards as quintessentially *ex post*—that is, we only know what the law is in an individual case when the case is adjudicated); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 257–58 (1974); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26–27 (1992). For a discussion applying this literature to the context of nondelegation, see generally Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, the Rules/Standards Dilemma and the Line Item Veto*, 44 VILL. L. REV. 189 (1999).

Act offenders provision for special treatment,<sup>251</sup> as well as in Justice Gorsuch's claim that his test would not spell the end of the administrative state since Congress could legislate to the rule.<sup>252</sup> Both of these passages suggest that the Court is wary of simply recalibrating existing standards in an ad hoc fashion, providing no ex ante guidance to Congress and the lower courts, both of which are positioned to do far more in the way of actually constraining delegation.<sup>253</sup>

As easy as it is to see why Justice Gorsuch would *want* to see his formulation of the test in *Gundy* as meaningfully improving the predictability of decision-making in nondelegation cases, that hope is belied by the data from the states. This is not to say that the Court will be deterred from giving federal legislation more scrutiny regardless of whether they can articulate firm, rule-like limits on delegation. In fact, the best evidence suggests that they will, much as they have ratcheted up the scrutiny of agencies' interpretations of ambiguous statutory and regulatory provisions, all without overturning the foundational *Chevron* doctrine.<sup>254</sup> Whether the doctrine formally changes or not, it would be a good bet that the Court will change the tenor of its review of nondelegation challenges. But the data analysis above suggests that, instead of being able to shape congressional and lower court behavior ex ante through articulation of a clear and knowable line dividing permissible from impermissible delegations, the only real option the Court has is to use ex post invalidations selectively as

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<sup>251</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring) (expressing interest in revisiting the Court's approach to nondelegation cases but refusing to do it in this case alone because "it would be freakish to single out the provision at issue here for special treatment").

<sup>252</sup> *Id.* at 2145 (Gorsuch, J., dissenting) (arguing that "enforcing the Constitution's demands" would not "spell doom for what some call the 'administrative state.' . . . Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution").

<sup>253</sup> Some empirical research on lower courts suggests that ex ante rules, perhaps not surprisingly, constrain lower courts' behavior more than open-textured standards. *See e.g.*, Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1537 (2008).

<sup>254</sup> *See* Nathan Richardson, *Deference is Dead (Long Live Chevron)* 38 (Aug. 18, 2020) (unpublished manuscript) (on file at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3676695](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3676695)) (recounting that the Court has deferred to the agency in only one of fifteen cases in which it cited *Chevron* since 2015); *see also* Michael Herz, *Chevron is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867, 1870 (2015) ("*Chevron* has had less of an impact than this attention implies. . . . [Judges] do not defer as much as the doctrine seems to require. Rather, they have narrowed the circumstances in which *Chevron*, by its own terms, applies and invoke *Chevron* only intermittently in those circumstances."); Michael Kagan, *Loud and Soft Anti-Chevron Decisions*, 53 WAKE FOREST L. REV. 37, 41 (2018) ("The *Chevron* doctrine is often expressed as a rigid algorithm—the two steps—which makes any deviation by the Court quite noticeable. Yet, despite all the fanfare, it is now well known that the Supreme Court itself applies *Chevron* inconsistently at best."). *But see* Natalie Salmanowitz & Holger Spamann, *Does the Supreme Court Really Not Apply Chevron When It Should?*, 57 INT'L REV. L. ECON. 81, 82 (2019) (empirically demonstrating that the Supreme Court consistently applies *Chevron* when it should be the relevant decision rule).



symbolic signals.<sup>255</sup> In this Part, I argue that judicial economy suggests a drastically diminished impact through this strategy, and some undesirable consequences for which the Court would do well to account.<sup>256</sup>

This account starts with a recognition of some basic institutional limits within which the Court must operate—the Supreme Court’s ability to change the law is fundamentally limited by institutional features of the federal judiciary. As Professor Andrew Coan persuasively argues, the limited capacity of the Court to hear cases constrains the Court’s enforcement of legal or constitutional norms.<sup>257</sup> The Court avoids commitments to doctrinal projects that strain its capacity, not so much because of anything like the “passive virtues,”<sup>258</sup> but because of sheer rational calculation. Because the Court can hear only a small fraction of the petitions for certiorari presented to it and because only a small fraction of those petitions can involve nondelegation challenges, the Court must be judicious about whether its doctrinal moves will generate more litigation than the Court has the capacity to attend to.<sup>259</sup> This is especially true in what Coan calls “high-volume domains”<sup>260</sup>—those “implicating the validity of a large

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<sup>255</sup> *Accord* Hickman, *supra* note 15, at 46–47. This move is common in the Court’s recent structural constitutional decisions. *See* Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 50 (2017) (“Decisions like *Free Enterprise* have a ‘this far but no further’ feel, which connects to the Court’s resistance to innovative administrative structures and regulatory regimes.”). *See generally* Zaring, *supra* note 174 (arguing that the Court’s remedies in structural separation of powers have occasionally been shocking but have nevertheless generally been ineffectual in changing government). Further, although it goes beyond the scope of this Article, we find in parallel research that the doctrine a state adopts can shape legislative behavior, just not in predictable ways. *See* Walters & Ash, *supra* note 27. For instance, we find that the “fill in the details” approach is actually associated with more delegation in subsequent statutes, and the procedural safeguards approach (a liberal test in theory) is associated with less delegation. *Id.*

<sup>256</sup> *Cf.* Hall, *supra* note 12, at 189 (noting that *Panama Refining* and *Schechter Poultry* were “symbolic check[s]” that had little impact).

<sup>257</sup> ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING (2019); *see also* Coan, *supra* note 15, at 142 (arguing the limitations of judicial capacity applicable in other constitutional domains are also applicable to the nondelegation doctrine). Similar points about the way the Court changes its formulation of doctrine to fit institutional realities can be found in Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997).

<sup>258</sup> *See generally* Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (analyzing doctrines that generalize on judicial timing and restraints).

<sup>259</sup> *See* Coan, *supra* note 15, at 142. An important caveat here, which Coan acknowledges, is that changes to the Supreme Court’s own quality-control norms might permit the Court to expand its docket. *Id.* at 146–47. Were it to do so, perhaps through a greatly expanded “shadow docket,” *see* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019), the Court could relax the need for predictable rules and simply manage the onslaught of cases that would result from implementation of a relatively ambiguous rule or standard. *See* Coan, *supra* note 15, at 143. Of course, doing so would also stretch the legitimacy of the Court, which relies in large part on its power to persuade through thoroughly researched and reasoned opinions, but which necessitates capping the number of cases the Court can hear at a very small number.

<sup>260</sup> Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 774 (2016).

number of federal statutes” in which the Court feels compelled to review nearly every case decided by the lower courts.<sup>261</sup> In such domains, the limits on the capacity to hear cases “create an almost irresistible pressure on the Court to cast its decisions in the form of clear but clumsy categorical rules or to defer to the constitutional decisions of other government actors.”<sup>262</sup>

The reason for this pressure is simple. The ultimate implementation of doctrine pronounced from on high is shaped by other actors—namely, lower courts and future courts.<sup>263</sup> As political scientists explain, the Supreme Court sits atop a bureaucracy—the federal judicial bureaucracy—and faces all of the familiar principal-agent challenges that principals face.<sup>264</sup> There are hierarchical control considerations (e.g., how much discretion to leave to the more numerous courts of appeals that will, as a practical matter, have the last word on most issues) and intertemporal considerations (e.g., how much discretion to leave for future courts, both at the lower levels of the judiciary and also on the Supreme Court, as personnel changes or justices’ ideology or philosophy drifts).<sup>265</sup> A clear rule of decision entitled to the benefit of stare decisis delivers substantial value to a current Supreme Court. In addition to making it far easier for Congress—the ultimate target of the nondelegation doctrine—to conform its behavior to the Court’s understanding of what the Constitution requires,<sup>266</sup> clear

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<sup>261</sup> Coan, *supra* note 15, at 143.

<sup>262</sup> *Id.*

<sup>263</sup> See generally Chad Westerland, Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Scott Comparato, *Strategic Defiance and Compliance in the U.S. Courts of Appeals*, 54 AM. J. POL. SCI. 891 (2010) (modeling the Supreme Court’s efforts to constrain both lower courts and future Supreme Courts through its decision-making); Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court–Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994) (modeling the relationship between the Supreme Court and the circuit courts by borrowing “principal-agent” constructs); Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Information Model of the Supreme Court’s Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000) (offering a strategic auditing model to explain the Supreme Court’s hierarchical monitoring of lower courts); Ryan C. Black & Ryan J. Owens, *Consider the Source (and the Message): Supreme Court Justices and Strategic Audits of Lower Court Decisions*, 65 POL. RSCH. Q. 385 (2012) (offering the same).

<sup>264</sup> See Westerland et al., *supra* note 263, at 892–94.

<sup>265</sup> See *id.* (analyzing “horizontal” and “vertical” principal-agent relations between the contemporary Supreme Court and (1) future Supreme Courts and (2) lower courts, while also exploring how subsequent circuits and Supreme Courts present additional challenges for the contemporary principal).

<sup>266</sup> As a general matter, relatively clear rules make it easier for the target of a law to comply. See Kaplow, *supra* note 250, at 577 (“Rules cost more to promulgate; standards cost more to enforce.”). Of course, this could be spun as a negative as well. The clarity of a rule can encourage the regulated actor to cut as close as possible to the line between unlawful and lawful delegation, whereas a less clear standard might cause the regulated actor to steer well clear of the line. See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 384–85 (1985) (“By specifying a sharp line between forbidden and permissible conduct, rules permit and encourage activity up to the boundary of permissible conduct.”); *id.* at 386 (“Using rules to define the scope and nature of the subordinate’s authority gives the subordinate ready-made safe havens that allow avoidance of responsibility or

rules solve the institutional control problems within the courts by making it easy for the Court to observe noncompliance and raising the cost of departure from the rule for the lower courts.<sup>267</sup> However, such clear doctrinal rules do not materialize on command, and, as can be seen in the state nondelegation context, there are certain areas of the law that stubbornly resist reduction.

Assuming that the lack of a hard-edged rule does not deter the Court from pursuing a renewed nondelegation doctrine, the Court is left with two bad choices,<sup>268</sup> although one may be better than the other. First, the Court could continue to rely on the basic contours of the relatively simple general intelligible principle approach but attempt a course correction through selective invalidation of statutes.<sup>269</sup> Call this the “shock and awe” approach: the Court would use its limited capacity to review statutes to occasionally remind Congress that the nondelegation doctrine exists, effectively moving the line for what counts as “intelligible,” but not so much that it threatens to grind the government to a halt. A more tailored variation on this might be to more explicitly incorporate the major questions doctrine into the nondelegation doctrine, pegging the intelligibility of a statutory principle in part to how big an impact the statute would have.<sup>270</sup> This approach has the hallmarks of governance by standard, and

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exercise of authority contrary to the objectives of the superior.”).

<sup>267</sup> See Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 AM. J. POL. SCI. 504, 504 (2008) (“Vague rulings decrease the likelihood of compliance.”). Of course, as Staton and Vanberg point out, the lack of compliance may be worth the tradeoff if it delivers other benefits, such as reduced decision costs in an uncertain legal environment. *Id.* at 505. See generally HRAFN ASGEIRSSON, *THE NATURE AND VALUE OF VAGUENESS IN THE LAW* (2020) (offering a more linguistic, normative, and theoretical exploration of the functions of vagueness in law). For a literature review on how the Supreme Court uses the content and substance of opinions to control outcomes in the judicial bureaucracy, see Jeffrey R. Lax, *The New Judicial Politics of Legal Doctrine*, 14 ANN. REV. POL. SCI. 131 (2011).

<sup>268</sup> There is a third option, but it is probably suboptimal from Justice Gorsuch’s perspective (insofar as it would be, by definition, less transformative): the Court could articulate more specific rules to govern specific permutations of the nondelegation problem (for instance, by categorically banning delegation in certain subject matter areas, like criminal law). Coan, *supra* note 15, at 149. It is worth noting, though, that the Court’s conservative wing may find it difficult to cobble together a majority on particular issues to single out for special treatment. This may have even been the case in *Gundy*, where Justice Alito’s reticence to single out SORNA might have reflected his more deferential attitude when it comes to criminal law matters. See *id.* at 148.

<sup>269</sup> In some sense, this approach invokes the law and economic literature on optimal deterrence. See, e.g., Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law Is Uncertain*, 27 VA. TAX REV. 241 (2007) (using assumptions from deterrence literature to discuss the tax penalty regime that would result in optimal reliance); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (discussing factors that affect an optimal amount of enforcement).

<sup>270</sup> See Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 986 (2018) (noting the ways that several of the Court’s “major questions” cases, like *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), seem better analyzed as applications of a nascent “as-applied” nondelegation principle than as ordinary *Chevron*).

it has many associated benefits and drawbacks.<sup>271</sup> On the benefits side, this approach would allow the Court to achieve an almost surgical level of precision in imposing limits that transgress constitutional limits, as understood by the Court.<sup>272</sup> The tradeoff is that what Professor Colin Diver called the “transparency” of the law would suffer,<sup>273</sup> and Congress would not be quite as able to adjust its behavior to conform to a knowable legal norm, nor would the lower courts necessarily get it right.

Second, the Court could try to build on Justice Gorsuch’s attempt to categorically shift the line to focus more on the policy-details dichotomy, giving it more content, and therefore perhaps more predictability and “rule-ness,” but also driving up the complexity of the inquiry. Imposing slightly more rule-like limits on delegation would, so the thinking goes, obviate the need for quite so much costly ex post monitoring. There are, however, likely upper bounds to just how concrete this line could become without losing much of the economy of rules.<sup>274</sup> The Court could devote an extraordinary amount of time to building out a complex jurisprudence of ever-more precise rules for policing delegation, detracting from other important aspects of the Court’s work. In all likelihood, the most it can hope for is a marginally more rule-like statement of the Gorsuch test.

There is, however, potentially a false economy in the use of relatively imprecise rules. As the law and economics literature makes clear, a simple rule is not necessarily better than a simpler standard.<sup>275</sup> Lower courts may encounter hard cases before the Supreme Court has had a chance to perfect its test. If the Court disagrees with the lower court’s decision, it must correct the misperception to prevent the lower court’s decision from taking on a life of its

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<sup>271</sup> See Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 42–43 (2000); Kaplow, *supra* note 250, at 584; Schlag, *supra* note 266, at 384–89.

<sup>272</sup> See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 67 (1983) (using the term *congruent* to describe whether a rule has the quality of precisely achieving its “underlying policy objective”). Standards are almost per se congruent, as they involve an ex post decision considering all of the relevant facts to the case at hand. See Kaplow, *supra* note 250, at 586 (clarifying the view that “rules tend to be over- and underinclusive relative to standards”).

<sup>273</sup> Diver, *supra* note 272.

<sup>274</sup> Much of the rules and standards literature ignores a cross-cutting dimension of simplicity versus complexity, instead assuming that rules are always simple and standards are always complex. See Adam I. Muchmore, *Jurisdictional Standards (and Rules)*, 46 VAND. J. TRANSNAT’L L. 171, 180 fig.1 (2013); Kaplow, *supra* note 250, at 565–66. Simple, imprecise rules can be made more complex and precise, but this changes the character of the rule and adds to the implementation costs, much as the shift to an equivalently simple standard (like the intelligible principle standard) might do.

<sup>275</sup> Kaplow, *supra* note 250, at 589–90 (noting that, once the relative complexity of a rule or standard is introduced into the calculus, a complex standard may sometimes trump a simple rule).

own, which imposes opportunity costs, given the Court's limited docket.<sup>276</sup> In addition, general rules make it costly to reverse course if the Court decides to change its tack.<sup>277</sup> By wedding itself to a particular articulation of the test, the Court may implicitly disapprove of other formulations that are irreconcilable with it but which, in hindsight, would be preferable. To make this concern more concrete, one can already see this problem arising in the state cases, where courts sporadically mix “fill in the details” language with intelligible principle language in their articulation of the nondelegation rule.<sup>278</sup> The layering of different articulations of the standard is one particularly incoherent response to the problem of building law iteratively. To avoid this, the Court might have to incur the cost of changing the doctrine more explicitly.

Not only do such rules require much the same kind of costly back-end monitoring and adjustment that an informal course correction would require, but they also create inefficiencies of their own. For instance, the use of marginally more rule-like language can make it easier for Congress to guess what kinds of details are and are not required, but that very phenomenon can cause Congress to make decisions that, contextually, make bad policy—as when Congress is forced to make policy determinations about which it lacks any information.<sup>279</sup> In essence, by setting up categorical lines that are marginally clearer, there is a risk that courts will induce Congress to legislate to the test—that is, Congress may design legislation that passes the Court's test but fails to provide the very best answers to the problem Congress seeks to solve.<sup>280</sup> Second, if the Court has to worry about strains on its judicial capacity, the articulation of the “stringent but vague”<sup>281</sup> Gorsuch test might be the worst of all possible worlds. The attempt

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<sup>276</sup> See Coan, *supra* note 15, at 143.

<sup>277</sup> Cf. Ozan O. Varol, *Constitutional Stickiness*, 49 U.C. DAVIS L. REV. 899 (2016) (contending that behavioral and economic considerations, not Article V's high threshold for amendment, explains much of the path dependence in constitutional law).

<sup>278</sup> See, e.g., *State v. Ariz. Mines Supply Co.*, 484 P.2d 619, 625 (Ariz. 1971) (“Under the doctrine of ‘separation of powers’ the legislature alone possesses the lawmaking power and, while it cannot completely delegate this power to any other body, it may allow another body to fill in the details of legislation already enacted.”); *id.* (“The object to be accomplished, or the thing permitted may be specified, and the rest left to the agency of others, with better opportunities of accomplishing the object, or doing the thing understandingly.” (quoting *Peters v. Frye*, 71 Ariz. 30, 35 (1950))).

<sup>279</sup> It is of course true that Congress sometimes leaves policy choices to the discretion of an agency because of a failure to come to a political agreement, but surely in some situations the lack of agreement is in fact informational.

<sup>280</sup> Cf. Ethan Bueno de Mesquita & Matthew C. Stephenson, *Regulatory Quality Under Imperfect Oversight*, 101 AM. POL. SCI. REV. 605, 616 (2007) (“Under these conditions, oversight increases the quality of proposed regulations, reduces the frequency of regulation, and distorts the policymaking agency's effort allocation toward those tasks that the overseer can observe. This last effect introduces an inefficiency that both the agency and the overseer would prefer to eliminate.”).

<sup>281</sup> Coan, *supra* note 15, at 149.

to formalize lines holds out more targets for litigants, practically inviting a substantial wave of litigation. Wherever there is a plausible argument that Congress has left more than the discretion to fill up the details in the process of implementation, litigants will have a potential lawsuit, and many of these cases will have to be reviewed by the Supreme Court.<sup>282</sup> By comparison, the intelligible principle standard, even were it to result in the occasional symbolic invalidation, would retain all of the right deterrent qualities: It would deter would-be litigants, since the uncertainty of a more open-ended standard would lower the expected value of challenging any given statute; and it would also deter Congress from engaging in objectionable forms of delegation, perhaps even more so than with an ill-defined rule, because Congress (and we'll assume it's a Congress that cares to see its policies implemented) cannot know *ex ante* which statutes will be struck.<sup>283</sup> This scenario resembles an audit process, which can have salutary behavioral effects if well designed.<sup>284</sup> By providing more clarity in a slightly more defined rule, by contrast, the Court introduces more risk that Congress will conform to the letter of the rule while accomplishing the delegation that the Court wishes to police. In some sense, the uncertainty about what the courts will do is an asset when it comes to deterrence.

For all of these reasons, it may be that the devil the U.S. Supreme Court knows (the intelligible principle standard) is better than the devil it doesn't (the Gorsuch test or some similar formulation).<sup>285</sup> Nothing prevents the Court from sending symbolic messages to Congress under the intelligible principle standard. Nothing guarantees that the intelligible principle standard should result in categorical deference. It may well be that such an approach would serve the Court's aims better than an attempt to draw a new, untested line between policy, on the one hand, and details or facts, on the other. More generally, the takeaway is that the Court's desire to formulate hard-edged rules, while understandable, cannot get out ahead of its capacity to define the problem in precise terms.

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<sup>282</sup> *Id.* at 146–47.

<sup>283</sup> It is a familiar point that *ex post* adjudication under a standards regime may result in overdeterrence. See Kaplow, *supra* note 250, at 618. In fact, this last point highlights a puzzle as to why Justice Gorsuch sought to provide more definite rules in the first place. It is widely assumed that Justice Gorsuch would prefer very minimal delegation from Congress, and it may be that a vague but stringent doctrine would have a maximal deterrent effect.

<sup>284</sup> See Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 33, 38 (2017) (urging attention to enforcement styles, including what Sohoni calls “crackdowns”—temporary aggressive enforcement of legal norms or rules—as a matter of good governance). See generally Margaret H. Lemos & Alex Stein, *Strategic Enforcement*, 95 MINN. L. REV. 9 (2010) (arguing for a process of “cascad[ing] retreat” as an effective means of deterring undesirable conduct).

<sup>285</sup> This point is underscored by parallel research using these data, which finds that the fill-in-the-details formulation might well backfire if the goal is to reduce delegation. See Walters & Ash, *supra* note 27.

## CONCLUSION

In the spirit of treating states as “laboratories,”<sup>286</sup> this Article looks to how state courts have implemented a wide variety of doctrinal formulations of the nondelegation principle over most of American history. Taking a data-driven approach, this Article contributes a new perspective on the likely impacts of a reinvigoration of nondelegation doctrine in the federal courts, and its findings caution against overstating the case for or against the nondelegation doctrine. The lack of any detectable impact on outcomes of the different formulations employed by state courts, including ones quite similar to Justice Gorsuch’s proposed framework from his dissent in *Gundy*, should inspire a reconsideration of whether the nondelegation doctrine matters much in the real world. To be sure, the experience in the states is bound to be different than what might be expected at the federal level.<sup>287</sup> That said, the state decisions are by far the best data we have about what to expect when we’re expecting the Court to take on the task of resuscitating the doctrine, and the lessons gleaned from the states should inform strategies moving forward, whether one supports or opposes the project in general.

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<sup>286</sup> Cf. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1755 (2010) (studying state court statutory interpretation methodologies in the hope that these “developments may be used to inform and change *federal* statutory theory and practice”).

<sup>287</sup> See Saiger, *supra* note 247, at 556–57 (noting that state administrative law has not received *Chevron* with enthusiasm).