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

Daniel E. Walters

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

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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 Supreme Court has, since the New Deal, shied away from enforcing any limits on congressional delegation. That may all 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 in details or find facts triggering policies, which can. Whether observers’ view of the prospect of Court-imposed limits on delegation is apocalyptic or euphoric, virtually everyone expects it 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, I show 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 are 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 Court actually does over a series of cases, not in what it says it is going to do. Moreover, it suggests significant limitations in the ability of the *Gundy* dissent’s approach to provide any ex ante guidance to Congress, 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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* Assistant Professor of Law, Pennsylvania State University (University Park). I am grateful for feedback from Jed Stiglitz, Caroline Cecot, David Zaring, Adam White, Joe Postell, Daniel Ortner, Adam Muchmore, Jud Mathews, Miriam Seifter, Jennifer Huddleston, Steve Ross, Mark Storslee, Ben Johnson, Chris Green, and Todd Gaziano. I also thank Mackenzie Moyer, Shannon Leininger, Ashleigh Herrin, and Helen Hao for their diligent work as research assistants on the project. The article was supported by the C. Boyden Gray Center for the Study of the Administrative State. All errors are my own.
Introduction

Before *Gundy v. United States*, 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. 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. Some, though, never quite stopped believing that the nondelegation doctrine would yet bear fruit for opponents of the growing regulatory state. 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.”

In point of fact, though, other than in two outlier cases in 1935, the federal nondelegation doctrine has never been invoked to invalidate any federal statute, and it was until quite recently described as “dead.”

After *Gundy*, all of that has changed. Speculation about where the Court might be going on nondelegation has reached a fever pitch. It started with Justice Gorsuch’s dissent in the case. Not only did Justice Gorsuch make clear that his views on nondelegation had not changed a bit since his elevation to the Court, and not only did he apparently persuade three of his colleagues, 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 nondelegation doctrine.

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


5 *See* United States v. Nichols, 784 F.3d 666 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc) (arguing that the provision in *Gundy* was unconstitutional as a delegation of legislative authority).

6 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* 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 because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.”).

7 *Gundy*, 139 S. Ct. at 2131.
capacious “intelligible principle” standard. While Justice Kavanaugh did not participate in Gundy, he indicated that he too was persuaded by Justice Gorsuch’s dissent, bringing the count of interested justices to five. With the passing of Justice Ginsburg and the replacement of her with Justice Barrett, who is likely sympathetic to Justice Gorsuch’s views as well, 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 limbo: will the modern administrative state survive a reinvigorated nondelegation doctrine?

This article swims against the current in arguing that the changes envisioned by the majority of the Court in and of themselves will not fundamentally change anything about how courts approach the problem of delegation. This counterintuitive position is data-driven: I look 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. At the state level, unlike in the federal courts, there is substantial variation in outcomes within and across states. But I find that the form of the doctrinal test or standard is not a predictor of these outcomes. Moreover, none of the doctrinal formulations of the nondelegation doctrine has constrained massive changes over time in the pattern of decisionmaking in state courts as courts

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8 Id. at 2135-2137; see generally Jonathan Hall, 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 it has been interpreted to impose almost no limits on Congress’s ability to delegate. See Gundy, 139 S. Ct. at 2129 (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 103-111 and accompanying text, is the idea that Congress need only provide a “general policy” and some “boundaries” on the discretion of the agency. See American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).


10 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-barrettssuspension-and-delegation/.

11 To be sure, other scholars have expressed general skepticism about how far reaching a revival of the nondelegation doctrine might be. See Jonathan H. Adler & Christopher J. Walker, Nondelegation for the Delegators, Regulation 15 (Spring 2020) (“Yet, reconsideration of the nondelegation doctrine may not mean much. If the Court’s practice with other revived constitutional doctrines is any guide, it may take more to curb delegation’s reach. In 1995, a Supreme Court majority announced its intent to police the limits of Congress’s Commerce Power, and yet few federal laws have seen their reach constrained. New and unprecedented assertions of federal power have been turned away, but the rest of the U.S. Code has been left intact. In much the same way, a nondelegation revival may target newly enacted outliers without doing much at all to curb those delegations that are already on the books.”); Andrew Coan, Eight Futures of the Nondelegation Doctrine, 2020 Wisc. L. Rev. 141 (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.

12 See infra Part II.

13 See infra fig. 3.

14 See infra tbl. 1, fig. 4, & fig. 5.
adjust to the conditions of a modern economy and a correspondingly more powerful state regulatory apparatus.\textsuperscript{15} While I find that, consistent with other studies of state cases, nondelegation challenges are far more likely to succeed across the board in state court,\textsuperscript{16} 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.\textsuperscript{17} 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 others purport to draw a far more formalistic line between legislative and executive power, or to permit only the delegation of discretion to determine “details” rather than “policies.” No matter what approach state courts take to the nondelegation problem, though, they converge on a fairly stable, and meager, invalidation rate, particularly in recent years.

These data 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. As others have argued, though, the benchmarks identified by Justice Gorsuch look better on paper than they do in practice.\textsuperscript{18} For instance, focusing on whether Congress has made all of the relevant policy questions and left only “details” for the agency to fill in raises the question of how one defines policies and differentiates them from details.\textsuperscript{19} 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.\textsuperscript{20} 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.

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.\textsuperscript{21} In the states, review remains irreducibly stochastic, subject to massive historical fluctuations, and ultimately unpredictable for legislators.

\textsuperscript{15} See infra fig. 2.

\textsuperscript{16} See infra fig. 2.

\textsuperscript{17} See infra Part II.D & III.A.

\textsuperscript{18} See Hall, supra note 8, at 202-06 (collecting practical concerns unaddressed by Justice Gorsuch in his dissent in \textit{Gundy}).

\textsuperscript{19} Hall, supra note 8, 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, \textit{Prodelegation}, 1 J. L. Econ. & Org. 81, 82 (1985) (noting that 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”).

\textsuperscript{20} Lawson, supra note 3, at 365 (describing the holding in \textit{Field v. Clark}, 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).

\textsuperscript{21} See infra Part III.
seeking to draft compliant statutes. These features of the doctrine undermine the 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, 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 in favor and against the modern approach to nondelegation, and the Gundy decision’s injection of uncertainty. Part II turns to the states, building on much recent work that draws insights for federal administrative law from the operation of state administrative law. I present analysis of an original panel dataset of state nondelegation cases from the mid-1800s to present day that permits analysis of the impacts of doctrine both across states and within states over time. Part III then draws lessons for contemporary debates over the nondelegation doctrine.

I. The “Never-Ending Hope”

For many, invigoration of the non-delegation doctrine is a “never-ending hope.”\(^{22}\) 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.\(^{23}\) 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 in an effort 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 closer to the bone but do not fundamentally imperil modern government.

A. The Roots of the Nondelegation Doctrine

The nondelegation doctrine reflects deep and unresolved ambiguities about the extent to which the U.S. Constitution instantiated an undiluted separation of powers principle that hermetically seals three idealized powers in three separate branches, 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.24 Unlike many state constitutions,25 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.26 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 fairly recently, most observers accepted that there was, in fact, an implicit limitation on delegation of the legislative power in the Framers’ original understanding, even if the boundaries of this limitation were murky in practice.27 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.28 However, even the idea that the nondelegation doctrine exists is no longer a matter

24 See Farina, supra note 3, 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 3, at 335-36 (noting, but disagreeing with, Justice Stevens’s claim in Whitman v. American Trucking Associations that the Constitution’s silence about nondelegation means that it does not exist”).

25 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 the “overwhelming majority of modern state constitutions contain a strict separation of powers clause” in the sense that it “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”).

26 U.S. Const. art. I, sec. 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.”); U.S. Const. art. II, sec. 1 (“The executive power shall be vested in a President of the United States of America.”); U.S. Const. art. III, sec. 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.”).

27 Lawson, supra note 3, 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”). Just since Gundy, a number of historical accounts have questioned whether the nondelegation doctrine, even if understood as a thing, was ever understood by the founding generation as prohibiting the kinds of delegation of coercive lawmaking authority that critics of delegation rail against. See Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: Evidence from the Federal Tax on Private Real Estate in the 1790s, 131 Yale L.J. (forthcoming 2021) (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 (Jul. 17, 2020), 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 8 (“At most, these other sources might possibly indicate that there is some abstract, unspecified limit on delegation (I assume arguendo there is) . . . .”).

28 Ilan Wurman, Nondelegation at the Founding, 130 Yale L.J., at (forthcoming 2021) (arguing that the “nondelegation principle can be traced to John Locke’s Second Treatise, which was deeply influential on
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 that it had a drastically different scope and purpose than conventionally assumed. For instance, 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. More recently, Julian Davis Mortensen and Nicholas Bagley touched off a gun fight with their argument that the original understanding, and even Locke’s thinking, evinces only a concern that the legislature not permanently delegate (i.e., alienate) its authority to legislate.

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 Supreme Court case in this area, the Cargo of the Brig Aurora, 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. 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, 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. 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 that the “line has not been exactly drawn which separates those important subjects, which must be regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.” 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. Thus, whatever the Framers’ understanding might have been, by 1825 the Marshall Court had recognized the basic contours of the modern nondelegation problem and had 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, all as Congress engaged in substantial delegation of legislative power to a burgeoning administrative state. Even at a time 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 Supreme Court—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, 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 nationals that did not engage in fair terms of commerce with the United States. The delegated discretion “[d]id 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.

As Keith Whittington and Jason Iuliano have recently showed, Field touched off a spate of nondelegation challenges after the long hiatus at the Court, many of which returned more to the scenario of Wayman in that more clearly involved the exercise of policymaking discretion, and none of which leveraged the doctrine to strike an Act of Congress. Yet it was yet another

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35 Id. at 42-43, 46.  
36 Id. at 43, 46.  
37 See, e.g., Parrillo, supra note 27; Chabot, supra note 27.  
39 143 U.S. 649 (1892).  
40 Id. at 693.  
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.\(^4^2\) 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 it stated that the nondelegation doctrine would not be violated if “Congress shall lay down by legislative act an intelligible principle” to which the delegate could “conform” its discretionary acts.\(^4^3\)

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.\(^4^4\) The first case, *Panama Refining Co. v. Ryan*, involved the constitutionality of Section 9(c) of the National Industrial Recovery Act (NIRA), which addressed falling prices of petroleum products by allowing the President to remove such products from interstate commerce through regulations.\(^4^5\) The implementing regulations required producers to keep and file records relating to petroleum product sales.\(^4^6\) 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.”\(^4^7\) 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.”\(^4^8\) The second case, *A.L.A. Schechter Poultry Corp. v. United States*, similarly involved a provision of

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\(^{4^2}\) 276 U.S. 394, 404-05 (1928).

\(^{4^3}\) Id. at 406, 409.

\(^{4^4}\) The Court did strike a delegation to private actors in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (“The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. 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.”).

\(^{4^5}\) 293 U.S. 388, 406 (1935). Section 9(c) read 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.”

\(^{4^6}\) Id.

\(^{4^7}\) Id. at 430.

\(^{4^8}\) Id. Notably, Justice Cardozo dissented, finding the policy the majority found lacking in other provisions of the NIRA. See id. at 434 (“My point of difference with the majority of the court is narrow. I concede that to uphold the delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed. I deny 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. What the standard is becomes the pivotal inquiry.”).
the NIRA, this time Section 3, which gave the President the authority to approve codes of fair competition for entire industries. 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. The Court again rejected this delegation, stating that “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 determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1.”

This time, even Justice Cardozo did not hold out, stating that the “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.”

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. 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.” 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. 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 an Act of Congress for violating the nondelegation doctrine, 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

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49 Id. at 534-35.
50 Id. at 541.
51 Id. at 551.
52 Cary Coglianese, Dimensions of Delegation, 167 U. Pa. L. Rev. 1849, 1851 (2019); see also Whittington & Iuliano, supra note 32, 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.”).
53 David Schoenbrod, Consent of the Governed: A Constitutional Norm That the Court Should Substantially Enforce, 43 Harv. J. L. & Pub. Pol’y 213, 229 (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”).
That is not to say there have not been flirtations. In the early 1980s, in the Benzene Case and then again in the Cotton Dust Case, Justice Rehnquist 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.”55 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. 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.56 The Supreme Court in Whitman v. American Trucking Associations disagreed, holding that the “scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents,”57 even though it excluded consideration of costs and called on EPA to set a standard for non-threshold pollutants that, as a scientific matter, had no known safe level of exposure.58

And, of course, it is possible to hear echoes of the central concerns of the nondelegation doctrine in other, less freighted contexts. 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.59 More recently, some have seen echoes in the emerging concept of the major questions approach to Chevron cases.60 And then there is the closely related domain of review for unconstitutional vagueness.61

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

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56 American Trucking Associations v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) (reviewing EPA’s construction of 42 U.S.C. § 7209(b)(1)).
58 Id. at 475.
60 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”).
61 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).
When it came time to act, as opposed to venting one’s constitutional frustrations in concurrences 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.\(^62\)

C. The Increasingly Fraught Debate Over Nondelegation

Over the same few decades that the Court seemed to abandon any judicially administrable limits 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 Joseph Postell groups them into three buckets: 1) arguments from a 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.\(^63\)

Briefly, the argument from separation of powers formalism starts from the theory that there must be limits to Congress’s ability to delegate its power, otherwise the separation of powers would be a sham and could be eviscerated by reshuffling the distribution of power through ordinary legislation.\(^64\) 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,\(^65\) it has not won over many converts here, where the textual hooks for the doctrine are minimal. The argument about political accountability has found more traction. The argument here, largely developed by political scientists like Ted Lowi\(^66\) and Morris Fiorina,\(^67\) and picked up by legal scholars like David Schoenbrod,\(^68\) John Hart Ely,\(^69\) and Peter Aranson, Ernest Gellhorn, and Glenn Robinson,\(^70\) is that allowing Congress to delegate freely allows them to claim responsibility for the act of delegating, as if it were the same as the actualization of


\(^{64}\) Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 340 (2002) (stating that if delegation were permissible, the “vesting clauses, and indeed the entire structure of the Constitution” would “make no sense”).


policy, and then avoid responsibility for the actions of the delegee when things go wrong, diminishing both democratic control and social welfare.\footnote{It is worth noting 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. \textit{See Mashaw, supra} note 19, 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. \textit{See} Thomas W. Merrill, \textit{Presidential Administration and the Traditions of Administrative Law}, 115 Colum. L. Rev. 1953 (2015) (positing that presidential administration, as advocated by Elena Kagan, \textit{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 “positivist” tradition that privileges legal formalisms, and that this development subverted a “grand synthesis” between these two warring traditions).

The delegation, by obscuring who is doing the real work of 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 argued 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.\footnote{Postell, \textit{supra} note 63, at 287-90 (citing, as a principal proponent of this view, Philip Hamburger, \textit{Is Administrative Law Unlawful} 377–402 (2014), and Gary Lawson & Guy Seidman, \textit{A Great Power of Attorney: Understanding the Fiduciary Constitution} (2017)). The bar on further subdelegation is often supplemented by reference to the Latin phrase \textit{delegate postestas 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; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or, if known, might not be selected by him for such a purpose.” Patrick W. Duff & Horace E. Whiteside, \textit{Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law}, 14 Cornell L. Rev. 168 (1929); \textit{but see} Farina, \textit{supra} note 3, at 91-92 (“Yet this rule—captured in the \textit{delegate postestas} 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.”).} 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.\footnote{Postell, \textit{supra} note 63, 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.”).} 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.\footnote{\textit{Cf.} Gundy \textit{v. United States}, 139 S. Ct. 2116, 2130 (2019) (opining that if the delegation at issue in \textit{Gundy v. United States} “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”); \textit{see also} Sean P. Sullivan, \textit{Powers, But How Much Power? Game Theory and the Nondelegation Principle}, 104 Va. L. Rev.

Some 300,000 statutes
currently on the books, many of them regulatory super-statutes, might be vulnerable to challenge under a changed nondelegation doctrine. Even the threat of litigation could lock up the gears of government. 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. This is not something agencies prefer to do; it would be far easier to be able to cite a brand-new statute explicitly authorizing 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. In this situation, opening the floodgates to court review of the delegations agencies are of necessity relying on to do incremental work (not to mention throwing into question any legislative action that might be taken) is tantamount to taking a stance against climate policy in general. Perhaps closer to

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”).

75 William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1216 (2001) (defining a super-statute as “a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does ‘stick’ in the public culture such that (3) the super-statute and its institutional or normative principles have 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-statutes. See William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution (2010).

76 Hall, supra note 8, 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.”).

77 Hannah Mullen & Segal Singh, The Supreme Court Wants to Revive a Doctrine That Would Paralyze Biden’s Administration, Slate (Dec. 1, 2020), https://slate.com/news-and-politics/2020/12/supreme-court-gundy-doctrine-administrative-state.html; Coan, supra note 11, at 146 (“Not every statute subject to challenge under the Gorsuch approach will ultimately be invalidated. But that’s part of the problem. A large fraction of existing delegations of power—quite possibly a majority—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 than a bright-line rule invalidating the same number of statutes.”).


79 Peggy Otum, Raya B. Treiser, Shannon Morrissey, & Lauren Mercer, What a Biden Administration Will Mean for US 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 (“Making progress toward these ambitious goals will require federal action on many fronts. However, the 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.”).

80 Mark P. Nevitt, The Remaking of the Supreme Court: Implications for Climate Change Litigation and Regulation, 42 Cardozo L. Rev. 101, 114 (2020) (“Future presidential administrations that seek bold agency action on climate must be particularly careful not to exceed existing delegated authority, and future
home for those of us affected by COVID-19, agencies from the Food and Drug Administration to the Centers for Disease Control used existing delegations of authority, some quite open-ended, to take some of the most crucial emergency actions throughout the pandemic, from the initial response to the rollout of vaccines. While the response from these agencies can certainly be criticized, it was surely more effective than tasking Congress with the details of the emergency response at a moment’s notice.

It is simply not convincing to sympathetic but pragmatic observers (I include myself in this vein) to cite untested theories about how Congress could adjust to a heightened doctrinal standard by furnishing new statutory authority that passes a heightened nondelegation bar. As Nicholas Bagley observes, “[d]elegations of power pervade modern American governance, at both the federal and state levels. 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.”

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, but also hard-edged enough to meaningfully correct for perceived lapses in the constitutional framework and the democratic political economy. 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, but they consistently insist that the seeds of a judicially manageable approach focused on the importance of the substance of the statutory can be calibrated based on the Court’s pre-New Deal decisions.

Congress 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.”)


85 Lawson, supra note 3, at 353 (“The difficulty of drawing this line—a difficulty that was acknowledged by Madison and Chief Justice Marshall, among others—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.”)

86 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
D. The Forecast After Gundy

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.” 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. On this reading, the Attorney General did not have unfettered discretion to choose whichever outcome it preferred, but instead was basically expected to promulgate regulations to make pre-Act offenders subject to registration requirements. Whether the unreconstructed statute would have survived intelligible principle review is an academic point, 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.

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 “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.” Count him in the reform column. Most importantly, Justice Gorsuch dissented and gained the votes of both the Chief Justice and Justice Thomas in

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87 34 U.S.C. § 20913(d).
88 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.”).
89 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.”).
90 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—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time.’ If that were so, we would face a nondelegation question. But it is not.”)
91 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.”).
92 Id. at 2131.
calling for an immediate rejection of the intelligible principle test.\textsuperscript{93} According to Justice Gorsuch, the delegation in section 20913(d) “can only be described as vast,”\textsuperscript{94} and the Attorney General’s policy choice “unbounded.”\textsuperscript{95} 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.\textsuperscript{96} Instead, Gorsuch 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 had “been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional.”\textsuperscript{97} In making this case, Justice Gorsuch pushed all of the relevant buttons: he argued that permissive delegation undermined clear lines of accountability between voters, elected representatives, and public policy\textsuperscript{98}; 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\textsuperscript{99}; and he tied all of these various strands together to argue that delegation threatens liberty.\textsuperscript{100} Indeed, he came close to stating that the purpose of

\textsuperscript{93} 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. \textit{See id.} at 2131 (Alito, J., concurring).

\textsuperscript{94} \textit{Id.} at 2132.

\textsuperscript{95} \textit{Id.} at 2133.

\textsuperscript{96} \textit{See id.} at 2129 (“[W]e have over and over upheld even very broad delegations. Here is a sample: We have approved delegations to various agencies to regulate in the ‘public interest.’ We have sustained authorizations for agencies to set ‘fair and equitable’ prices and ‘just and reasonable’ rates. We more recently affirmed a delegation to an agency to issue whatever air quality standards are ‘requisite to protect the public health.’ And so forth.” (internal citations omitted)).

\textsuperscript{97} \textit{Id.} at 2139–40.

\textsuperscript{98} \textit{Id.} at 2134.

\textsuperscript{99} \textit{Id.} at 2133 (“The framers understood, too, that it would frustrate “the system of government ordained by the Constitution” if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.\textsuperscript{19} Through the Constitution, after all, 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.”).

\textsuperscript{100} \textit{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 [t]o ... counteract ambition” would do more than written promises to guard unpopular minorities from the tyranny of the majority.

\textit{Id.} at 2134.
instituting a heightened standard of review for delegations is largely to prevent the implementation of laws and regulations, precisely because these are anathema to liberty. The central contribution of Justice Gorsuch’s analysis, though, is his articulation of a new test—what some have termed the “Gorsuch test”—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. On this account, Congress may not delegate any legislative authority unless the delegation can be fitted into one of three categories of exceptions. 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.” 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.” 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.” As 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. Finally, Gorsuch acknowledged that in practice constitutional powers are not hermetically sealed off from one another, and so if Congress delegates its power but a coordinate branch has overlapping power

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101 Id. at 2134 (“Why did the framers insist on this particular arrangement? They believed the new federal government’s most dangerous power was the power to enact laws restricting the people's liberty. An ‘excess of law-making’ was, in their words, one of ‘the diseases to which our governments are most liable.’ To address that tendency, the framers went to great lengths to make lawmaking difficult.”).

102 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. See Cass R. Sunstein & Adrian Vermeule, Libertarian Administrative Law, 82 U. Chi. L. Rev. 393 (2015).

103 Hall, supra note 8.

104 See also 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 a ‘more categorical’ one); Mike Rappaport, A Nondelegation Doctrine the Court Can Believe In, Law & 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”).

105 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”).

106 Id. at 2136.

107 Id. at 2136 (quoting Yakus v. United States, 321 U.S. 414, 426 (1944)).

108 Id.

in that domain, the delegation is either illusory or permissible.\textsuperscript{110} There seems to be little debate that this articulation of a standard would be stricter than the intelligible principle standard.\textsuperscript{111}

Subsequent developments with respect to Justice Kavanaugh, along with the confirmation of Justice Barrett, replacing Justice Ginsburg, who had been in the majority in \textit{Gundy}, 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. 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, \textit{Center for Biological Diversity v. Wolf}, 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. The second, \textit{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. So far, neither argument has made its way to the Court: in \textit{Wolf}, the Court denied review,\textsuperscript{112} and in \textit{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.\textsuperscript{113}

Separately, Alan Morrison, a progressive litigator who had previously tried to invigorate the nondelegation doctrine in cases like \textit{Bowsher v. Synar} and \textit{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.\textsuperscript{114} Morrison argued that in his case, unlike in \textit{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.”\textsuperscript{115} Nevertheless, the Court denied the petition.\textsuperscript{116}

\textsuperscript{110} 139 S. Ct. at 2137.
\textsuperscript{111} Hall, \textit{supra} note 8, at 179 (arguing that 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”).
\textsuperscript{115} Id.
\textsuperscript{116} Id.
Most recently, *Gundy* has been cited in cases challenging emergency measures in the states in response to the COVID-19 pandemic.\(^{117}\) 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 effectively addressed through private initiative.\(^{118}\) 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,”\(^{119}\) the COVID-19 emergency orders cases in the states may be viewed by some as a preview or 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 Court’s future nondelegation cases might mean for regulatory governance as we know it.

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 approach 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.\(^{120}\) In this 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,\(^{121}\) the similarities are substantial enough to make the differences informative, and some of the most innovative and promising work in the fields of


\(^{118}\) Bagley, *supra* note 83.

\(^{119}\) *Gundy*, 139 S. Ct. at 2145.

\(^{120}\) Hall, *supra* note 8 (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 my focus in this paper, there are many other hypothesized effects on Congress’s behavior, most of them anticipating a reinvigoration of Congress’s work ethic. See Mashaw, *supra* note 18 (collecting arguments); Postell, *supra* note 63 (same). I reserve empirical examination of these questions for later work.

\(^{121}\) See *supra* Part II.D.
administrative law and public administration make use of the analogy to draw lessons for the federal side. It is in that spirit that I turn in this part to an examination of the nondelegation doctrine’s experience in the states. This article is by no means the first to examine the nondelegation doctrine in the states, although it is, to my knowledge, the first to examine empirically how different articulations of the doctrine might affect outcomes.

A. Surveying the States

As one casebook describes it, the “nondelegation doctrine has much greater practical significance at the state level than at the federal level.” In terms of raw numbers, this does appear to be the case. Keith Whittington and Jason Iuliano collected nondelegation decisions in the state courts from the Founding Era to 2015. They found over 2,100 such cases from 1789 to 1940, and, sampling at five-year intervals after 1940 up until 2015, they found 919 cases, which extrapolates to over 5,000 cases over the period. They also found a large disparity between the invalidation rate in federal court (3 percent) and the invalidation rate in state court (16 percent). Contra claims that the nondelegation has faded in significance since an apotheosis in 1935, Whittington and Iuliano conclude that the “narrative of decline that has dominated the past eighty years is wrong. The nondelegation doctrine did not die during the New Deal but

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123 In focusing on what the state experience foretells about the impending federal nondelegation experiment, I bracket important questions about 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 Sutton, 51 Imperfect Solutions (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 (2019) (theorizing about how states could interact with presidential administration at the federal level); Jessica Bulman-Pozen & Miriam Seifter, The Democracy Principle in State Constitutions, 118 Mich. L. Rev. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3591788 (noting that states and the federal government may complement each other in the degree to which they permit majoritarian preferences to shape public policy).


127 Whittington & Iuliano, supra note 92, at 418 (finding 2,506 state and federal cases during this period, 85% of which were state decisions).

128 Iuliano & Whittington, supra note 126 at 636.

129 Id.
rather persists to this day,” particularly in state courts; it’s just that it never played a major role in limiting delegation.\footnote{\textit{Id.} at 645. Others have pushed back on this claim, arguing that 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, in the pre-New Deal Era. See Postell, \textit{supra} note 63, at 303-04.}

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,\footnote{In addition to making this point, Whittington and Iuliano focus much of their effort on identifying variation in challenges and outcomes based on the type of delegation involved.} 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. 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”\footnote{Gary J. Greco, \textit{Standards or Safeguards: A Survey of the Delegation Doctrine in the States}, 8 Admin. L.J. Am. U. 567, 580 (1994).}; 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”\footnote{\textit{Id.} at 588.}; and 3) “procedural safeguards” states, where 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.\footnote{\textit{Id.} at 598.} According to Greco, the “loose” nondelegation doctrine predominated in the states. 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,\footnote{See Rossi, \textit{supra} note 25, at 1191-92 (finding that 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, \textit{The Administrative Law Legacy of Kenneth Culp Davis}, 42 San Diego L. Rev. 315, 332 (2005).} is almost entirely absent in the federal cases.\footnote{In fact, the U.S. Supreme Court has apparently definitively ruled out this approach. See Whitman v. Am. Trucking Associations, 531 U.S. 457, 473 (2001) (“The 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. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority. Whether 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, \textit{supra} note 71 (understanding the general nonenforcement of the nondelegation doctrine as a “grand synthesis” involving the partial substitution of process for positive law).} Building on Greco’s work, Jim Rossi classified states into weak, moderate, and strong categories, and much as with Greco, Rossi found that a plurality of states employ a moderate
version of the nondelegation doctrine, although states with a strong doctrine (20 of the 50 states) were not far behind.137

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 in an effort to classify states’ nondelegation doctrines according to Gorsuch’s conceptualization of the inquiry. Specifically, I attempted to discern whether any states borrow the language “fill in the details” or some equivalent attempt to prohibit the delegation of policymaking authority in the drafting of rules, whether any states specify that executive agencies can identify whether facts are present that would trigger a policy set by the legislature, and whether any states recognize that delegation may be saved by the fact that the executive branch inherently shares overlapping power in that domain.138 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 fully 22 states appear to adopt something close to Justice Gorsuch’s “fill in the details” standard,139 with 28 states retaining

137 Rossi, supra note 25, at 1193-1201.

138 These, again, map the three prongs of the Gorsuch test. See Hall, supra note 8.

139 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. Cty. Bd. of Ed. of Johnson Cty., 249 Iowa 209, 228 (1957) (“Authority as to details and promulgation of rules and regulations to carry out administrative 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 Interest of C.S., 516 N.W.2d 851, 859 (Iowa 1994). Another state that quite clearly uses the Gorsuch verbiage is Kansas. See, e.g., Kansas One-Call Sys., Inc. v. State, 294 Kan. 220, 230 (2012) (“To distinguish whether the legislature has delegated legislative power or administrative power, the specific standards set out in the delegation must be considered. If the standards are specific, meaning they contain sufficient policies and standards to guide the nonlegislative body, the legislature has delegated administrative power. The legislature can 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 Cty./Kansas City, Kan., 264 Kan. 293, 304 (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 Kansas, 268 P. 123, 126 (Kansas 1928) (“It is not of much importance by what name the authority or power conferred upon the council by the Legislature is designated, whether it be a delegation of police power or merely the vesting of discretionary authority. It is the nature and character of the power or discretion and the subject-matter of its application that are of essential and foremost consideration. Generally speaking, 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. True, a statute which authorizes a public official to issue or withhold licenses, permits, or approval as applied to a lawful business or the lawful use of private property, or the lawful exercise of private rights according to such official’s arbitrary action, without specifying the conditions, rules, or necessary findings upon which such official shall base his action, is void. In my judgment, the Legislature by the clause contained in the statute, ‘Under such terms and conditions as the Executive Council may determine to be just and proper,’ has not furnished the Executive Council with any definite rule, standard or measure, or specific condition upon which to predicate its discretionary
something that more generally resembles the intelligible principle standard in only requiring a high-level statement of the goals or policy of the statute. Less common is recognition of the second exception articulated by Justice Gorsuch: only 9 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. Only 1 state—Missouri—recognized Justice Gorsuch’s nebuluous third category. Overall, Justice Gorsuch’s approach is not foreign to the states.

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140 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 ‘lays down policies and establishes 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. Batchford, 64 Ohio St. 2d 256, 260, 416 N.E.2d 614, 618 (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. Ordinarily, the establishment of standards can be left to the administrative body or officer if it is reasonable for the General Assembly to defer to the officer’s or body’s expertise.”). Arkansas also exemplifies the general guidelines or intelligible principle approach, although it does not use the federal language. See, e.g., This 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, 2011 Ark. 505, 8 (2011) (“This court has held that discretionary power may be delegated by the legislature to a state agency as long as reasonable guidelines are provided. This guidance must include appropriate standards by which the administrative body is to exercise this power. A statute which in effect reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers.”).

141 State v. Arizona Mines Supply Co., 107 Ariz. 199, 205 (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. Since the power to make a law includes discretion as to what it shall be, this particular power cannot be delegated. But the 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, Indiana 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.”), cert. denied sub nom. Gunderson v. Indiana, 139 S. Ct. 1167 (2019).

142 State v. Cushman, 451 S.W.2d 17, 20 (Mo. 1970) (“While an executive officer may not be delegated the power to make and promulgate rules and regulations of a strictly and exclusively legislative nature the 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.”)
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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. 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. 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. While this kind of thinking is not entirely unheard of in the federal cases and is implicit in “major questions” thinking in general and in some models of the nondelegation problem, it has never been 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

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143 See Greco at 579 n. 66 (“Obviously the categories will have some overlap . . . .”).


146 *Whitman v. Am. Trucking Associations*, 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. See *Loving v. United States*, 517 U.S., at 772–773, 116 S.Ct. 1737; *United States v. Mazurie*, 419 U.S. 544, 556–557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). While Congress need not provide any direction to the EPA regarding the manner in which it is to define “country elevators,” which are to be exempt from new-stationary-source regulations governing grain elevators, see 42 U.S.C. § 7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy.”).

147148 See generally Kevin O. Leske, *Major Questions about the Major Questions Doctrine*, 5 Mich. J. Envtl. & Admin. L. 479 (2016); Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent Major Questions Doctrine*, 49 Conn. L. Rev. 355 (2016). It also may be implicit in the way the Court has operationalized the intelligible principle standard. See Sullivan, *supra* note 74, at 1254 (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).

148 See Coglianese, *supra* note 52, at fig. 1 (suggesting that the federal nondelegation doctrine only prohibits delegation when there is a high amount of both discretion and power).
questions doctrine, as traditionally conceived. 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 an all-or-nothing pattern. 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, between them, the measures capture something real about the flavor of review in various states.

B. State Nondelegation Case Dataset

As discussed above, the main question I seek to answer is whether all of the variation among states’ approaches to the nondelegation doctrine can explain any of the variation in outcomes. In order to answer that question, it is necessary to collect data on nondelegation cases. Although Whittington and Iuliano collected a complete dataset for the period from 1789 to 1940, their more recent data only covers cases sampled every fifth year. 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. To do so, I used the Westlaw key system to identify the universe of potentially relevant cases. In order to ensure that I was not missing relevant cases, I cast a wide net. This search returned 4,001 cases ranging from 1830 to 2019. Not all of these cases were true nondelegation challenges,

150 Whittington & Iuliano, supra note 92.
151 Iuliano & Whittington, supra note 126.
152 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.
153 Westlaw’s key system may in some sense be both “overinclusive and underinclusive.” David Zaring, Toward Separation of Powers Realism, 37 Yale J. Reg. 708, 739 & n.189 (2020). I have attempted to minimize overinclusiveness by having research assistants read opinions and determine whether nondelegation was actually at issue. See infra note 156 and accompanying text. Underinclusiveness is less addressable, but there is no better way to identify relevant cases. See Zaring, supra (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).
154 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.”
155 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
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. Reducing the included cases to those where two coders agreed it should be included, it is still the case that many states regularly hear at least one or two nondelegation cases every year, as Figure 1 demonstrates.

Figure 1: Case Counts by State and Year

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.

For my purposes, I treated statutory interpretation cases where 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 59; Manning, supra note 59.
Likewise, some cases did not concern delegation of legislative authority to executive branch actors, but instead delegation to courts or other actors. In order 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 these independent determinations by the 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 do any analysis on 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; when it is moving up, it means that courts are validating more statutes than they are invalidating. When it 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 average validation rate of 81.3 percent is noticeably more stringent in practice than the federal nondelegation doctrine is. 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, on the whole, 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 percent of cases. Courts again changed their approach around the turn of the twentieth century, driving the average validation rate to almost 90 percent by the 1920s. The courts then leveled off over the New Deal years, settling at an 83.1 percent validation rate for the period running from 1950 to 2019. These findings largely correspond to previous findings, but not entirely. There is clearly more volatility in the validation rate than previous research has shown.

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 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 back 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 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 highlights concerns that the nondelegation doctrine is not mechanical enough to provide a predictable baseline against which to legislate, and that it is driven by extra-legal considerations, like politics.

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157 See Whittington & Iuliano, supra note 32, at 419-20 (finding that “[n]ondelegation cases surged at the opening of the twentieth century” but that the “number of judicial invalidations hardly budged”).

158 See Iuliano & Whittington, supra note 126, at 633 (finding that “the success rate has remained markedly stable over the past century”).
Figure 3: Cumulative Percent Validated by State
2. Analyzing Doctrinal Constraint

The question the data inevitably raise 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 these hypotheses. 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 percent, and for states that did recognize it, the validation rate was 83.3 percent, a difference that could well be random (p=.207).

<table>
<thead>
<tr>
<th>Rossi</th>
<th>Validate</th>
<th>Invalidate</th>
<th>Chi-Square</th>
<th>P-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Weak</td>
<td>268</td>
<td>55</td>
<td>0.26</td>
<td>.878</td>
</tr>
<tr>
<td>Moderate</td>
<td>497</td>
<td>104</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Strong</td>
<td>609</td>
<td>135</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Greco          | Procedural Safeguards | 231 | 49   | 0.43 | .805 |
|                | Loose               | 617 | 137  |      |      |
|                | Strict              | 476 | 96   |      |      |

| Gorsuch Test   | Fill in Details     | No  | 783  | 166  | 0.27 | .869 |
|                |                     | Yes | 591  | 128  |      |      |
| Executive Factfinding | No  | 1184 | 245  | 1.59 | .207 |
|                  | Yes               | 190 | 49   |      |      |
| Overlap with Executive | No  | 1348 | 289  | 0.05 | .825 |
|                  | Yes               | 26 | 5    |      |      |
| Procedural Safeguards | No  | 940  | 194  | 0.66 | .418 |
|                  | Yes               | 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 scrutiny 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, and some courts say as much. 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, and this may impact 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 high chance of invalidation. For the delegation history category, I include a battery of textual measures of delegation from state session laws and measures capturing the degree to which that court had intervened to review and stop delegations in the past. 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; delegations last 10 years computes a moving average of the total number

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

161 Rossi, supra note 25.


163 Here 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.

164 See Vannoni, Ash, & Morrelli, supra note 162.
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* similarly 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 on 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; *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; finally, relying on Jim Rossi’s tabulation of state constitutional provisions concerning the separation of powers, 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 which of four periods the case was decided in. These periods were drawn from the basic changepoints indicated in Figure 2: *pre-1900* indicates the fairly volatile period before the year 1900, *progressive* indicates the period running from 1900-1934, the *new deal* indicates the period running from 1935-1949, and the *modern* period runs from 1950-2019 (here the reference point in the estimation is the *modern* period).

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 percent 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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166 Id.


168 The indicators for historical period perform something 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 use to produce dot and whisker plots does not support the application I use to estimate fixed effects logistic regressions.
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 variables are statistically significantly associated with outcomes, or at least very nearly statistically significantly, 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 percent 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=.1 level).

The results in Figure 4, and really any models based on observational data, 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.\textsuperscript{169} 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. A not dissimilar problem arose in the context of the U.S. Supreme Court’s decisions in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal* imposing heightened “plausibility” pleading requirements in general civil litigation, where empirical legal scholars attempted to test the hypothesis that the heightened pleading standard disadvantaged plaintiffs in subsequent cases.\textsuperscript{170} While this problem is difficult to resolve completely, there are reasons to believe it is not as serious a problem as it is here as it was in the pleading context.

When it comes to primary legislative behavior, much research suggests that statutory drafters are highly inattentive to the details of the Supreme Court’s decisions. Abbe Gluck and Lisa Bressman extensively surveyed legislative staffers who draft the bulk of statutes, and they 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.\textsuperscript{171} Even when the signal gets through, Congress not infrequently 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*.\textsuperscript{172} It is therefore not obvious at all that primary legislative

\textsuperscript{169} 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. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 18 J. Leg. Studies 1 (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. of L. & Econ. 59 (2016).


\textsuperscript{172} 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
behavior would change based on the stringency of the doctrine, in general, and in fact the best evidence available in the specific context of the state nondelegation doctrine suggests that state legislatures are unmoved in their drafting behavior by nondelegation decisions.173 In a separate project, I am using the data here to probe the extent to which nondelegation decisions change state legislatures’ propensity to delegate, but for now it seems reasonable to assume that this kind of equilibrium change is unlikely to be significant.174

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 vanishingly small probability of success in federal courts over 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 unchained from the immediate probability of success.175 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.176 For all of 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.177 Figure 5a models the number of invalidations of statutes observed in a given state in a given year, while Figure 5b models the total number of cases presenting a nondelegation challenge, regardless of outcome.

173 Stiglitz, supra note 124.

174 In addition, some of the controls in Figure 4, supra, address the possibility of changing legislative behavior. Specifically, the average number of delegations over the past 10 years and the number of delegations in the year the case was decided both capture changes in the baseline.

175 Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc’y Rev. 95 (1974) (noting that “repeat players”—that is, litigants to have long-term incentives or needs to use the litigation system—can withstand losses strategically in advancing long-term interests incrementally).


177 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 am able to 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 5b, since it serves as the substitute outcome variable.
Figure 5: Count Models of Nondelegation Cases

The results in Figure 5a 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 delegation and the total volume of cases. These findings are more striking in light of the results in Figure 5b, where the results 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; and 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.

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 it 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.\(^{178}\) In addition, as 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.\(^{179}\)

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. Joseph Postell, for instance, surveys cases in the states and concludes that nondelegation cases are not a “monolithic category” at the state level.\(^{180}\) States examine a wide variety of delegations—delegations of the taxing power, delegations to private actors, and delegations to other institutions besides regulatory agencies, and even delegations “back to the people through initiative petitions.”\(^{181}\) Likewise, Benjamin Silver observes that “what little state scholarship there is often misses the breadth and depth of state nondelegation jurisprudence.”\(^{182}\) Indeed, Silver reinforces Postell’s conclusion that “states apply nondelegation to many different types of delegates and in a variety of contexts, sometimes with little coherence on the surface.”\(^{183}\)

This article avoids some of these barriers to external validity by focusing on delegations of legislative authority to executive branch actors, either the governor or 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

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\(^{178}\) Rossi, supra note 25.


\(^{180}\) Joseph Postell, The Myth of the Nondelegation Doctrine in the States, at 12 (manuscript on file with author).

\(^{181}\) Id. at 12-13.


\(^{183}\) Id. at 4-5.
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 Supreme Court hears should reassure.

One obvious difference between state and federal nondelegation cases that might initially suggest caution in drawing lessons from these 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 percent of the statutes they review in nondelegation doctrines—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, in particular, 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.

For all of 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 19th century to the present, several big patterns and findings emerge.

First, and consistent with prior research on the state nondelegation doctrine, I find that 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. In the state courts, by contrast, 18.7 percent 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 still 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.

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.

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184 Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 330 (1999) (noting that the federal nondelegation doctrine has “had one good year and more than two hundred bad ones”).
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 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 change in the law—a conclusion which will disappoint those who see in Justice Gorsuch’s dissenting opinion in Gundy a genuine opportunity to rebalance the balance of power between the legislature and the executive, but which 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 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.185

This limitation on what doctrine can accomplish also has significant implications for how the Court, assuming it would want to more vigorously police Congress’s legislative behavior, will do it. 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 decisionmaking, 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 gesticular approach may succeed in changing Congressional behavior, perhaps to an extreme, but it is likely to carry many imprecisions and undesirable side effects.

Overall, the empirical analysis adds to the questions others have 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 to it that the project is completed. Yet, if it is concrete and tangible results that we care

185 Cf. Zaring, supra note 153, at 748 (“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.”).
about and not some form of separation of powers virtue signaling, the findings in Part II provide some reason to doubt that there will be much of a real payoff (or a real threat).

A. The Futility of a Doctrinal Shift

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.”

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.”

States would beg to differ. State governments have, just like the federal government, become modern administrative states in their own right. As other scholars have documented, state governments are involved in substantial regulatory policymaking. Moreover, as 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 on delegations of authority from the state legislatures. This has all occurred despite the fact that a substantial number of states employ elements of Justice Gorsuch’s strict approach to nondelegation, 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. How could this be?

Ultimately, the findings suggest that Justice Gorsuch’s test is just as irreducibly ambiguous as the intelligible principle standard. Even conservative or libertarian proponents...
of the nondelegation doctrine have recognized as much.\textsuperscript{193} 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:

- Despite having a strict separation of powers clause in its state constitution, despite being classified by others as a “strict” or “strong” nondelegation state by others, and despite clearly adhering to a hard and fast line between delegation of policymaking authority versus details of implementation, 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 \textit{Commonwealth v. Clemmey}, in which the Court 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. The statute in question stated a general prohibition on the altering wetlands, but it also provided that these prohibitions do not apply to “work performed for normal maintenance or improvement of land in agricultural use.”\textsuperscript{194} 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].’”\textsuperscript{195} 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.\textsuperscript{196} Nevertheless, the Massachusetts Supreme Court brushed aside the argument that the legislature had left a policy question for the agency, stating that 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.”\textsuperscript{197}

- 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 the facts or state of things upon which the law makes its own operations depend.”\textsuperscript{198} In \textit{Clark County v. Luqman}, the Nevada Supreme Court considered whether

\textsuperscript{193} Michael Rappaport, for instance, described Gorsuch’s test as “pretty indeterminate” and argued for a stricter approach that distinguishes between “traditional areas of executive responsibility, such as foreign and military affairs, spending, and the management of government property,” on the one hand, and other areas involving domestic private rights, on the other, and categorically limits delegation in the latter. Michael B. Rappaport, \textit{A Two Tiered and Categorical Approach to the Nondelegation Doctrine}, San Diego Leg. Studs. Paper No. 20-471, at 3 (Oct. 13, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3710048.


\textsuperscript{195} \textit{Id.} at 125.

\textsuperscript{196} \textit{Id.}

\textsuperscript{197} \textit{Id.}

\textsuperscript{198} State ex rel. Ginocchio v. Shaughnessy, 47 Nev. 129 (1923).
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. The Court held that, while the “standards for classifying drugs into specific schedules are phrased in general terms,” ultimately the board was “placed into the role of a fact finder,” and the board had “merely been delegated the duty of applying its findings to the legislative scheme.” 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 lines between legislative and executive authority.

- California employs a more liberal approach to nondelegation, requiring only that the legislature resolve “fundamental” policy questions and that it provide “adequate direction” for administrative agencies’ exercise of “quasi-legislative” authority. 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. 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.” After the onset of the energy crisis, CARB attempted to delay the effective date of the regulations, citing the “extraordinary and compelling reasons” provision. 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.”

- 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. Nevertheless, the Court struck a highly technical statute reforming the judicial retirement system, concluding that the Court 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.”

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.\textsuperscript{206} 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.\textsuperscript{207} 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).\textsuperscript{208} 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\textsuperscript{209} and by examining models where the outcome variables are counts, which should not be as susceptible to equilibrium effects.\textsuperscript{210} However, these controls and robustness checks are not perfect, and the chance that the decided nondelegation cases do not represent 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 percent), which might suggest to some that the nondelegation doctrine, whatever the precise articulation, is hardwired for more stringent application, and that the 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 dual federalist system rather than something inherent about how courts in general resolve nondelegation problems.\textsuperscript{211} 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

\textsuperscript{206} Accord Sunstein, \textit{supra} note 59, at 326-27 (arguing that the “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”).

\textsuperscript{207} \textit{See supra} notes 169-177 and accompanying text.

\textsuperscript{208} This may be less of a problem before the 1900s, before state high courts shifted to a primarily discretionary docket. \textit{See} Stephen L. Wasby, \textit{State Court Discretionary Jurisdiction and Federal Habeas Corpus}, 21 Justice Sys. J. 89, 89 (1999) (noting the transition from mandatory to discretionary dockets in the state supreme courts).

\textsuperscript{209} \textit{See supra} notes 162-164 and accompanying text.

\textsuperscript{210} \textit{See supra} notes 169-177 and accompanying text.

\textsuperscript{211} Cf. Rick Hills, \textit{Attack of the Clones: How State Courts’ Adoption of SCOTUS’ Constitutional Doctrinal Disputes Defeats the Purpose of Federalism}, Balkinization (Oct. 4, 2020) (critiquing the Michigan Supreme Court’s decision in \textit{In re Certified Questions}, supra note 117, as “studiously oblivious about the distinctive practical and legal problems and opportunities created by executive power in state governments” and how that should shape the nondelegation doctrine’s application in the states); \textit{see also} Aaron J. Saiger, \textit{Chevron and Deference in State Administrative Law}, 83 Fordham L. Rev. 555, 557 (2014) (noting that \textit{Chevron} deference has “not been embraced with enthusiasm or consistency in state administrative law” and that this is likely due to the fact that \textit{Chevron} is better suited to features of the federal regulatory system).
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.\footnote{Cf. id. (arguing that, from a federalist standpoint, there are both good reasons for a heightened nondelegation standard in the states and good reasons for a lightened nondelegation standard—but at any rate, plenty of reason to think the doctrine should be different in order to reflect different circumstances).} After all, problems have to be solved by one sovereign or another.

Notwithstanding these caveats and puzzles, 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 the lines that the Gorsuch test attempts to draw between legislative power and executive power.\footnote{Hickman, supra note 22 (“But finding a better and more rigorous standard for discerning between acceptable from unacceptable grants of rulemaking authority is very, very hard. Contrary to Philip Hamburger, none of the justices has suggested eliminating agency rulemaking altogether. Justice Gorschuk even seemed to find acceptable ‘statutes that allow federal agencies to resolve even highly consequential details so long as Congress prescribes the rule governing private conduct.’ His primary objection seems to be with mushy terms like ‘feasible,’ and perhaps even then not all the time. Consequently, any more rigorous replacement for the intelligible principle standard will need to facilitate such line drawing. Justice Gorsuch’s first effort, contrasting ‘mere details’ with rules governing final conduct, seems too susceptible to the whim of the moment.’”); Lawson, supra note 3, at 354; Hall, supra note 8; Sunstein, supra note 59.} What the empirical analysis in Part II adds is real-world evidence of this ambiguity in the form of wildly varying patterns of decisionmaking 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 a Constitution in exile, or to view it as foreshadowing the end of administrative government.

B. The Judicial Economy of Nondelegation

This observation raises important questions: \emph{Why is it that Justice Gorsuch wants to frame his test as a sort of foil to the intelligible principle test?} \emph{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 to say, 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.\footnote{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 Decisionmaking in Law and in Life (1991); Louis Kaplow, \textit{Rules Versus Standards: An Economic Analysis}, 42 Duke L.J. 557, 559-60 (1992) (defining rules as a legal command that can be understood ex ante—that is, before a judicial determination—and a standard as quintessentially ex post—we only know what the law is in an individual case when the case is adjudicated);} If this is correct as an 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 comes 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 to work with. 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-Act offenders provision for special treatment.\(^{215}\) as well as in Justice Gorsuch’s claims that his test would not spell the end of the administrative state since Congress could legislate to the rule.\(^{216}\) 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.\(^{217}\)

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 decisionmaking 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.\(^{218}\) Whether the doctrine

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\(^{215}\) *Gundy* v. United States, 139 S. Ct. 2116, 2131 (2019) (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 because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.”).

\(^{216}\) *Id.* at 2145 (Gorsuch, J., dissenting) (“Nor would enforcing the Constitution’s demands spell doom for what some call the “administrative state.” The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation’s course on policy questions like those implicated by SORNA. What is more, Congress is hardly bereft of options to accomplish all it might wish to achieve. It may always authorize executive branch officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers. Congress can also commission agencies or other experts to study and recommend legislative language. 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.”).


\(^{218}\) See Nathan D. Richardson, *Deference is Dead (Long Live Chevron)*, (Aug. 18, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3676695 (“The Court has considered an agency’s interpretation of a statute and cited *Chevron* in the majority opinion in 15 cases decided since Michigan and *King* in 2015 . . . . In only one of those 15, *Cuozzo Speed Technologies v. Lee*, did the Court defer to the agency’s interpretation. In two further cases, the Court agreed with the agency’s interpretation, but held that deference was irrelevant because the statute’s meaning was clear (in other words, the agency won but *Chevron* was irrelevant to the outcome).”); Michael Herz, *Chevron is Dead; Long Live Chevron*, 115
formally changes or not, it would be a good bet that the Court will change the tenor of its review of nondelegation challenges. But what the data analysis above suggests is 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 symbolic signals. In this section I argue that judicial economy suggests a drastically diminished impact through this strategy, and some undesirable consequences that the Court would do well to account for.

This account starts with recognition of some basic institutional limits that the Court must operate within—the Supreme Court’s ability to change the law is fundamentally limited by institutional features of the federal judiciary. As Andrew Coan persuasively argues, the limited capacity of the Court to hear cases constrains the Court’s enforcement of legal or constitutional norms. The Court avoids commitments to doctrinal projects that strain its capacity, not so much because of anything like the “passive virtues,” but because of sheer rational calculation. Because the Court can only hear 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 keep tabs on. This is especially true in what Coan calls “high-volume domains”—i.e., those “implicating the validity of a large number of federal statutes” in which the

Colum. L. Rev. 1868, 1870 (2015) ("Chevron has had less of an impact than this attention implies. Several scholars have surveyed the case law and reported that judges, especially those on the Supreme court, 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 ("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 Court Really Not Apply Chevron When It Should?, 57 Int’l Rev. L. Econ. 81 (2019) (empirically demonstrating that the Supreme Court consistently applies Chevron where it should be the relevant decision rule).

This move is common in the Court’s recent structural constitutional decisions. See Gillian Metzger, 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 2, 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.”).

Cf. Hall, supra note 8, at 189 (noting that Panama Refining and Schechter Poultry were “symbolic check[8]” that had little impact).

Andrew Coan, Rationing the Constitution: How Judicial Capacity Shapes Supreme Court Decision-Making (2019); Coan, supra note 11. Similar points about the way the Court changes its formulation of doctrine to fit institutional realities can be found in Richard H. Fallon, Jr., Foreward: Implementing the Constitution, 111 Harv. L. Rev. 56 (1997).


Coan, supra note 11. 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. 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. 128, 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. Coan, supra note 11. 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.
Court feels compelled to review nearly every case decided by the lower courts. 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.”

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. 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. There are hierarchical control considerations—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—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. 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, clear rules solve the institutional control problems within the courts by making it easy for the Court to observe noncompliance.

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224 Id. at 143.
225 Id.
227 Id. at 894.
228 Westerland et al., supra note 226, at 892-94 (analyzing “horizontal” and “vertical” principal-agent relations between the contemporary Supreme Court and 1) future Supreme Courts and 2) lower courts, and exploring subsequent circuit and Supreme Courts present additional challenges for the contemporary principal).
229 As a general matter, relatively clear rules make it easier for the target of a law to comply. Kaplow, supra note 214, at 577 (“Rules cost more to promulgate; standards cost more to enforce. With regard to compliance, rules’ benefits arise from two sources: Individuals may spend less in learning the content of the law, and individuals may become better informed about rules than standards and thus better conform their behavior to the law.”). 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. Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 384 (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 exercise of authority contrary to the objectives of the superior.”).
and raising the cost of departure from the rule for the lower courts. 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, 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. 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. This approach has the hallmarks of governance by standard, and it has many associated benefits and drawbacks. 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. The tradeoff is that what Colin Diver called the "transparency" of the law would

230 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."); see also 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). 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. 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).

231 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 11, 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. Id. at 148.


235 Colin S. Diver, The Optimal Precision of Administrative Rules, 93 Yale L.J. 65, 67 (1983) (using the term congruence 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. Kaplow, supra note 229, at 586 (noting that “rules tend to be over- and underinclusive relative to standards”).
suffer, and Congress would not be quite as able to adjust its behavior to conform to a knowable legal norm,\textsuperscript{236} 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.\textsuperscript{237} 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.\textsuperscript{238} Lower courts may encounter hard cases before the 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 it from taking on a life of its own, which imposes opportunity costs, given the Court’s limited docket.\textsuperscript{239} In addition, general rules make it costly to reverse course if the Court decides to change its tack.\textsuperscript{240} 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.\textsuperscript{241} The layering of

\textsuperscript{236} Diver, \textit{supra} note 235, at 67.

\textsuperscript{237} 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, \textit{Jurisdictional Standards (and Rules)}, 46 Vand. J. of Transnational L. 171, 180 & fig. 1 (2013); Kaplow, \textit{supra} note 214, 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.

\textsuperscript{238} Kaplow, \textit{supra} note 229, 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).

\textsuperscript{239} Coan, \textit{supra} note

\textsuperscript{240} Cf. Ozan O. Varol, \textit{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 path dependence in constitutional law).

\textsuperscript{241} \textit{See}, e.g., State v. Arizona Mines Supply Co., 107 Ariz. 199, 205 (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.”); \textit{id}. at 625 (“We see, then, that while the Legislature may not divest itself of its proper functions, or delegate its general legislative authority, it may still authorize others to do those things which it might properly, yet cannot understandingly or advantageously do itself. Without this power legislation would become oppressive, and yet imbecile. Local laws almost universally call into action, to a greater or less extent, the agency and discretion, either of the people or individuals, to accomplish in detail what is authorized or required in general terms. 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, 33 (1950))).
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.\footnote{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.}

Second, if the Court has to worry about strains on its judicial capacity, the articulation of the “stringent but vague”\footnote{Cf. Ethan Bueno de Mesquita & Matthew C. Stephenson, 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.”).} Gorsuch test might be the worst of all possible worlds. The attempt 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 in 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.\footnote{Coan, supra note 11, at 149.} 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.\footnote{Coan, supra note 221.} This scenario resembles an audit process, which can have salutary behavioral effects if well designed.\footnote{It is a familiar point that ex post adjudication under a standards regime may result in overdeterrence. See Kaplow, supra note 229, 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.} By providing more clarity in a slightly more defined rule, by contrast, the Court introduces more risk that Congress would have a maximal deterrent effect.

...
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 Court knows—the intelligible principle standard—is better than the devil it doesn’t—the Gorsuch test or some similar formulation. 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.

Conclusion

In the spirit of treating states as “laboratories,” this article looked to how state courts have implemented a wide variety of doctrinal formulations of the nondelegation principle over most of American history. 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 is really ready for prime time. To be sure, the experience in the states is bound to be different than what might be expected at the federal level, but 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.

\footnote{Cf. Abbe R. Gluck, \textit{The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism}, 119 Yale L.J. 1750, 1753 (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).}

\footnote{Saiger, \textit{supra} note 211.}