Vanderbilt Law Review

Volume 75 | Issue 4 Article 4

5-2022

Nondelegation in the States

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American public law is on the precipice of a nondelegation revival. Yet scholars have largely ignored the greatest wellspring of American nondelegation law: that of the states. As a result, the nondelegation literature is badly in need of a broad and deep examination of state nondelegation. This Article takes up that task by describing the kaleidoscope of contexts in which states apply the nondelegation doctrine. Significantly, state nondelegation reaches deep into public law and covers far more than the legislature-to-agency delegations that preoccupy the discussion at the federal level. This Article analyzes this mess of state nondelegation jurisprudence, arguing that it can be explained coherently by two theories underlying nondelegation: the separation of powers and sovereignty. While these theories overlap to an extent, each supplies a distinct logic to nondelegation, thus motivating the doctrine's disparate and varied applications. Finally, the Article argues that the Supreme Court ought to consult state nondelegation jurisprudence when it revives the federal nondelegation doctrine. The states' experience counsels important lessons for the federal doctrine. On one hand, should a revived federal doctrine follow the logic of state nondelegation, key features of American public law may need to be reworked. On the other hand, there is reason to think that a revived doctrine would not present insurmountable obstacles to effective government.

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INTRODUCTION

When will the nondelegation doctrine be resurrected?[1] Scholars have largely interpreted *Gundy v. United States*[2]—a case in which the Supreme Court upheld the statute at issue against a nondelegation

1. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (hoping to "lay the doctrine to rest once and for all, in an unmarked grave").

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

challenge—as signaling the second coming of the doctrine.[3] Thus a cluster of articles has recently been published, each of which aims to flesh out or even move the needle on the future of nondelegation.[4] Most of this scholarship, though, focuses on originalist understandings of nondelegation: What did the Founders have in mind when it came to delegating legislative power?[5] This scholarly emphasis makes considerable sense given that Justice Gorsuch's *Gundy* dissent was an originalist analysis of nondelegation.[6] One problem remains with this literature, though: Even if scholars can pin down the precise boundaries

3. For example, William Araiza has argued that *Gundy*'s significance is not its "rejection of the non-delegation challenge," but rather the "amenability of a majority of the justices to reopening a question that many had considered settled." William D. Araiza, *Toward a Non-Delegation Doctrine that (Even) Progressives Could Like*, 3 AM. CONST. SOC'Y SUP. CT. REV. 211, 212 (2019). The math is as follows. Three Justices dissented in *Gundy* (the Chief Justice and Justices Gorsuch and Thomas). 139 S. Ct. at 2131 (Gorsuch, J., dissenting). Justice Alito concurred in the judgment, but signaled that if a majority of Justices could be cobbled together to revisit the Court's nondelegation jurisprudence, he'd "support th[e] effort." *See id.* at 2131 (Alito, J., concurring in the judgment). Justice Kavanaugh had not yet joined the Court when *Gundy* was argued, thus he did not vote in the case. But later in 2019, in an order denying a writ of certiorari in a similar case, Justice Kavanaugh signaled his agreement with Justice Gorsuch's *Gundy* dissent. *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases."). That makes five. Justice Barrett's vote on nondelegation may be uncertain, but it is possible she may agree with the five Justices just mentioned here. Indeed, vindication for these commentators may come as soon as this year. *West Virginia v. EPA*, No. 20-1530 (U.S. Feb. 17, 2022), which is awaiting decision by the Supreme Court, presents the question of whether § 7411(d) of the Clean Air Act "constitutionally authorize[s]" the EPA to promulgate certain anti-pollution rules. Commentary on the oral argument largely focused on the nondelegation doctrine (or its application by way of the major questions doctrine) among both nondelegation supporters and detractors. *See* Ian Milhiser, *A New Supreme Court Case Could Gut the Government's Power to Fight Climate Change*, VOX (Nov. 3, 2021, 10:30 AM), https://www.vox.com/2021/11/3/22758188/climate-change-epa-clean-power-plan-supreme-court [https://perma.cc/Y2YV-W6BU] (calling nondelegation a "crankish notion"); Peter J. Wallison & John Yoo, *The Supreme Court's Chance to Restore Political Accountability*, WALL ST. J. (Feb. 27, 2022, 6:12 PM), https://www.wsj.com/articles/the-supreme-court-restore-political-accountability-epa-west-virginia-carbon-dioxide-legislation-policy-11646002070 [https://perma.cc/8GCW-KU3B] (echoing Justice Marshall that the nondelegation doctrine protects the separation of powers and that a "far-reaching" decision in *West Virginia* could "revitalize" the doctrine).

4. *See, e.g.*, Joseph Postell, *The Nondelegation Doctrine After Gundy*, 13 N.Y.U. J.L. & LIBERTY 280 (2020).

5. *See* Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2022); Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718 (2019); Jonathan Hall, *The Gorsuch Test:* Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175 (2020); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

6. *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting) (arguing that the intelligible principle test "has no basis in the original meaning of the Constitution").

of eighteenth-century nondelegation law, to what extent can the Court "translate"[7] that rule to resolve contemporary nondelegation disputes?

Fortunately, the Supreme Court can look to a large body of nondelegation law to help it fashion a new doctrine—that of the states. These state cases, numbering in the thousands, span from the early nineteenth century until today. While invalidations of statutes on nondelegation grounds by state courts are not routine, neither are they rare.[8] And state courts have applied the nondelegation doctrine in a far wider variety of contexts than have federal courts, such as against delegations to private parties, other state governments, and nearly all types of interbranch delegations.[9] Nevertheless, scholarship on state nondelegation is sparse, a striking fact given how voluminous scholarship is on the federal doctrine. And what little state scholarship there is often misses the breadth and depth of state nondelegation jurisprudence. As a result, the current scholarship has not drawn out all the lessons that state nondelegation has to teach.

This Article is an attempt to meet state nondelegation on its own terms, broadly examining and assessing its character. This is difficult not only because there exists a large volume of cases, but because the states apply nondelegation to many different types of delegates and in a variety of contexts, sometimes with little coherence on the surface. After taking state nondelegation on its own terms, this Article analyzes the doctrine and identifies theories that explain the varied applications of state nondelegation.

In light of these goals, this Article advances three core claims. The first is that state nondelegation, though hardly monolithic, arises in far more contexts than does the federal nondelegation doctrine. Notwithstanding this breadth, states appear to consider these vastly different applications to be emanations of a single doctrine, not multiple distinct doctrines. This fact, combined with the observation that the doctrinal tests used are unhelpful in predicting case outcomes, makes clear that we need a new and more comprehensive account of state nondelegation, one that meets these doctrines on their own terms.

The second claim is that state nondelegation can largely be explained by two theories of nondelegation. The first theory, which I call the "Separation of Powers theory" ("SOP theory") of nondelegation, is likely very familiar. It claims that a free society requires confining

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7. *See* Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 FORDHAM L. REV. 935, 935–36 (2015).

8. Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 636 (2017) (noting that about ten statutes per year are invalidated in the states on nondelegation grounds).

9. *See infra* Parts II.C, III.C.1–2.

specific powers to specific branches of government; the nondelegation principle follows from this premise because conveying power between branches impermissibly combines powers. Importantly, states suggest that this rationale applies to *all* types of interbranch delegations, not just delegations of legislative power to agencies. The second theory, which I call the "Sovereignty theory," maintains that self-government demands that the government alone exercise government power. The nondelegation principle is violated, on this theory, when governmental powers are transferred outside the government in question, such as to private parties, parallel state governments, the federal government, and occasionally even municipalities.

The third and final claim concerns the lessons of state nondelegation for the federal doctrine. If the Supreme Court is to strengthen the federal doctrine, it has good reasons to look closely at nondelegation in the states. The landmark Supreme Court case that set out the "intelligible principle" test—*J.W. Hampton, Jr., & Co. v. United States*[10]—grounded its holding in state law. And, more prudentially, the Court should not throw open the courthouse doors to more nondelegation claims without knowing what is on the other side. And what is on the other side? This Article proposes two lessons of state nondelegation. First, if the doctrine is revived along the lines of the SOP theory, the doctrine could swallow all of separation-of-powers law and thus force the Court to rework important landmarks in public law. To some, this conclusion might suggest that the Supreme Court ought not revive the nondelegation doctrine in the first place. Countervailing that argument, some state jurisprudence and other theoretical arguments suggest that the Supreme Court could reasonably narrow the reach of the nondelegation doctrine to avoid this problem. Second, if the doctrine is revived along the lines of the Sovereignty theory, the nondelegation doctrine may force changes in federal-state relations and federal relations with international bodies. While it is harder to find a limiting principle in this area, the Supreme Court should not shy away from this result. The Sovereignty theory of nondelegation is less controversial, partly on account of its intuitiveness, and thus there is less cause to rein in its more far-reaching effects.

The Article proceeds as follows. Part I provides a broad overview of state nondelegation and argues that the doctrine is applied in a wide variety of circumstances under a single doctrinal heading.[11] Because the doctrinal tests that courts use are unhelpful in analyzing the applications of the doctrine, state nondelegation appears to have little

10. 276 U.S. 394 (1928).

11. *See infra* Part I.

surface coherence, and thus a new account is necessary. Parts II and III provide that account by defining and explicating two "theories" of nondelegation and demonstrate their ubiquity in state law.[12] Part II addresses the SOP theory of nondelegation.[13] Part III addresses the Sovereignty theory.[14] In Part IV, I make the normative argument that the Supreme Court should consult state nondelegation jurisprudence when it revives the federal nondelegation doctrine.[15] Part IV also draws out lessons of the SOP theory and Sovereignty theory for federal nondelegation.[16] A brief conclusion follows.[17]

I. A MESS OF DOCTRINE

The nondelegation debate at the federal level by and large addresses the problem of legislative delegations to the executive branch.[18] While these types of delegation challenges are routinely brought in state courts, the universe of state nondelegation claims is far broader than challenges to administrative action. This Part of the Article brings into focus the long reach of state nondelegation doctrines, pointing out that the doctrine is applied in circumstances that would be unthinkable at the federal level. Moreover, these varied applications are in fact viewed by state supreme courts as emanations of the very same doctrine. Coupled with these two observations is another: the doctrinal test used in state nondelegation cases fails to reliably predict outcomes. Finally, these results suggest that a new account of state nondelegation—one that meets the states on their own terms—is necessary.

A. Breadth

State nondelegation law arises in a wide variety of contexts, not simply the legislature-to-agency contexts with which scholars and federal courts are most familiar. This fact can be observed only by way of example. Therefore, this sub-Part proceeds by describing cases in a single state—Kentucky—and following up with a few examples from other states.

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12. *See infra* Parts II–III.
13. *See infra* Part II.
14. *See infra* Part III.
15. *See infra* Part IV.A.
16. *See infra* Part IV.B–C.
17. *See infra.*
18. For example, Ilan Wurman has recently characterized the doctrine as holding that "Congress cannot delegate [its legislative power] to agencies." Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 977 (2018).

Kentucky courts have consistently affirmed the strength of their nondelegation doctrine. In 2003, the Supreme Court of Kentucky boasted that, "in the area of nondelegation, Kentucky may be unsurpassed by any state in the Union."[19] To be sure, when the court made this pronouncement, it certainly had in mind classic delegations from the legislature to state agencies. In *Flying J Travel Plaza*,[20] the court invalidated a statute using the phrases "public service information" and "similar information" because they give "no guidance" to the delegate agency.[21]

Yet the court's boast was not limited to such classic delegations. In *Fawbush v. Bond*,[22] the Kentucky Supreme Court invalidated a statute that functionally delegated to the court system the power to redraw electoral districts. Crucially, the court lamented that the statute under review "provide[d] no criteria whatever" for "review [of] a reapportionment proposal"; the statute thus effectively conferred "the power to draw new lines," which "absolutely cannot be delegated by statute to a court of law."[23] More recently, the Kentucky Supreme Court extended this logic to petit juries, noting that they may not decide whether a given criminal offense should be deemed a misdemeanor or a felony.[24]

The Kentucky Supreme Court has deployed the nondelegation doctrine in other strange cases. It has invalidated a labor contract between a municipality and a police union, finding that a mandatory arbitration clause offended the doctrine.[25] Likewise, it has struck down a statute creating a "Legislative Research Commission" ("LRC"); this

19. Bd. of Trs. of the Jud. Form Ret. Sys. v. Att'y Gen., 132 S.W.3d 770, 782 (Ky. 2003).

20. Flying J Travel Plaza v. Transp. Cabinet, Dep't of Highways, 928 S.W.2d 344 (Ky. 1996).

21. *Id.* at 350.

22. 613 S.W.2d 414 (Ky. 1981).

23. *Id.* at 415.

24. Brewer v. Commonwealth, 478 S.W.3d 363, 375 (Ky. 2015) ("[T]he General Assembly essentially delegated its authority to a petit jury."). In *Brewer*, the statute at issue permitted juries (or the judge, in the case of a nonjury trial) to decide whether a particular conviction should be punished as a misdemeanor or a felony. *Id.* at 367. To be sure, if the defendant waived a jury trial, then the judge would make such a determination, which would be a clear delegation from the legislature to the judiciary. The court did not distinguish such a scenario from a jury trial. We can only speculate as to why such cases are not distinguishable—indeed, insofar as juries are insulated from political control, delegations to juries might violate the Sovereignty theory of nondelegation, not the SOP theory of nondelegation. Perhaps the court had in mind that a judge may enter a judgment of acquittal even if the jury convicts the defendant of the underlying crime. Thus, delegation to the jury remains reviewable by government officers—in particular, the judge—requiring that such a delegation be characterized as an interbranch delegation, not a delegation to private parties. *But see* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991) (noting that juries are "a quintessential governmental body, having no attributes of a private actor").

25. City of Covington v. Covington Lodge No. 1, Fraternal Ord. of Police, 622 S.W.2d 221 (Ky. 1981).

LRC was organized as an independent commission "part and parcel of the General Assembly and . . . under its control," and its members were all members of the Assembly.[26] But the Kentucky Supreme Court found that the LRC's organizing statute crossed the nondelegation line because the LRC had the power to legislate while the full Assembly was in recess.[27] Finally, in a recent concurrence, one Kentucky Supreme Court justice even argued that Kentucky local governments may not, pursuant to their own authority, create new criminal offenses.[28] That power, he argued, rested solely with the General Assembly and could not be delegated away.[29]

Other unusual nondelegation cases abound in Kentucky, and Kentucky is not unordinary in this regard. As will be discussed below, a handful of states have invalidated plebiscites on a nondelegation theory under certain circumstances.[30] Others have barred therapists from fashioning custody arrangements in domestic disputes on nondelegation grounds.[31] Arizona courts have even denied their own ability to order parole as a penalty for duly convicted defendants—stating that doing so would violate the nondelegation doctrine.[32] Further examples of strange applications of the doctrine may become laborious, so it may suffice to note that none of the cases mentioned here can properly be categorized as delegations from the legislature to the executive branch. This leads to the inescapable conclusion that the nondelegation doctrine is more extensive at the state level than it is thought to be at the federal level. Moreover, the evidently indiscriminate contexts in which it is invoked—both in Kentucky and elsewhere—invite an effort to resolve and reconcile the cases.

B. Unity

Though states apply the nondelegation doctrine in a wide variety of contexts, it would be a mistake to characterize the doctrine as a conglomeration of subdoctrines. Most states treat their nondelegation doctrine as a single doctrine with applicability to many different situations; consequently, even if the scrutiny afforded to delegations changes based on the type of delegation, states nevertheless unite the

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26. Legis. Rsch. Comm'n *ex rel.* Prather v. Brown, 664 S.W.2d 907, 911, 914 (Ky. 1984).

27. *Id.* at 915.

28. Johnson v. Commonwealth, 449 S.W.3d 350, 354 (Ky. 2014) (Cunningham, J., concurring).

29. *Id.* at 354–55.

30. *Infra* Part III.C.2.

31. *Infra* Part III.C.6.

32. *Infra* Part II.C.3.

challenges under the same doctrinal umbrella. Here I discuss two examples, one from Texas and another from Iowa.

In a landmark case on nondelegation, *Texas Boll Weevil Eradication Foundation*,[33] the Texas Supreme Court considered delegations to state agencies,[34] municipal agencies,[35] and to the judiciary[36] all to be emanations of the same nondelegation doctrine. The court referenced a laundry list of cases addressing delegations in the criminal context,[37] such as delegations to the State Highway and Public Transportation Authority to set speed limits;[38] to the Department of Corrections to set out the substances and procedures used for lethal injections;[39] and to the Department of Public Welfare to set out rules to maintain healthy conditions in child care homes.[40]

In *Boll Weevil,* the court interrogated the extent to which delegations to private entities could be constitutional. The court noted that, as with delegations to the judiciary or executive, delegations to private entities "are frequently necessary and desirable" and therefore pose "immense benefit to the public."[41] The problem with private delegations, as with public delegations, is to craft a rule that preserves "the basic concept of democratic rule under a republican form of government."[42]

Iowa, for its part, uses a clear standard for evaluating delegations to agencies: whether or not the statute at issue possesses sufficient procedural safeguards.[43] Yet Iowa's high court has deployed the nondelegation principle also against local quasi-legislative institutions. For example, in *Bunger v. Iowa High School Athletic Association*,[44] the court considered whether a school board—a functionally legislative organization—could delegate rulemaking

33. Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454 (Tex. 1997).

34. *Id.* at 467 ("Texas courts have also generally upheld legislative delegations to state . . . agencies.").

35. *Id.* ("Texas courts have also generally upheld legislative delegations to . . . municipal agencies.").

36. *Id.* at 468 ("[T]his Court has been especially willing to strike down delegations of legislative authority to the judicial department.").

37. *Id.*

38. Masquelette v. State, 579 S.W.2d 478 (Tex. Crim. App. 1979).

39. *Ex parte* Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978).

40. Oxford v. Hill, 558 S.W.2d 557 (Tex. Civ. App. 1977).

41. *Boll Weevil*, 952 S.W.2d at 469.

42. *Id.*

43. *See* Gary J. Greco, Survey, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 599 n.123 (1994).

44. 197 N.W.2d 555 (Iowa 1972).

authority to a third-party, quasi-public entity.[45] At the time of the suit, all school boards in the state of Iowa (save one) had agreed to "abide by the constitution and bylaws" of a statewide athletics organization.[46] When a football player was suspended after confessing to violating one of the rules, he challenged the rule on nondelegation grounds. The Supreme Court of Iowa noted that, "while a public board or body may authorize performance of ministerial or administrative functions by others, it cannot re-delegate matters of judgment or discretion."[47] After finding that the rule was indeed promulgated by the athletic organization, not the school board, the court held that the rule was "invalid for want of authority . . . to promulgate it."[48] In short, the school district had re-delegated power to the athletics association.

This nondelegation framework was raised again in a 1996 case, *Gabrilson v. Flynn*.[49] There, a school board had made a rule stipulating that if a school board member requested certain grading assessments, the decision to permit the release of the information would be made by the superintendent or the president of the school board.[50] The court cited approvingly to *Bunger* for the idea that a school board, to which the state legislature had delegated certain authorities, could not re-delegate that authority, even to one of its own members acting in isolation, unless a ministerial-administrative exception applied.[51] The *Gabrilson* court held that the "[d]etermination of school board access to school records . . . is not a ministerial or administrative matter . . . [but] is precisely the type of discretionary decision the legislature has empowered the school board to make."[52] As a result, the school board's re-delegation rule violated the nondelegation doctrine.

The *Bunger* test has been cited approvingly twice by the Supreme Court of Iowa in the past four years: once in the context of a challenge under an open-meetings statute[53] and again in a challenge to "automated traffic enforcement" systems.[54] And in the most recent case, *Behm*, the Supreme Court of Iowa cited consecutively to *Bunger* and

45. To be clear, the issue was not whether the state assembly, which is ultimately responsible for public education, could delegate rulemaking authority to the school board; the question was whether the school board could take its own properly exercised authority and delegate it to a third entity. *Id.* at 557–60.

46. *Id.* at 557.

47. *Id.* at 560 (citing Kinney v. Howard, 110 N.W. 282 (Iowa 1907)).

48. *Id.* at 563.

49. 554 N.W.2d 267 (Iowa 1996).

50. *Id.* at 275.

51. *Id.* at 276.

52. *Id.*

53. Hutchison v. Shull, 878 N.W.2d 221, 234 (Iowa 2016).

54. Behm v. City of Cedar Rapids, 922 N.W.2d 524, 572 (Iowa 2019).

Iron Workers Local No. 67—the case establishing the "procedural safeguards" test for delegations to executive branch agencies.[55] Simply put, the court would not have incorporated both cases if it did not consider these applications to be emanations of the very same doctrine.

C. Doctrinal Tests

The nondelegation debate at the federal level has largely focused on what the proper doctrinal test ought to be.[56] Yet even cursory study of state nondelegation doctrines suggests that the doctrinal tests are decoupled from enforcement and thus outcomes.

Consider Massachusetts. The landmark case on legislature-to-agency delegation there sets out a test that requires the court to consider whether the legislature "delegate[d] the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy,"[57] a test that seems rather strict. Yet the Supreme Judicial Court of Massachusetts—the highest court in that commonwealth—has not invalidated a statute on nondelegation grounds in nearly half a century, since 1973.[58] This is not for want of opportunity; since then, the Supreme Judicial Court has considered at least eighteen nondelegation challenges, yet not a single one resulted in the invalidation of a statute.[59] The puzzle is this: What use is a

55. *Id.*; *see also* Iron Workers Loc. No. 67 v. Hart, 191 N.W.2d 758, 772–73 (Iowa 1971).

56. *See* Mortenson & Bagley, *supra* note 5, at 287–88 (distinguishing between the intelligible principle test and Justice Gorsuch's "fill up the details" test). Yet one might note that the precise issue is not the doctrinal formulation, but the proper interpretation of the intelligible principle standard. If one takes a very broad view of what constitutes an intelligible principle, then virtually all statutes or government actions will comply with the nondelegation prohibition. Conversely, if one takes a very narrow view of what constitutes an intelligible principle, then it is hard to imagine how the intelligible principle test is at all different than the "fill up the details" test. My thanks are due to Richard Epstein for this observation.

57. Chelmsford Trailer Park, Inc. v. Town of Chelmsford, 469 N.E.2d 1259, 1262 (Mass. 1984).

58. *See* Corning Glass Works v. Ann & Hope, Inc. of Danvers, 294 N.E.2d 354 (Mass. 1973) (invalidating a law that permitted manufacturers to set a "fair trade" price at which retailers could advertise and sell manufacturers' products).

59. *E.g.*, Murphy v. Mass. Tpk. Auth., 971 N.E.2d 231 (Mass. 2012) (sustaining Turnpike Authority's power to "fix and revise tolls"); Atwater v. Comm'r of Educ., 957 N.E.2d 1060 (Mass. 2011) (sustaining statute that requires arbitration under wrongful dismissal claims); Commonwealth v. Clemmey, 849 N.E.2d 844 (Mass. 2006) (sustaining delegation of power to define material exemptions from Wetlands Protection Act to the Department of Environmental Protection); Tri-Nel Mgmt., Inc. v. Bd. of Health, 741 N.E.2d 37 (Mass. 2001) (sustaining local government regulation that banned smoking indoors at restaurants and bars); Ops. of the Justs. to the House of Representatives, 696 N.E.2d 502 (Mass. 1998) (sustaining law allowing cities to determine whether insurance coverage for city employees could extend to domestic partners); Ops. of the Justs. to the Senate, 660 N.E.2d 652 (Mass. 1996) (sustaining delegation to Secretary of Transportation and Construction of the "allocation of cost items" in master construction agreements); Powers v. Sec'y of Admin., 587 N.E.2d 744 (Mass. 1992) (sustaining a law that

"strong" nondelegation test when courts seem to go out of their way to not enforce it? In fact, one might say that circumstances in Massachusetts parallel the federal doctrine, which has not been used to invalidate a statute since 1935[60] and thus has been characterized as "dead."[61] How can Massachusetts's nondelegation doctrine be simultaneously "strong" and "dead"?

The converse state of affairs obtains in some "weak" states. For example, Wisconsin courts use a relatively permissive doctrinal test for legislature-to-agency delegations.[62] But in a well-publicized 2020 case,[63] the Wisconsin Supreme Court invalidated Secretary-Designee of Wisconsin Department of Health Services Andrea Palm's emergency order to close nonessential businesses and force residents to stay at home on account of the COVID-19 pandemic.[64] Palm's order imposed criminal penalties, stipulating that violators could be punished with up

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allowed the executive branch to appoint a receiver for the City of Chelsea); Constr. Indus. of Mass. v. Comm'r of Lab. & Indus., 546 N.E.2d 367 (Mass. 1989) (sustaining statute that invested Commissioner of Labor and Industries with the power to set wages for certain truck drivers); Blue Cross of Mass., Inc. v. Comm'r of Ins., 489 N.E.2d 1249 (Mass. 1986) (sustaining Commissioner's ability to reject rate adjustments); Op. of the Justs. to the House of Representatives, 471 N.E.2d 1266 (Mass. 1984) (sustaining Commissioner of Revenue's power to adjust rates of tax assessments); Town of Warren v. Hazardous Waste Facility Site Safety Council, 466 N.E.2d 102 (Mass. 1984) (sustaining section of hazardous waste law); Comm'r of Revenue v. Mass. Mut. Life Ins. Co., 428 N.E.2d 297 (Mass. 1981) (sustaining law that allowed Commissioner to set reporting standards, which determined amount of excise tax); Op. of the Justs. to Senate, 424 N.E.2d 1092 (Mass. 1981) (sustaining delegation to release Massachusetts' rights to tidelands); DiLoreto v. Fireman's Fund Ins. Co., 418 N.E.2d 612 (Mass. 1981) (sustaining ability for insurance company to assess certain surcharges); Arno v. Alcoholic Beverages Control Comm'n, 384 N.E.2d 1223 (Mass. 1979) (sustaining law that permits religious institution to object to granting of liquor license to store within five hundred feet of the religious institution); M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control Comm'n, 358 N.E.2d 778 (Mass. 1976) (sustaining delegation to ABCC to regulate certain prices); Town of Arlington v. Bd. of Conciliation & Arb., 352 N.E.2d 914 (Mass. 1976) (sustaining arbitration statute as not conferring legislative authority on private individuals); Op. of the Justs. to the House of Representatives, 333 N.E.2d 388 (Mass. 1975) (allowing (1) delegation of power to determine eligibility for public assistance to an executive agency, and (2) delegation of power to provide public assistance to that agency).

60. *See, e.g.*, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).").

61. Posner & Vermeule, *supra* note 1, at 1762; *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST, 132–33 (1980).

62. The landmark case in Wisconsin held that a delegation will be sustained if the general purpose of the law is "ascertainable" and if general procedural safeguards—such as an administrative procedure act—exist. *See* J.F. Ahern Co. v. Wis. State Bldg. Comm'n, 336 N.W.2d 679, 689 (Wis. 1983) (citing Watchmaking Examining Bd. v. Husar, 182 N.W.2d 257, 262 (Wis. 1971)).

63. *See, e.g.*, Steve Gorman & Sharon Bernstein, *Wisconsin Supreme Court Invalidates State's COVID-19 Stay-at-Home Order*, REUTERS (May 13, 2020, 8:22 PM), https://www.reuters.com/article/us-health-coronavirus-usa-wisconsin/wisconsin-supreme-court-invalidates-states-covid-19-stay-at-home-order-idUSKBN22Q04H [https://perma.cc/H5W7-NP2C].

64. Wis. Legislature v. Palm, 942 N.W.2d 900 (Wis. 2020).

to thirty days in jail, a $250 fine, or both.[65] The narrow issue in *Palm* was whether the emergency order was constructively a "rule" and thus required rulemaking in order to be enforceable.[66] But Secretary-Designee Palm pointed to an emergency statute authorizing the Secretary of Health Services to "implement all emergency measures necessary to control communicable diseases,"[67] and thus argued that her order was exempt from the rulemaking requirement. The court refused to read the emergency statute so broadly, noting that doing so would raise a "serious" constitutional issue.[68] That issue, of course, would be one of nondelegation. Applying Wisconsin's doctrinal nondelegation test, the court found that only through a rulemaking requirement could the statute be saved.[69] If the court had not held that the order was a procedurally invalid rule, it would have held that the emergency statute ran afoul of the state's nondelegation doctrine. The example of Wisconsin shows that the nondelegation doctrine can pull real legal weight even in a state that uses a relatively weak doctrinal test.

One way to resolve the puzzle posed by Massachusetts and Wisconsin is to consider whether the problem is not so much judicial willingness (or unwillingness) to enforce the nondelegation doctrine but whether a defect exists in the cases themselves. Perhaps the Supreme Judicial Court of Massachusetts simply has not had occasion to pass judgment on a delegation "run[ ] riot,"[70] and therefore has not had the right opportunity to strike down a statute. Conversely, perhaps the emergency statute at issue in *Palm* was so egregious as to violate *any* nondelegation doctrine, even Wisconsin's lenient one. This doubt, while substantial, might not run very far. In *Commonwealth v. Clemmey*, the Massachusetts Supreme Judicial Court validated a statute that allowed the Department of Environmental Protection to completely define an exception to a crime, a set of facts which poses a serious nondelegation

65. *Emergency Order #28: Safer at Home Order*, WIS. DEP'T OF HEALTH SERVS. (Apr. 16, 2020), https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf [https://perma.cc/8QJ8-YEXP].

66 *Palm*, 942 N.W.2d at 908.

67. WIS. STAT. § 252.02(6) (2022).

68. *Palm*, 942 N.W.2d at 912. Interestingly, the Wisconsin Supreme Court seemed to provide a perfect example of what Cass Sunstein has argued: that, although the nondelegation doctrine is effectively unable to invalidate statutes, its effect can be felt when it is used as a constitutional avoidance canon. *See* Sunstein, *supra* note 60.

69. *Palm*, 942 N.W.2d at 913 ("Rulemaking provides the ascertainable standards that hinder arbitrary or oppressive conduct by an agency. Judicial review does not prevent oppressive conduct from initially occurring.").

70. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring); *see also* Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035 (2007).

issue.[71] And recently the Supreme Court of Kentucky—which, it has already been noted, boasts of its strong nondelegation doctrine—sustained an emergency statute similar to the one at issue in *Palm*, reasoning that the governor's emergency powers were granted lawfully.[72] Evidently, something apart from the doctrinal formulation of the states' nondelegation doctrine is driving enforcement.

Another explanation for the apparent irrelevance of doctrinal formulation might be that states are using avoidance canons to decide nondelegation cases, thus muting the importance of the doctrinal formulation.[73] But the *Palm* case from Wisconsin, which used a constitutional avoidance canon to reach its decision, is the exception rather than the rule. In fact, state supreme courts tend to use constitutional avoidance canons in nondelegation cases quite sparingly. Only eighty-nine state supreme court decisions since the year 1900 contain both the words "delegation" and "avoidance"; in the same time period, those courts have heard nearly five thousand nondelegation cases.[74] It is unclear why state supreme courts seem less inclined to use constitutional avoidance to save statutes that may pose nondelegation problems.[75] One possibility relies on Miriam Seifter's recent observation that legislatures are the "least majoritarian branch" of state governments[76] and thus carry less democratic legitimacy than we might think. If state legislatures are not entitled to deference because they reflect the will of the majority—even if only compared to state supreme

71. 849 N.E.2d 844 (Mass. 2006).

72. Beshear v. Acree, 615 S.W.3d 780, 813 (Ky. 2020).

73. For a general overview of the nondelegation canons thesis, see Sunstein, *supra* note 60.

74. In Westlaw, I searched the phrase "delegation & avoidance." Then I confined the search only to state supreme court decisions; finally, I narrowed the cases only to those since January 1, 1900. *Wisconsin v. Palm* was included in the search results, which might serve as a rough proxy that the search terms are meaningful. I conducted a corresponding search for *all* nondelegation cases. The search term was "delegation % 'nondelegable duty.' " I purposely excluded the phrase "nondelegable duty" here because many states incorporate a nondelegable duty doctrine into state labor law; this doctrine has nothing to do with the nondelegation doctrine, yet frequently comes up in searches for nondelegation cases. Next, I confined the results to only state supreme court cases since January 1, 1900. This search yielded 4,881 cases. Of course, these search terms are imperfect, and will be both over- and under-inclusive. Yet they provide a sense of how uncommonly the constitutional avoidance canon is used in state nondelegation cases.

75. There do exist, however, some quasi-avoidance canons for delegations at the state level. Dillon's Rule, for example, instructs state courts to narrowly construe which powers state governments grant to municipalities. *See generally* Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1991). Moreover, Farah Peterson has recently explained how, at the founding, "private acts" (i.e., legislative business that fixes the rights of particular private parties) were construed narrowly. *See* Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 1, 17 n.38, 29–30 (2020). Many thanks to Nathaniel Donahue for raising these examples to me.

76. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1755–77 (2021).

courts—then courts may not feel the need to go out of their way to save statutes that pose constitutional problems.

The general point here, that the specific formulation of a doctrinal test likely does little work in explaining the results of nondelegation cases, has recently been corroborated in the administrative context by Daniel Walters.[77] In an effort to determine whether the test articulated in Justice Gorsuch's *Gundy* dissent will, in point of fact, gut the administrative state, Walters conducts a survey of state nondelegation cases, sorting by the type of doctrinal test used (and analogizing it to Justice Gorsuch's test).[78] In addition to confirming that the nondelegation doctrine is more strongly enforced in state courts than in federal courts, one of Walters' primary findings is that an "analysis of the determinants of individual case outcomes revealed no relationship with the doctrinal formulation a state maintains."[79] Walters postulates some other factors that may explain when a statute is struck down—for example, if the legislature recently started ramping up delegations to agencies—but the final result 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 . . . the intelligible principle standard that the federal courts have employed."[80]

D. Which Way Forward?

Earlier scholarship on state nondelegation, which is surprisingly thin,[81] has not sufficiently engaged with the breadth of state nondelegation. Some scholarship only addresses discrete applications of the nondelegation principle, such as to capital punishment or local taxation,[82] while others address the doctrine only in a single state.[83] Another line of scholarship sorts states by the doctrinal test used to

77. *See* Daniel E. Walters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417 (2022).

78. *Id.* at 445–47.

79. *Id.* at 469.

80. *Id.* at 469–70.

81. Postell, *supra* note 4, at 307 n.96 ("To call the scholarship on the state nondelegation doctrines sparse is to put it mildly.").

82. *See, e.g.*, Alexandra L. Klein, *Nondelegating Death*, 81 OHIO ST. L.J. 405 (2020) (capital punishment); Myron Schreck, *Local Taxation and the Nondelegation Principle*, 25 IDAHO L. REV. 11 (1988) (local taxation).

83. *See, e.g.*, Eric Theroff, Comment, *The Private Nondelegation Doctrine in Kansas and the Kansas State High School Activities Association*, 44 U. KAN. L. REV. 633 (1996); JP Stilz, *Neither Toothless Nor Rigid: Kentucky's Nondelegation Doctrine as Applied to Governor Beshear's Emergency Response to COVID-19*, KY. L.J. ONLINE: BLOG (Oct. 24, 2020), https://www.kentuckylawjournal.org/blog/kynondelegation [https://perma.cc/ZDV9-YXRN].

evaluate legislative delegations to executive-branch agencies,[84] but, as discussed, doctrinal tests are often beside the point when it comes to state nondelegation. Lastly, other scholarship recognizes the disparate applications of state doctrines to particular areas,[85] yet these scholars have not sought to reconcile or connect those applications into a coherent framework. Thus, the basic problem presented by state nondelegation—which prior scholarship seems to have left unanalyzed—is that it is a single doctrine with a long reach and seemingly disparate applications. How can we make sense of such a doctrine so that we can learn from it?

In the next two Parts, I propose two "theories" of nondelegation that help make sense of the states' mess of nondelegation doctrine. Although they will be elaborated more fully below, the two theories will be termed the "SOP theory" and "Sovereignty theory." Each fundamentally concerns a motivation for the nondelegation doctrine, and thus supplies a logical principle that determines which situations may raise a nondelegation question. The SOP theory regards the definition of particular governmental powers and the confinement of those powers, in many cases absolutely, to a specific branch of government. According to the SOP theory, the nondelegation doctrine is violated when a branch gives over a power uniquely wielded by one branch to another branch. In contrast, the Sovereignty theory asserts that there are certain powers that must be exercised by the state itself, not by private individuals or other governments. The nondelegation doctrine is thus violated when the power entrusted to the sovereign state is transferred by law to a nonstate entity.[86]

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84. *See, e.g.*, Greco, *supra* note 43, at 580–99; Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1201–02 (1999); Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J.L. ECON. & ORG. 27, 31–32 (2018); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 964–65 (2014).

85. Iuliano & Whittington, *supra* note 8, at 643–44 (noting increased enforcement in professional licensing, delegations to prosecutors, and delegations of the tax power); A.J. Kritikos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 MO. L. REV. 441, 478 (2017) (singling out delegations of the power to define criminal offenses); Postell, *supra* note 4, at 308 (identifying private delegations, tax delegations, state delegations that "incorporate" terms or standards from federal statutes, delegations to agencies, and defining crimes or punishments).

86. Although this claim overlaps with the question in Fourteenth Amendment jurisprudence regarding which entities count as state actors, I do not contend that that line of cases (or the logic used therein) applies to the Sovereignty theory as such. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883); United States v. Morrison, 529 U.S. 598, 621 (2000). In fact, at least one court has invalidated a delegation on evidently Sovereignty-theory grounds, even though the delegate was a public university and thus a clear state actor. *See infra* text accompanying note 190.

Each of these theories encompasses a general view of what nondelegation is *about*—that is, they provide independent, if sometimes overlapping, motivations for having a nondelegation doctrine in the first place. This is not to say that these theories are conceptual islands, that they are themselves in no need of independent justification. The Separation of Powers, for example, rests on certain understandings of freedom, legitimacy, and efficiency. And the Sovereignty theory implicates not only modern philosophical understandings of what the state is for but unique American theories of federalism that are subject to contestation. For our purposes, the SOP and Sovereignty theories are simply theoretical jumping-off points for how to understand and reconcile this vast mess of nondelegation jurisprudence.

Parts of each of these theories will be familiar to any student of nondelegation. Importantly, however, each theory is, as elaborated in the states, so broad as to raise uncommon nondelegation issues. Furthermore, there are numerous contact points between the SOP and Sovereignty theories—and thus they are not mutually exclusive—yet the theories are conceptually distinct. Each therefore harbors lessons for a revived federal nondelegation doctrine.

II. THE SEPARATION OF POWERS THEORY

This part describes the SOP theory, the view that certain powers should be permanently entrusted to one branch of government and not shared with another branch, and suggests that its logic helps explain the doctrinal mess discussed in Part I. In order, I describe the SOP theory generally in the states and what work it seems to be doing in state nondelegation cases; how prevalent SOP theories are in state nondelegation cases; and applications of the nondelegation doctrine across many types of separation-of-powers violations.

A. Articulating the SOP Theory

In contrast to the Sovereignty theory discussed below,[87] the SOP theory is likely quite familiar to federal nondelegation observers. In part, this is because federal courts routinely invoke separation-of-powers considerations in deciding nondelegation cases. In *Gundy*, for example, Justice Gorsuch rooted his view of the nondelegation doctrine in the notion that the Constitution "vest[ed] the authority to exercise different aspects of the people's sovereign power in distinct entities."[88]

87. *See infra* Part III.

88. Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

He went on to contend that the separation of powers fundamentally "safeguard[s] a structure designed to protect [the people's] liberties, minority rights, fair notice, and the rule of law."[89] On this view, the nondelegation doctrine is an outgrowth of the SOP theory. As a result, according to Justice Gorsuch, courts possess an "obligation" to police nondelegation questions.[90]

Discussion of the nondelegation doctrine at the state level frequently takes a similar posture: state constitutions vest each branch with certain unique powers, and there those powers must remain. A recent North Dakota case—intriguing in that it involved the state legislature suing the governor before the state supreme court—provides a representative example. There, the Supreme Court of North Dakota explained that their constitution "creates three branches of government and vests each branch with a distinct type of power," and that "[b]y vesting each branch with a distinct form of power, the [North Dakota] Constitution keeps those powers separate."[91] The three branches of the government are thus "coequal . . . [and] each [is] supreme in its own sphere."[92] How does this relate to nondelegation? The court explained that "a violation of non-delegation encompasses those situations where one branch of government consents to the exercise of its power by another body."[93] Statements like these—although they verge on the platitudinous and do not help much in crafting doctrine—are common in state nondelegation opinions.[94]

The states largely derive the SOP view of nondelegation from two sources: historical evidence about republican government and separation-of-powers provisions in state constitutions. First, to historical evidence, numerous state cases invoke—just as Justice Gorsuch did in his *Gundy* dissent[95]—materials such as John Locke's *Second Treatise*,[96] Montesquieu's *The Spirit of the Laws*,[97] the

89. *Id.* at 2135.

90. *Id.*

91. N.D. Legis. Assembly v. Burgum, 916 N.W.2d 83, 100 (N.D. 2018).

92. *Id.* (internal quotation marks omitted) (citing N.D. CONST. art. XI, § 26 and State *ex rel.* Spaeth v. Meiers, 403 N.W.2d 392, 394 (N.D. 1987)).

93. *Id.* at 101.

94. *See infra* Part II.B.

95. *Gundy*, 139 S. Ct. at 2133–34 (Gorsuch, J., dissenting). Justice Gorsuch did not, however, invoke Montesquieu's *The Spirit of the Laws*. *Id. But see* sources cited *infra* note 97.

96. *See, e.g.*, Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827, 833 (Pa. 2017); B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994); Newport Int'l Univ., Inc. v. Dep't of Educ., 186 P.3d 382, 388 (Wyo. 2008).

97. *See, e.g.*, Gabler v. Crime Victims Rts. Bd., 897 N.W.2d 384, 387–88 (Wis. 2017); Schisler v. State, 907 A.2d 175, 234–45 (Md. 2006); State *ex rel.* Stephan v. Kan. House of Representatives, 687 P.2d 622, 639 (Kan. 1984) (Herd, J., concurring in part and dissenting in part).

Federalist Papers,[98] and early federal cases on the separation of powers such as *Wayman v. Southard*.[99] Second, as Jim Rossi has observed, thirty-five state constitutions contain "strict" separation-of-powers clauses, while another five have "general" separation-of-powers clauses.[100] The New Jersey Constitution provides a representative example of a strict separation-of-powers clause: "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."[101] In contrast, Connecticut has a "general" separation-of-powers clause: "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."[102] "Strict" and "general" separation-of-powers clauses are said to differ in that the former forbid the concurrent exercise of more than one power, whereas the latter simply distinguish between the powers.[103] State courts typically use the existence of these clauses as evidence that the nondelegation doctrine requires active enforcement.[104]

How, then, does the SOP theory help courts craft the nondelegation doctrine's applications? Two major features of state nondelegation seem to emerge from the SOP theory.

First, the theory helps courts determine the breadth of cases to which the nondelegation doctrine ought to apply. In principle, nothing about the SOP view suggests that nondelegation problems arise only out of certain kinds of delegations, such as from the legislature to (executive) agencies. In other words, a delegation is not immune from a nondelegation challenge simply by virtue of the identities of the delegator and the delegate. An egregious delegation from the executive to the judiciary is unlawful for the same reason that a delegation from the judiciary to the executive is unlawful, even if different doctrinal

98. *See, e.g.*, State v. Rhine, 297 S.W.3d 301, 315 (Tex. Crim. App. 2009); Almond v. R.I. Lottery Comm'n, 756 A.2d 186, 201–02 (R.I. 2000) (Flanders, J., dissenting).

99. *See, e.g.*, State v. Broom, 439 So. 2d 357, 361 (La. 1983); *In re* Certified Questions from U.S. Dist. Ct., 958 N.W.2d 1, 25–26 (Mich. 2020).

100. Rossi, *supra* note 84, at 1190–91.

101. N.J. CONST. art. III, ¶ 1.

102. CONN. CONST. art. II.

103. Rossi, *supra* note 84, at 1191.

104. Take a recent Colorado case as an example. In *Amica Life Ins. Co. v. Wertz*, 462 P.3d 51 (Colo. 2020), the Supreme Court of Colorado invoked Article III of the Colorado Constitution for the proposition that "[o]f our three branches of government, only the General Assembly has the power to make law." *Id.* at 54.

tests might be used. As discussed below,[105] some states have in fact applied the nondelegation doctrine to these unusual delegations, and they do so on the basis that such delegations run afoul of the separation of powers. Moreover, in surveying states, no state court insists that certain delegations between branches are lawful simply on the basis of the identity of the delegator and the delegate, much less that the nondelegation doctrine only applies to transfers from the legislature to executive. The most important feature of the SOP theory of nondelegation in the states is that it applies, in theory and in practice, to *all* interbranch delegations of power.[106] One curiosity that arises here, and to which we will return, is that some government actions are struck down on nondelegation grounds even though the branch constitutionally vested with the power did not consent to its exercise by another branch. In a case we will visit later,[107] the state legislature shifted the power to grant parole (an executive power under state law) to the judiciary. What is unusual about deeming this a nondelegation case, as the court did, is that the executive branch—with whom the parole power rested—did not consent to the shift in power. In such cases, state courts appear to have anticipated a move recently made by Philip Hamburger: "[G]eneric discussions of delegation should give way to a more accurate analysis in terms of vesting," because "the Constitution speaks of vested rather than delegated powers."[108] Thus state courts can be thought of as policing situations where one branch is *divested* of a power constitutionally vested in it, though courts still apply the "nondelegation" doctrinal moniker, presumably to fit with tradition.

Second, although state courts apply the doctrine broadly, they do not view the SOP theory as requiring absolute separation between the branches. State supreme courts are fond of using two metaphors to describe this point: that the branches are not "hermetically sealed"[109]

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105. *See infra* Part II.C.3.

106. To be sure, this conclusion raises a problem about how to understand nondelegation's relation to separation of powers generally: If the nondelegation doctrine is so broad—indeed, if states are lumping many kinds of SOP problems under the nondelegation heading—does it swallow all separation of powers issues? Part IV.B addresses this question and the impact it may have on lessons for the federal nondelegation doctrine.

107. *See infra* Part II.C.3.

108. Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88, 90 (2020).

109. *See, e.g.*, United Auburn Indian Cmty. of Auburn Rancheria v. Newsom, 472 P.3d 1064, 1077 (Cal. 2020) (citing Hustedt v. Workers' Comp. Appeals Bd., 636 P.2d 1139, 1143 (1981)) ("[N]othing in our separation of powers jurisprudence demands a hermetic sealing off of the three branches of Government from one another." (internal quotation marks omitted)); Colvin v. Inslee, 467 P.3d 953, 960 (Wash. 2020) (citing Carrick v. Locke, 882 P.2d 173, 177 (Wash. 1994) (en banc)) (noting that the separation of powers "does not require that the branches of government be hermetically sealed off from one another" (internal quotation marks omitted)); *In re* D.L., 669 A.2d

from one another, nor are the branches "watertight."[110] *Some* leakage must be allowed between the three departments, because functioning government requires it. As a result, some delegations between the departments must be tolerated. Many states therefore hold some de facto delegations of power between the branches to not constitute de jure nondelegation violations. This fact, applied to delegations specifically from the legislature to executive agencies, explains how Gary Greco was able to neatly divide states into strong, medium, and weak nondelegation states.[111]

B. Prevalence

The SOP theory is nearly omnipresent in state nondelegation cases. Forty-eight state supreme courts have, in recent memory, invoked the separation of powers as a justification for their state's nondelegation doctrine. (The two exceptions, discussed below, are Delaware and Rhode Island.) What's more, relatively recent cases that ground nondelegation in a SOP theory can be found in the vast majority of those forty-eight states. At least seven states invoked the SOP theory in their discussion of a nondelegation question in 2020.[112] Another twenty-eight states did so at least as recently as the span of 2010 through 2019.[113] Eleven more states used the SOP theory between 2000

1172, 1176 (Vt. 1995) ("[W]e have emphasized that separation of powers doctrine does not contemplate an absolute division of authority among the three branches such that each branch is hermetically sealed from the others."). Evidently the genesis of this metaphor may be found in *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

110. *See, e.g.*, Commc'ns Workers of Am. v. N.J. Civ. Serv. Comm'n, 191 A.3d 643, 658 (N.J. 2018) (citing *In re* P.L., 895 A.2d 1128, 1134 (N.J. 2006)) ("The purpose of the separation of powers doctrine is not to create three watertight governmental compartments, stifling cooperative action among the executive, legislative, and judicial branches . . . ." (internal quotation marks omitted)); Commonwealth v. Clemmey, 849 N.E.2d 844, 855 (Mass. 2006) (quoting Ops. of the Justs. to the Senate, 363 N.E.2d 652, 659 (Mass. 1977)) ("[S]eparation of powers does not require three watertight compartments within the government." (internal quotation marks omitted)).

111. *See supra* Part I.D.

112. Amica Life Ins. Co. v. Wertz, 462 P.3d 51, 54 (Colo. 2020); Premier Health Care Invs., LLC v. UHS of Anchor, L.P., 849 S.E.2d 441, 454–55 (Ga. 2020); Emps. Res. Mgmt. Co. v. Kealey, 461 P.3d 731, 736–38 (Idaho 2020); *In re* Certified Questions from U.S. Dist. Ct., 958 N.W.2d 1, 25–26 (Mich. 2020); White Bear Lake Restoration Ass'n *ex rel.* State v. Minn. Dep't of Nat. Res., 946 N.W.2d 373, 382–83 (Minn. 2020); Athens Sch. Dist. v. Vt. State Bd. of Educ., 237 A.3d 671, 687 (Vt. 2020); Wis. Legislature v. Palm, 942 N.W.2d 900, 908 (Wis. 2020).

113. *See, e.g.*, Hobbs v. Jones, 412 S.W.3d 844 (Ark. 2012); State v. McCleese, 215 A.3d 1154 (Conn. 2019); S. All. for Clean Energy v. Graham, 113 So. 3d 742 (Fla. 2013); Alakai Na Keiki, Inc. v. Matayoshi, 277 P.3d 988 (Haw. 2012); Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp., 959 N.E.2d 1133 (Ill. 2011); Serv. Emps. Int'l Union, Loc. 199 v. Iowa Bd. of Regents, 928 N.W.2d 69 (Iowa 2019); Kan. One-Call Sys., Inc. v. State, 274 P.3d 625 (Kan. 2012); Commonwealth *ex rel.* Beshear v. Bevin, 575 S.W.3d 673 (Ky. 2019); Krielow v. La. Dep't of Agric. & Forestry, 125 So. 3d 384 (La. 2013); Bouchard v. Dep't of Pub. Safety, 115 A.3d 92 (Me. 2015); Clark v. Bryant, 253 So. 3d 297 (Miss. 2018); State *ex rel.* Praxair, Inc. v. Mo. Pub. Serv. Comm'n, 344 S.W.3d 178 (Mo.

and 2009, but a more recent case could not be found.[114] Only two out of forty-eight states used the SOP theory to motivate their nondelegation doctrine during the 1990s but appear not to have done so since.[115] These data points overwhelmingly point to the conclusion that the SOP theory is widely embraced as a motivator for the nondelegation doctrine in the states.

The two states for which a case cannot be found—Delaware and Rhode Island—each warrant some individual attention. The Supreme Court of Rhode Island appears never to have explicitly justified their nondelegation doctrine on SOP grounds for the reason that it maintains a formal distinction between their "nondelegation doctrine" and their "separation of powers doctrine." In a 2015 case, the court characterized the difference between the two doctrines as follows:

> The nondelegation doctrine, derived from the Rhode Island Constitution, "arises when it is contended that there has been an impermissible delegation of legislative power to an administrative agency." Whereas, "[t]he separation of powers doctrine prohibits the usurpation of the power of one branch of government by a coordinate branch of government."[116]

In other words, in Rhode Island, the separation-of-powers doctrine is violated when one branch proactively *takes* power vested in a coordinate branch. The nondelegation doctrine, however, is implicated when the legislature gives away legislative power—voluntarily—to an agency. The court left it unclear, however, whether nondelegation cases are distinguished by *voluntarily* ceding power to another branch or else

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2011); Mont. Indep. Living Project v. Dep't of Transp., 454 P.3d 1216 (Mont. 2019); Fischer v. Superintendent, Strafford Cnty. House of Corr., 44 A.3d 493 (N.H. 2012); State v. A.T.C., 217 A.3d 1158 (N.J. 2019); Unite N.M. v. Oliver, 438 P.3d 343 (N.M. 2019); Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm'n, 36 N.E.3d 632 (N.Y. 2015); Jones v. Keller, 698 S.E.2d 49 (N.C. 2010); N.D. Legis. Assembly v. Burgum, 916 N.W.2d 83 (N.D. 2018); City of Toledo v. State, 110 N.E.3d 1257 (Ohio 2018); W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist., 132 A.3d 957 (Pa. 2016); Hampton v. Haley, 743 S.E.2d 258 (S.C. 2013); State v. Orr, 871 N.W.2d 834 (S.D. 2015); Injured Workers Ass'n of Utah v. State, 374 P.3d 14 (Utah 2016); Elizabeth River Crossings OpCo, LLC v. Meeks, 749 S.E.2d 176 (Va. 2013); Auto. United Trades Org. v. State, 357 P.3d 615 (Wash. 2015); State *ex rel.* State Farm Mut. Auto. Ins. Co. v. Marks, 741 S.E.2d 75 (W. Va. 2012); Int'l Ass'n of Fire Fighters Loc. 5058 v. Gillette/Wright/Campbell Cnty. Fire Prot. Joint Powers Bd., 421 P.3d 1059 (Wyo. 2018).

114. *See* Monro v. Harco, Inc., 762 So. 2d 828 (Ala. 2000); Alaska Pub. Int. Rsch. Grp. v. State, 167 P.3d 27 (Alaska 2007); Facilitec, Inc. v. Hibbs, 80 P.3d 765 (Ariz. 2003); Kasler v. Lockyer, 2 P.3d 581 (Cal. 2000); Healthscript, Inc. v. State, 770 N.E.2d 810 (Ind. 2002); *Clemmey*, 849 N.E.2d at 855–57; *In re* Neb. Cmty. Corr. Council to Adopt Voluntary Sent'g Guidelines for Felony Drug Offenses, 738 N.W.2d 850 (Neb. 2007); Comm'n on Ethics v. Hardy, 212 P.3d 1098 (Nev. 2009); *In re* Initiative Petition No. 366, 46 P.3d 123 (Okla. 2002); Gallaher v. Elam 104 S.W.3d 455 (Tenn. 2003); City of Pasadena v. Smith, 292 S.W.3d 14 (Tex. 2009).

115. *See* Christ *ex rel.* Christ v. Md. Dep't of Nat. Res., 644 A.2d 34 (Md. 1994); State v. Long, 843 P.2d 420 (Or. 1992).

116. State Dep't of Corr. v. R.I. Bhd. of Corr. Officers, 115 A.3d 924, 933 n.6 (R.I. 2015) (alteration in original) (first quoting Moreau v. Flanders, 15 A.3d 565, 584 (R.I. 2011); and then quoting Woonsocket Sch. Comm. v. Chafee, 89 A.3d 778, 793 (R.I. 2014)).

the unique transfer of power from the legislature to an agency, since neither of these scenarios would seem to fit within the separation-of-powers doctrine. (Query: If a Rhode Island agency proactively usurps legislative power, would that be a nondelegation violation or a separation-of-powers violation?) In any case, because Rhode Island retains a formal distinction between these two doctrines, it seems inapposite to lump the Ocean State in with the forty-eight states that explicitly link nondelegation to the SOP theory. At the same time, it would seem equally unsuitable to distinguish Rhode Island on the substance: their nondelegation doctrine undoubtedly invokes the question of confining certain powers to one branch of government, which is the hallmark of the SOP theory. In substance, then, there may be forty-nine states that ground nondelegation in some way in the SOP theory.

Delaware, on the other hand, is sui generis when it comes to grounding nondelegation in the SOP theory. The closest and most recent case in which the Delaware Supreme Court seemed to base nondelegation in separation-of-powers ideas was in 2002. Yet the reference was oblique and came only in a dissent: "[T]he non-delegation doctrine is based upon a fundamental principle of constitutional democracy," namely that "[a]dministrators should not have unguided and uncontrolled discretionary power to govern as they see fit."[117] The court evidently gestured at certain separation-of-powers themes—namely that only a duly elected legislature ought to have some arbitrary power as to the content of legislation—yet it avoided referencing the separation of powers explicitly, and thus warrants some distinction from the other forty-nine states.

The ubiquity of the SOP theory in state nondelegation cases should come as no surprise. After all, at the federal level, where the study of the nondelegation doctrine is most focused, nondelegation cases frequently invoke the SOP theory. The opinions in *Mistretta*, for example, reference the separation of powers nineteen times;[118] in *Gundy*, the opinions do so fourteen times.[119]

C. Applications

At the federal level, nondelegation arguments are typically aimed only at delegations of legislative power to the executive—specifically executive-branch agencies. But state courts routinely apply

117. Cannon v. State, 807 A.2d 556, 564 (Del. 2002) (Holland, J., dissenting) (alteration in original) (internal quotation marks omitted).

118. Mistretta v. United States, 488 U.S. 361 (1989).

119. Gundy v. United States, 138 S. Ct. 2116 (2019).

the doctrine to other types of interbranch delegations. In fact, cases can be found in states applying the nondelegation principle to five out of six possible interbranch delegations: (1) from the legislature to the judiciary; (2) from the legislature to the executive; (3) from the executive to the judiciary; (4) from the executive to the legislature; and (5) from the judiciary to the executive. The final category, (6) from the judiciary to the legislature, has evaded judicial opinion. This portion of the Article provides an example case for each kind of delegation and explains why the court considered the law or government to present a nondelegation problem offending the separation of powers.

1. Legislature to Judiciary

In *Turner County v. City of Ashburn*,[120] the Georgia Supreme Court considered a challenge to the Georgia Assembly's Local Option Sales Tax ("LOST"). LOST created "special taxing districts" coterminous with each of Georgia's counties, authorized a "special district tax" for the district and instituted a procedure wherein "the county and qualified municipalities [within each county] . . . negotiate the terms by which the jointly collected tax will be distributed between them."[121] Two years from the statutory amendment at issue in the litigation, the county and municipalities had to file a certificate with the state to re-impose the tax and divide the revenue. The statute provided that, if the county and the municipalities could not reach an agreement about how to divvy up the proceeds on their own, they would pursue "nonbinding arbitration, mediation, or such other means of resolving conflicts."[122] If that step failed, the county and municipalities could petition a state court within the special district to resolve the dispute based on each party's "written best and final offer specifying the distribution of the tax proceeds."[123] Finally, the judge would "adopt the best and final offer of one of the parties" and "enter [it as] a final order."[124] If no agreement was reached by a deadline set by LOST, the tax simply would not be imposed and no revenue would be collected until an agreement could be reached.

The court found that the judicial resolution mechanism—the last step in the process of reaching an agreement—violated the nondelegation doctrine on two grounds. First, because failure to file a

120. 749 S.E.2d 685 (Ga. 2013).

121. *Id.* at 687.

122. GA. CODE ANN. § 48-8-89(d)(3) (2022).

123. GA. CODE ANN. § 48-8-89(d)(4)(B) (2010), *invalidated by* Turner Cnty. v City of Ashburn, 749 S.E.2d 685, 693 (Ga. 2013).

124. GA. CODE ANN. § 48-8-89(d)(4)(D) (2010), *invalidated by* Turner Cnty., 749 S.E.2d at 693.

distribution certificate with the state would halt imposition of the tax, the court's involvement "effectively permits a municipality or county to obtain a court order forcing the other party or parties to renew and levy the tax."[125] But, because the "authority to levy a tax is a legislative function"[126] and a court order would trigger the tax, the court would be exercising the legislative power. Second, according to the court, the statute "improperly authorizes judicial resolution of the allocation and distribution of tax proceeds, an exclusively legislative power."[127] Citing state precedents for the proposition that "the question of the benefit of a tax is one that is exclusively left to legislative discretion,"[128] the court found that such a determination "may not be delegated to a judicial officer."[129]

2. Legislature to Executive

These delegations are the heartland of the nondelegation doctrine.[130] As a result, I explicate this category with one recent and notable case from Pennsylvania.

Under the Pennsylvania Public School Code, financially distressed school districts are placed under the governance of a "School Reform Commission,"[131] whose members are largely designated by the Pennsylvania governor. The statute creating School Reform Commissions also empowers them to "suspend" the requirements of the Public School Code.[132] When a Philadelphia charter school sought, as required by law, to have its charter re-certified by Philadelphia's then-extant School Reform Commission, the Commission exercised its suspension power to abrogate a Public School Code provision applying only to charter schools. Specifically, the Commission suspended a provision that allowed for the placement of "reasonable conditions" on the charter school's charter only if the charter school hadn't made "adequate yearly progress for at least four consecutive years."[133] By suspending this provision, the Commission argued it could impose conditions on the charter school's charter—notwithstanding the fact

125. *Turner Cnty.*, 749 S.E.2d at 689.

126. *Id.*

127. *Id.* at 691.

128. *Id.* at 690 (first citing Speer v. Mayor of Athens, 11 S.E. 802 (Ga. 1890); and then citing Greene Cnty. Bd. of Comm'rs v. Higdon, 626 S.E.2d 541 (Ga. 2006)).

129. *Id.* at 692.

130. *See supra* note 43 and accompanying text.

131. W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist., 132 A.3d 957, 959 (Pa. 2016).

132. *Id.*

133. *Id.*

that the charter school had made adequate yearly progress.[134] The charter school sued on the theory that the broad suspension powers vested in the Commission violated Pennsylvania's nondelegation doctrine.

The Supreme Court of Pennsylvania agreed, rejecting two central contentions of the Commission: (1) that the nondelegation doctrine does not apply to the suspension power because "[the] legislative authority is the power to make, alter, and repeal laws," which does not encompass suspensions;[135] and (2) that even if the nondelegation doctrine applies, the suspension provision passes muster in that the statute sets out the "overall policy objective . . . to take all measures necessary to rescue a school district . . . from financial distress."[136] After citing Locke, Blackstone, Montesquieu, and the Federalist Papers,[137] the court concluded that the suspension provision gave the Commission "what amounts to *carte blanche* powers to suspend virtually any combination of provisions of the School Code."[138] According to the court, the clear purpose of the statute is irrelevant to deciding the nondelegation question: "The [Commission's] awareness of the objective of its mission does not equate to definite standards, enforceable guidelines, or a realistic check against arbitrary decision making."[139] At least in this case, an executive body's power to suspend law effectively constituted the power to make law.

3. Executive to Judiciary

Although Arizona's nondelegation cases are sparse compared to other states, its state supreme court decided one of the leading cases on delegations from the executive to the judicial branch. In *State v. Wagstaff*,[140] the trial judge sentenced Wagstaff to twelve years of prison and lifetime parole for a child molestation conviction.[141] The statute under review related to the parole sentence, and it stated that "the court shall order that a person convicted of any dangerous crime against children in the first degree be supervised on parole after release from confinement on such conditions as the court or board of pardons and paroles deems appropriate for the rest of the person's life."[142]

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134. *Id.* at 960.
135. *Id.* at 963.
136. *See id.*
137. *Id.* at 963–64.
138. *Id.* at 965.
139. *Id.* at 967.
140. 794 P.2d 118 (Ariz. 1990) (en banc).
141. *Id.* at 119–20.
142. *Id.* at 120 (internal quotation marks omitted).

Wagstaff argued that this statute effectively transferred the power to impose and supervise a parole sentence from the executive branch to the judicial branch—and the court agreed. After making broad statements about the importance of separation of powers to the Arizona constitution,[143] the court observed the historical "division of power and . . . transfer of jurisdiction over a felon from the judicial to the executive branch of government."[144] Thus, "[u]pon entry of a final judgment and sentence *of imprisonment*, legal authority over the accused passes by operation of law to the Department of Corrections and the Board of Pardons and Paroles."[145] In the state of Arizona—notwithstanding the courts' power to determine prison sentences—it is the "Board of Pardons and Paroles, an arm of the executive branch, [that] has exercised authority over parole decisions."[146] Hence the court observed that other state statutes "envision active administration by trained officials who decide whether to grant parole and determine parole conditions."[147] The court rejected the argument, advanced by the state, that clear statutory language could upset this historical balance. The primary reason was the "long history of the distinct functions of the judicial and executive branches, as well as the judiciary's unsuitability for carrying out the tasks associated with a parole system"—a reference to the fact that judges rarely interact with convicted criminals after sentencing and thus are in a poor position to evaluate the suitability of parole.[148]

4. Executive to Legislature

Delegations from the executive to the legislature are rare. No litigated case appears to address this type of delegation head on, although some legislative veto cases drift in the direction of nondelegation.[149] A line of New Hampshire advisory opinions addresses the issue in the nondelegation formulation; unfortunately, they all fail to reach the merits or do not pronounce on the issue in a decisive way. In any event, these cases indicate that a delegation from the executive

143. *See id.*

144. *Id.* at 121.

145. *Id.* (emphasis added).

146. *Id.* at 122.

147. *Id.*

148. *Id.*

149. *See, e.g.*, State *ex rel.* Meadows v. Hechler, 462 S.E.2d 586, 593 (W. Va. 1995) (holding that a statute requiring an agency to draft nursing home regulations that could not become binding without an affirmative vote of the legislature "amounted to an intrusion into the Executive branch's ability to effectuate its mandated responsibilities").

to the legislature could arise and that state courts can police this boundary.

In *Opinion of the Justices*, the General Court of New Hampshire—the state's legislature—proposed a law requiring that a subsidiary "fiscal committee" of the legislature give approval to salary changes for certain executive-branch officials.[150] The Governor petitioned the Supreme Court of New Hampshire to answer four questions about the statute in the form of an advisory opinion. One of these questions read: "Do these amendments provide for an unconstitutional delegation of executive powers to the legislative branch of government?"[151] The court determined that "in the absence of express legislative authority[,] the Governor . . . may not fix salaries even of personnel which the Governor is empowered to appoint"[152]—thus concluding that the power to set salaries is a legislative power, not an executive power, so no delegation from the executive to the legislature could occur here. Justice Grimes dissented, arguing that "the determination of *when*, within the guidelines set forth in the statutes, a salary increase is justified is an administrative function falling within the powers of the executive department," and therefore that requiring the legislature's approval before a salary increase could take effect would violate the separation of powers.[153]

In 1987, the Supreme Court of New Hampshire confronted a nearly identical question from the governor.[154] This time, the underlying statute would have required a legislative council's approval before the governor entered into certain contracts to purchase or rent computer hardware or software.[155] The court did not reach the nondelegation question, however, finding that contract-making is an exclusively executive activity, provided that an appropriation has been made.[156] Surprisingly, the court cited immediately thereafter to Justice Grimes's dissent in the 1970 advisory opinion.[157] On that basis, it would seem that if the Governor of New Hampshire *had* allowed the resolution to become law, it may have violated New Hampshire's nondelegation doctrine, since by giving his consent he would have delegated an exclusively executive function to the General Court.

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150. 266 A.2d 823 (N.H. 1970).

151. *Id.* at 824.

152. *Id.* at 826.

153. *Id.* at 827 (Grimes, J., dissenting) (emphasis added).

154. *See In re* Op. of the Justs., 532 A.2d 195 (N.H. 1987).

155. *See id.*

156. *Id.* at 197 ("Once the legislature has made an appropriation for the executive branch, the requirement of fiscal committee approval of contracts made pursuant thereto by the executive branch is an unconstitutional intrusion into the executive branch of the government.").

157. *See id.*

The New Hampshire high court seemed to ratify this view in a 2011 advisory opinion that concerned a proposed statute that would have required the Attorney General of New Hampshire to join a federal lawsuit regarding the Patient Protection and Affordable Care Act.[158] Citing the 1987 *Opinion*, the court explained:

> It is the executive, not the legislative branch, in which the constitution vests the "supreme executive" authority to determine whether it is in the public interest to litigate a particular matter. Necessarily, this includes the decision *not* to initiate a specific civil action on the part of the State. The executive branch alone has the power to decide the State's interest in litigation. If enacted, HB 89's usurpation of an exclusively executive function would violate the separation of powers doctrine.[159]

It would seem to be the case, then, that if the statute at issue had become law, it would have simultaneously violated the state's nondelegation doctrine as well as the separation of powers more generally.

5. Judiciary to Executive

These types of delegations are uncommon but arise more frequently than do delegations from the executive to the legislature. Unsurprisingly, such cases arise when the legislature vests the power to resolve disputes in executive-branch agency tribunals, not dissimilar from the underlying issue in *Crowell v. Benson*.[160]

In *Alaska Public Interest Research Group v. State*, the Supreme Court of Alaska passed judgment on the constitutionality of the Workers' Compensation Appeals Commission, which hears appeals of the state's Workers' Compensation Board.[161] The plaintiff alleged the Appeals Commission was an "executive court," and so the statute authorizing the Commission impermissibly delegated the judicial power to the executive branch.[162] The court determined—much as the Supreme Court found in *Crowell*—that the legislature "may constitutionally delegate some adjudicative power to an executive agency, but it may not delegate judicial power."[163] To distinguish the judicial power—which may not be delegated—from "some adjudicative power," the court looked to four factors: (1) the extent of the agency court's jurisdiction; (2) the finality or lack of finality of agency decisions; (3) whether or not judicial review is available; and (4) the discretion

158. *See In re* Op. of Justs., 27 A.3d 859, 871 (N.H. 2011).
159. *Id.* at 869.
160. 285 U.S. 22 (1932).
161. 167 P.3d 27, 33 (Alaska 2007).
162. *Id.*
163. *Id.* at 35–36.

vested in the agency court.[164] Ultimately, the Alaska Supreme Court determined that the Appeals Commission was simply a "quasi-judicial agency," and thus valid.[165]

Typically, courts hearing these types of cases conclude that the agency is vested only with quasi-judicial power.[166] Yet there are a handful of cases showing that the nondelegation doctrine can, in theory, hem in these delegations. In *Davis v. Britt*, for example, the Supreme Court of Arkansas invalidated a statute allowing a court to enter a writ of commitment for a person found insane by a state mental hospital.[167] The court asked, "Is a statute constitutional, which takes away from the judiciary and delegates to a branch of the executive department, the right and power to finally decide whether a person (charged with murder) is 'sane' or 'insane'?"[168] The court cited numerous authorities for the proposition that the determination of insanity in the face of a criminal charge must be decided by a judge or jury—being fundamentally a determination of legal status entitling a defendant to an affirmative legal defense.[169] Consequently, a state hospital—run by the executive branch—could not make that legal determination without the court.

6. Judiciary to Legislature

These types of nondelegation cases seem not to exist—or, to be more precise, they do not use the language of nondelegation. They thus represent the sole departure from the general trend that impermissible delegations can exist in any direction between any of the branches of government.

Legislative veto cases, however, are the best candidates for putative judiciary-to-legislature nondelegation cases.[170] Some states have discussed the legislative veto issue not as a violation of

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164. *Id.*

165. *Id.*

166. *See, e.g.*, Dee Enters. v. Indus. Claim Appeals Off., 89 P.3d 430, 434 (Colo. App. 2003) (concluding that the act in issue did not confer "pure judicial authority").

167. 420 S.W.2d 863 (Ark. 1967); *see also* Cnty. Council v. Invs. Funding Corp., 312 A.2d 225, 258 (Md. 1973) (Barnes, J., concurring in part and dissenting in part) (noting that "[t]here may be states in which . . . delegation of judicial authority to administrative boards . . . can be done, but Maryland is not one of them" (quoting Dal Maso v. Bd. of Cnty. Comm'rs, 34 A.2d 464, 466 (Md. 1943))).

168. *Davis*, 420 S.W.2d at 865.

169. *See id.*

170. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 964–65 (1983) (Powell, J., concurring) ("On its face, the House's action appears clearly adjudicatory. The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria.").

presentment but as a usurpation of the judiciary's power.[171] In any event, no state supreme court seems to have gone so far as to strike down a legislative veto on this nondelegation theory.

* * *

States overwhelmingly appeal to the SOP theory when deciding nondelegation cases. And they have evidently found that the logic of the SOP theory requires extending nondelegation jurisprudence to all interbranch delegations: if combinations of government power can be used tyrannically, then *all* delegations must be policed, not just those from the legislature to the executive.

III. THE SOVEREIGNTY THEORY

In this Part, I discuss the Sovereignty theory as it appears in state nondelegation jurisprudence, suggesting that its logic helps explain the mess of applications from Part I. The Sovereignty theory can succinctly be summarized as the view that certain governmental functions must be exercised by public officials acting in their official capacities. As in the prior Part, I discuss the Sovereignty theory generally in the states and what work it seems to be doing in state nondelegation cases; how prevalent SOP theories are in state nondelegation cases; and specific applications of this theory to various types of delegations.

A. Articulating the Sovereignty Theory

One must look before the New Deal to find a Supreme Court case that meaningfully hits upon the Sovereignty theory of nondelegation.[172] For that reason, along with a dearth of Circuit Court opinions on the

171. *See, e.g.*, Mead v. Arnell, 791 P.2d 410, 420 (Idaho 1990) (resolving whether "the judiciary's constitutional authority to determine whether an administrative rule is in conformance with the enabling statute, and the legislature's statutory entitlement to determine if an administrative rule or regulation fails to reflect the legislative intent contained in the enabling statute").

172. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) ("This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."); *see also* Washington *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 122 (1928) (invalidating a statute that gave property owners power to deny another property owner the right to build a home on the land, noting that such a "delegation of power . . . is repugnant"). Despite this discussion, the holding of *Carter* regarded the constitutionality of the Bituminous Coal Conservation Act under the Commerce Clause, not nondelegation. *See Carter*, 298 U.S. at 314.

matter, the Sovereignty theory of nondelegation will be less familiar to public law scholars than the SOP theory. Yet the Sovereignty theory's basic claim—that certain powers must be exercised not only by government officials, but by officials of the *correct* government—is similarly intuitive. Just as the SOP theory claimed that combining power into the same hands leads to unacceptable abuse of citizens and other regulated parties, so too with the Sovereignty theory: when nonstate individuals or groups wield governmental power without oversight or constraint, the risks of abuse multiply.

Only a few years ago, the Supreme Court of Pennsylvania clearly articulated the motivations underlying the Sovereignty theory of nondelegation. The first could be describe as a "political accountability" rationale: confining power in specific governmental bodies "ensures that duly authorized and politically responsible officials make all of the necessary policy decisions."[173] Thus, when political power is exercised in ways the people dislike, the people are afforded an opportunity at the next election to remove those officials. While a similar rationale can be provided for the SOP theory of nondelegation, it applies with more force in the Sovereignty theory context because in any Sovereignty-motivated nondelegation case the delegation will have been made to an entity beyond the reach of the state's voters. The second justification might be called an "abuse" rationale: invalidating delegations of governmental power preemptively "protect[s] against the arbitrary exercise of unnecessary and uncontrolled discretionary power."[174] This rationale, too, might be said to apply with more force in the Sovereignty view context; in the SOP context, checks and balances provide some guardrails against absolute and arbitrary discretion. Yet in the Sovereignty context, where little other constitutional safety net can check outside actors, complete discretion can devolve upon an unaccountable delegate.

Importantly, the Sovereignty view of nondelegation must not be conflated with a straightforward rule against delegations to private entities. Gillian Metzger has forcefully argued that public law routinely "fail[s] to appreciate how privatization can delegate government power to private hands."[175] While this is true, and while state supreme courts have routinely held delegations to private entities to be invalid,[176] the

173. Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827, 833 (Pa. 2017).

174. *Id.*

175. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1371 (2003).

176. *See, e.g.*, Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 457 (Tex. 1997) (concluding "that the Legislature made an unconstitutionally broad delegation of authority to the Foundation, a private entity, thereby violating Article II, Section 1 of the Texas Constitution").

rule against private delegations is a particular instance of a much broader rule against delegating outside the state government. In other words, the Sovereignty view of nondelegation prohibits the state from delegating any of its sovereign powers beyond the walls of the state government itself. Thus, it prohibits delegations to foreign governments (such as other states or the federal government),[177] in addition to delegations to private parties.

From where does the Sovereignty view of nondelegation come? States use varied textual hooks for the Sovereignty theory of nondelegation, but four main constitutional provisions emerge as key.

First—and most on point—a few state constitutions contain explicit provisions targeted against the delegation of government power to outside actors. For example, South Dakota fits this category, although the constitutional provision cited by the state supreme court is narrow, prohibiting the delegation of certain powers "to any special commission, private corporation or association."[178]

The second category of states derives the Sovereignty theory of nondelegation from due process clauses, although courts sometimes fail to specify whether the precise source is the Due Process Clause of the Fourteenth Amendment[179] or their own state constitution.[180]

Third, and most relevant for the federal nondelegation doctrine, are vesting clauses. The Supreme Court of Rhode Island has noted that the nondelegation doctrine, which in Rhode Island law is distinct from the "separation of powers" doctrine,[181] "is derived from sections 1 and 2 of article 6 of the Rhode Island Constitution";[182] in pertinent part these sections respectively state that "[t]he general assembly shall pass all laws necessary to carry this Constitution into effect" and "[t]he legislative power . . . shall be vested in two houses."[183] The Supreme Court of Texas once admonished litigants for "erroneously rely[ing]" on the state's constitutional separation of powers clause as a "source for the constitutional prohibition of delegations of legislative authority to private entities."[184] Instead, the court observed, that prohibition arises

177. *See infra* Part III.C.1.

178. S.D. CONST. art. III, § 26; Law v. City of Sioux Falls, 804 N.W.2d 428, 434 (S.D. 2011).

179. U.S. CONST. amend. XIV, § 1.

180. *See, e.g.*, Humane Soc'y, Inc. v. N.J. State Fish & Game Council, 362 A.2d 20, 22 (N.J. 1976); Coffey v. Cnty. of Otoe, 743 N.W.2d 632, 638–39 (Neb. 2008) (citing Silverman v. Barry, 845 F.2d 1072, 1086 (D.C. Cir. 1988), presumably to connect the nondelegation idea to the federal Due Process Clause).

181. *See supra* Part II.B.

182. *In re* Advisory Op. to House of Representatives (*Casino II*), 885 A.2d 698, 707 (R.I. 2005).

183. R.I. CONST. art. 6, §§ 1–2.

184. Proctor v. Andrews, 972 S.W.2d 729, 732–33 (Tex. 1998).

from a constitutional provision that "vests in the Legislature the power to make laws."[185]

The fourth constitutional source for the Sovereignty view of nondelegation is, astonishingly, separation-of-powers clauses. In *Protz*, the Pennsylvania high court noted that the nondelegation doctrine, which it was in the instant case applying to a delegation from the legislature to the American Medical Association, could be "described as a 'natural corollary' to the text of" the Pennsylvania Constitution's separation-of-powers provision.[186] The thought seems to be that, if the state constitution prohibits interbranch delegations (a la the SOP view of nondelegation), then a fortiori delegations to nongovernmental, private parties are prohibited.

What effect do these different textual hooks have on the application of the nondelegation doctrine as it applies against private parties? Evidently very little. In the main, most courts still break down the analysis into three distinct steps. First, the court must determine whether the delegate is a part of the state government. (Only arguably private delegates will raise this issue, as foreign governments are readily identifiable as such.) Second, the court questions whether governmental power—usually rulemaking power or adjudicatory power—was in fact delegated to that entity. And third, if power was delegated, the court asks whether the delegation can nevertheless be sustained.

The first of these questions—which amounts to asking whether the delegate is public or private—is significant in states, such as Texas, that deploy different tests for delegations to private entities and interbranch delegations.[187] Thus in *Boll Weevil*, the Supreme Court of Texas promulgated an eight-factor balancing test to determine whether the delegate party was private and so the delegation required more scrutiny.[188]

Importantly, this inquiry should not be confused with the "state actor" analysis conducted in many other constitutional cases.[189] In one recent Indiana lower-court case, the court determined that a Bloomington city ordinance "impermissibly delegated to Indiana University the authority to decide whether a group of people will be

185. *Id.*; *see also* TEX. CONST. art. III, § 1.

186. Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827, 833 (Pa. 2017) (quoting State Bd. of Chiropractic Exam'rs v. Life Fellowship of Pa., 272 A.2d 478, 481 (Pa. 1971)).

187. *See* Tex. Boll Weevil Eradication Found., v. Lewellen, 952 S.W.2d 454, 469 (Tex. 1997) ("[W]e believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.").

188. *Id.* at 472.

189. *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202 (1989).

recognized . . . as members of a fraternity or sorority for purposes of determining whether a property owner complies with the Ordinance."[190] Despite Indiana University being a public university and thus a state actor, for purposes of a private nondelegation analysis, they were not permitted to make decisions that would affect liability under Bloomington's zoning laws.

The second step of the analysis, whether governmental power was actually conferred on the actor, is a way of winnowing out cases that aren't, at the core, about a nondelegation issue. If indeed governmental power was not transferred by law from the government to a private actor, then there are one of two results: (1) no government power was transferred at all, which would result in a garden variety ultra vires action against the private party claiming power; or (2) power *was* transferred, but it was a lawful transfer that did not offend the nondelegation doctrine or any other rule of public law. Where to draw the line between these two categories has a tremendous impact on the effects of the Sovereignty view of nondelegation. For example, courts have held, much in the same way the Supreme Court has, that transfers of merely administrative power do not violate the nondelegation doctrine.[191] But what is legislative or judicial, and what is merely administrative?

Third and finally, courts deploy different tests to determine whether the delegation, if made, was lawful or not. Insofar as different states have squarely addressed the question, courts are of two minds about these tests. One set of states scrutinize delegations to private parties under the same test they would use to scrutinize delegations made between branches of the state government. For example, in *Krielow*, a Louisiana case from 2013, the court invalidated a statute delegating the power to impose a rice assessment to rice producers but used a test from a separation-of-powers nondelegation case.[192] On the other hand, some states, such as Texas and Rhode Island, exercise more scrutiny over delegations to private parties on the basis that the Sovereignty view of nondelegation requires more oversight for nongovernmental officials exercising government power.[193]

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190. City of Bloomington Bd. of Zoning Appeals v. UJ-Eighty Corp., 141 N.E.3d 869, 877 (Ind. Ct. App. 2020).

191. *See, e.g.*, Marta v. Sullivan, 248 A.2d 608, 609 (Del. 1968).

192. *See* Krielow v. La. Dep't of Agric. & Forestry, 125 So. 3d 384, 396 (La. 2013) (citing Schwegmann Bros. Giant Super Mkts. v. McCrory, 112 So. 2d 606, 613 (La. 1959)).

193. *See Tex. Boll Weevil Eradication Found.*, 952 S.W.2d at 469; Jennings v. Exeter-West Greenwich Reg'l Sch. Dist. Comm., 352 A.2d 634, 638 (R.I. 1976) ("[T]he nondelegation doctrine prohibits only unreasonable delegations of legislative power. In order to meet the reasonableness test, a statute *delegating power to private persons* must satisfy both of the underlying concerns of the nondelegation doctrine." (emphasis added)).

To be sure, states sometimes collapse these last two steps so that the lawfulness of the action at issue turns simply on whether a "delegation" as such "took place." That is, if the court finds that governmental authority was delegated, it is ipso facto unlawful; conversely, if a delegation was lawful, then the delegation was not of governmental power per se. In effect, what this means is that many de facto delegations are either not considered delegations at all (that is, they are deemed not to be de jure delegations at step two) or, even if they are considered delegations, in some states they will be sustained if they comply with a certain test, as in Texas and Rhode Island. Consequently, delegations are routinely sustained even in states that look less favorably on delegations that might violate the Sovereignty theory as compared to delegations that might violate the SOP theory.

B. Prevalence

The Sovereignty theory of nondelegation is, like the SOP theory, articulated in one form or another by nearly every state. Every state supreme court has referenced the basic idea underlying Sovereignty nondelegation at least once since 1957.[194] To be sure, a handful of states

194. *See* Al Means, Inc. v. City of Montgomery, 104 So. 2d 816 (Ala. 1958); Mun. of Anchorage v. Anchorage Police Dep't Emps. Ass'n, 839 P.2d 1080 (Alaska 1992); Parrick v. City of Phx., 340 P.2d 997 (Ariz. 1959); Gallas v. Alexander, 263 S.W.3d 494 (Ark. 2007); Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd., 405 P.3d 1087 (Cal. 2017); Fraternal Ord. of Police, Colorado Lodge #19, v. City of Commerce City, 996 P.2d 133 (Colo. 2000); Carofano v. City of Bridgeport, 495 A.2d 1011 (Conn. 1985); Marta v. Sullivan, 248 A.2d 608 (Del. 1968); Fla. Bd. of Bar Exam'rs *In re* Hale, 433 So. 2d 969 (Fla. 1983); Local Division 732, Amalgamated Transit Union v. Metro. Atlanta Rapid Transit Auth., 320 S.E.2d 742 (Ga. 1984); Cnty. of Haw. v. C & J Coupe Fam. Ltd. P'ship, 242 P.3d 1136 (Haw. 2010); State v. Gee, 695 P.2d 376 (Idaho 1985); Coram v. State, 996 N.E.2d 1057 (Ill. 2013); Bissell Carpet Sweeper Co. v. Shane Co., 143 N.E.2d 415 (Ind. 1957); Behm v. City of Cedar Rapids, 922 N.W.2d 524 (Iowa 2019); Sedlak v. Dick, 887 P.2d 1119 (Kan. 1995); City of Covington v. Covington Lodge No. 1, Fraternal Ord. of Police, 622 S.W.2d 221 (Ky. 1981); Krielow v. La. Dep't of Agric. & Forestry, 125 So. 3d 384 (La. 2013); *In re* Child. of Richard E., 227 A.3d 159 (Me. 2020); Stop Slots MD 2008 v. State Bd. of Elections, 34 A.3d 1164 (Md. 2012); DiLoreto v. Fireman's Fund Ins., 418 N.E.2d 612 (Mass. 1981); Dukesherer Farms, Inc. v. Ball, 273 N.W.2d 877 (Mich. 1979); Hubbard Broad., Inc. v. Metro. Sports Facilities Comm'n, 381 N.W.2d 842 (Minn. 1986); State v. Allstate Ins., 97 So. 2d 372 (Miss. 1957); Murray v. Mo. Highway & Transp. Comm'n, 37 S.W.3d 228 (Mo. 2001) (en banc); State v. Mathis, 68 P.3d 756 (Mont. 2003); Coffey v. Cnty. of Otoe, 743 N.W.2d 632 (Neb. 2008); Bautista v. Picone, 419 P.3d 157 (Nev. 2018); City of Portsmouth v. Ass'n of Portsmouth Teachers, 597 A.2d 1063 (N.H. 1991); Humane Soc'y of the U.S., Inc. v. N.J. State Fish & Game Council, 362 A.2d 20 (N.J. 1976); Madrid v. St. Joseph Hosp., 928 P.2d 250 (N.M. 1996); Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State, 550 N.E.2d 919 (N.Y. 1990); Bulova Watch Co. v. Brand Distribs., Inc., 206 S.E.2d 141 (N.C. 1974); State v. Brown, 771 N.W.2d 267 (N.D. 2009); State *ex rel.* Ebersole v. Powell, 21 N.E.3d 267 (Ohio 2014); Tulsa County Deputy Sheriff's Fraternal Ord. of Police, Lodge No. 188 v. Bd. of Cnty. Comm'rs, 995 P.2d 1124 (Okla. 2000); Miller v. Ford Motor Co., 419 P.3d 392 (Or. 2018) (en banc); Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827 (Pa. 2017); *In re* Advisory Op. to House of Representatives (*Casino II*), 885 A.2d 698 (R.I. 2005); Joytime Distribs. & Amusement Co. v. State, 528 S.E.2d 647 (S.C. 1999); Law v. City of Sioux Falls, 804 N.W.2d 428 (S.D. 2000); Davis v. Blount Cnty. Beer Bd., 621 S.W.2d 149 (Tenn.

have considered these issues only rarely and often address them only in dicta. What's more, courts sustain delegations in many of these cases. Nevertheless, the court in each case referenced here directly implies (in dictum or the holding) that certain types of delegations run afoul of the nondelegation doctrine. And, in context, none of these discussions could be mistaken for an application of the SOP theory of nondelegation because the court is not considering a transfer of power between governmental branches.

Take, for instance, a 1983 Florida case considering the question of whether the Florida Supreme Court could require, as a condition of admission to the bar, graduation from an American Bar Association–accredited law school.[195] Although the court dismissed this challenge on the grounds that such a requirement did not constitute a delegation of judicial power, it noted that "abdicating [the court's] supervisory responsibility over bar admissions and unlawfully delegating [their] constitutional function to a private authority," would constitute a violation.[196] For purposes of this Part, any case that implied the existence of boundaries on delegations to nonstate actors, such as private parties, plebiscites, municipal corporations, or other governments, was deemed an invocation of the Sovereignty theory of nondelegation.

Some observations are in order about this set of cases and the survey from which it resulted. First, as compared to the SOP theory, it was necessary in many states to reach back further in time to find an applicable case. This could be explained by a simple dearth of statutes or government actions that raise Sovereignty nondelegation problems—and thus fewer claims to litigate. As a result, the relative infrequency of Sovereignty nondelegation cases may have nothing to do with courts' willingness to entertain these arguments. Second, when such cases do arise, courts seem willing to pay lip service to the values undergirding the Sovereignty theory of nondelegation, even when the delegations are sustained.

1981); Proctor v. Andrews, 972 S.W.2d 729 (Tex. 1998); Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759 (Utah 1994); Vt. Dep't of Pub. Serv. v. Mass. Mun. Wholesale Elec. Co., 558 A.2d 215 (Vt. 1988); Cnty. of Fairfax v. Fleet Indus. Park Ltd. P'ship, 410 S.E.2d 669 (Va. 1991); Ent. Indus. Coal. v. Tacoma-Pierce Cnty. Health Dep't, 105 P.3d 985 (Wash. 2005) (en banc); Kristopher O. v. Mazzone, 706 S.E.2d 381 (W. Va. 2011); Milwaukee Cnty. v. Milwaukee Dist. Council 48, 325 N.W.2d 350 (Wis. 1982); Bulova Watch Co. v. Zale Jewelry Co., 371 P.2d 409 (Wyo. 1962).

195. *See* In re *Hale*, 433 So. 2d at 969.

196. *Id.* at 972.

C. Applications

Applications of the Sovereignty theory of nondelegation are potentially limitless. In theory, the state can attempt to delegate power by statute or order to any entity, private or public, and according to whatever constraints it desires. Consequently, the potential targets for Sovereignty theory nondelegation claims are quite varied, yet some types of delegation cases seem to be relatively common. Here, I discuss six types of cases motivated by the Sovereignty theory of nondelegation: (1) delegations to foreign governments, such as Congress or other states; (2) delegations to the people, in the form of plebiscites; (3) delegations to municipal corporations; (4) delegations of the eminent domain power; (5) mandatory alternative dispute resolution; and (6) delegations to experts or other professionals. The first two categories involve delegations to public entities (that is, other governments) or quasi-public masses (the electorate); the resulting problem is that government power is not exercised by the relevant politically accountable government. The third category addresses the question of when a private group becomes a government actor. And the last three categories constitute different substantive areas that are frequently the subject of Sovereignty delegations.

1. Delegations to Foreign Governments

Under this type of delegation, a state legislature will typically pass a statute that references or "incorporate[s]"[197] a statute or regulation passed by another government. Under the Sovereignty view of nondelegation, this kind of legislation may present a problem because it effectively allows another government—perhaps related to, but certainly distinct from, the state government—to create state law. And unlike other delegations that prove problematic under the Sovereignty view of nondelegation, this type of nondelegation is unique in that it cannot be characterized as a delegation to a *private* party. Because these delegations are always made to another government, the problem arises because policy decisions are being made by the "wrong" government. This type of delegation thus highlights one motivation of the Sovereignty theory mentioned in *Protz*:[198] The "political accountability" rationale for Sovereignty nondelegation turns not only on policymakers being accountable to *an* electorate but to the *proper* electorate. Otherwise, a state delegating lawmaking power to the

197. Postell, *supra* note 4, at 315.

198. *See Protz*, 161 A.3d at 837.

United States Congress would not pose a problem because Congress is of course politically accountable to an electorate. (Such delegations may also pose federal constitutional problems in that they may violate the rule that Congress can only exercise its enumerated powers.) The rub, of course, is that the United States Congress is accountable to far more people with far more varied interests than is any particular state government—and there is no reason to give, say, Californians influence over New York state law or vice versa.

The connection between the Sovereignty theory and this application seems straightforward, yet states typically narrow what counts as a delegation in this context. In *Coram v. State*, for example, the Supreme Court of Illinois pointed out that a delegation exists only if the state statute changes in lockstep with changes in federal law:

> When a state statute incorporates federal law . . . the general rule is that the incorporation is limited to federal statutes or regulations in existence at the time the statute was adopted. . . . The incorporation cannot include future amendments to the federal law because such an incorporation would constitute an unlawful delegation of state legislative power to the federal government.[199]

Thus, when a state legislature merely duplicates statutory language from a federal statute or regulation or the statute or regulation of another state,[200] no delegation occurs. In these circumstances, the state legislature is simply adopting language proposed (indeed used by) another government; legislative judgment stays with the state legislature because it determines whether the policies embedded in the language ought to be the law. But if the state legislature tethers state law to the law of some other government so that state law changes solely by virtue of the fact that another government's laws are changing, then the state legislature has, according to *Coram*, delegated its legislative powers. Absent a repeal of the law that tethers content to the law of another state or the federal government, the state's law will be determined by a body not elected by the citizens of the state in question.

2. Delegations to the People (Plebiscites)

Occasionally, states delegate legislative power down to the citizenry. A state can do so through statutes that, by their own terms, go into effect only upon a favorable plebiscite vote. One might think that

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199. 996 N.E.2d at 1081 (Buke, J., concurring) (emphasis added) (citing State v. Williams, 583 P.2d 251, 254 (Ariz. 1978)).

200. Miller v. Ford Motor Co., 419 P.3d 392, 398 (Or. 2018) (en banc) (noting that "[c]onstitutional issues may arise . . . when such provisions are interpreted to automatically incorporate subsequent changes in the foreign law on which they are based").

these delegations do not pose a problem under the Sovereignty theory of nondelegation—after all, sovereign power is vested in state governments only because the people of the state chose to do so when they ratified the state constitution. It stands to reason, therefore, that the state legislature's reverse delegation of lawmaking power to the people is not a per se outsourcing of governmental power away from the sovereign. That is, if the Sovereignty theory of nondelegation hinges largely on keeping elected officials politically accountable, what better way to do that than by permitting plebiscites? Despite the force of this reasoning, courts have largely failed to take this view. Instead, they suggest something akin to Bruce Ackerman's "dualist democracy" hypothesis: there is a legal and political difference between constitutional lawmaking and ordinary lawmaking, and it is only in the former that the people exercise their sovereign powers.[201] In an act of constitutional sovereignty, the state's populace determined that their say over *ordinary* lawmaking should extend to the election of representatives, state senators, governors, and so forth; once those officers are elected, sovereign lawmaking authority is entrusted to them until another election occurs.[202]

The landmark Maryland case on this point is nearly a century old but remains good law. In *Brawner v. Curran*, the Maryland Court of Appeals (the highest court in the state) considered the constitutionality of the Soldier's Bonus Act, which "submits [itself] for approval or rejection to the qualified voters of the state."[203] The *Brawner* court held that the legislature did not have the power to enact such a provision—which hung the validity of the law on the outcome of a plebiscite—for two reasons. First is sovereignty: "[T]he people of Maryland having delegated to the Legislature of Maryland the power of making its laws, that body could not legally or validly relegate the power and the authority thus conferred upon it to the people

201. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3–33 (1991).

202. One is also tempted to analogize this rule to Justice Powell's concurrence in *INS v. Chadha*, 462 U.S. 919, 959 (1983) (Powell, J. concurring). Justice Powell rejected the constitutionality of the legislative veto on the grounds that it allows Congress to "assume[ ] a judicial function in violation of the principle of the separation of powers." *Id.* at 960. Of course, Congress could have disposed with Chadha's residency status by passing a general law. Congress's will is thus not irrelevant to Chadha's fate. But Congress erred when it interposed its will at the wrong stage of the process—that is, adjudication. So too with plebiscites. The people's will is not irrelevant to any particular law. In fact, it is decisive at two stages of law making: constitutional ratification and general elections. But the people's say may not be imposed during ordinary lawmaking, that is, when duly elected representatives and executives make decisions about which laws of ordinary status should be in effect.

203. 119 A. 250, 251 (Md. 1922). For a similar, but more recent, holding in another state, see Joytime Distributors and Amusement Co. v. State, 528 S.E.2d 647 (S.C. 1999).

themselves . . . ."[204] Second, only barely distinguishable, is procedure: "[T]he people of the state from whom the Legislature itself derives powers, having prescribed . . . the manner in which its laws shall be enacted, it is not competent for the Legislature to prescribe any other or different way in which its laws may be enacted."[205] To support these two propositions, the *Brawner* court cited the opinions of fourteen other state courts on the same question.[206]

Brawner's core holding has been reaffirmed, if narrowed by clarification, in recent years. In general, the Maryland Court of Appeals has trended toward permitting plebiscites when constitutional considerations are involved. In particular, the court held in *Smiegel* that a statute is valid that, by its own terms, only comes into effect upon the ratification of a later constitutional amendment.[207] The court distinguished *Brawner* by noting that, in *Smiegel*, the voters were "not asked to approve a statute."[208] Rather, the legislature proposed a constitutional amendment—which the Maryland Constitution empowers it to do—and voters were asked to ratify that amendment;[209] only incidentally did the plebiscite have an effect on the effectiveness of a statute.[210]

Whether or not *Brawner* and *Smiegel* are truly distinguishable, Maryland and other states have frequently affirmed that the legislature

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204. *Brawner*, 119 A. at 252.

205. *Id.*

206. *See id.* (citing cases from Pennsylvania, New York, Ohio, Arkansas, California, Connecticut, Indiana, Iowa, Kentucky, Michigan, Mississippi, New Hampshire, New Jersey, and Texas). In addition to these states, the court in *Brawner* cited to an earlier Maryland precedent, *Fell v. State*, 42 Md. 71 (1875). Significantly, the court in *Brawner* never addressed what impact, if any, the state's constitutional provision on referenda would have on the outcome of the case. That provision reads: "The people reserve to themselves power known as The Referendum, by petition to have submitted to the registered voters of the State, to approve or reject at the polls, any Act or part of any Act of the General Assembly . . . ." MD. CODE ANN., CONST. art. 16, § 1 (West 2022). We are then left with the conclusion that *Brawner* covers only the narrow issue when the *legislature* initiates a plebiscite or referendum by conditioning legislation on a favorable vote. Article 16 of the constitution prohibited the Court of Appeals from fully embracing an Ackermanian view on ordinary and constitutional lawmaking, for it reserved to the people the power to veto ordinary laws. *But see* Amalgamated Transit Union Loc. 587 v. State, 11 P.3d 762, 798 (Wash. 2000) (en banc) (second alteration in original) (footnote omitted) (citation omitted):

> [W]e conclude that prior to the people's adoption of the initiative and referendum powers in this state, the Legislature lacked the authority to condition measures on a vote of the people. . . . With adoption of the initiative and referendum powers . . . the people reserved the right to legislate exercis[ing] the same power of sovereignty as that exercised by the legislature in the passage of a statute.

207. *See* Smiegel v. Franchot, 978 A.2d 687 (Md. 2009).

208. *Id.* at 694.

209. *Id.* (citing MD. CODE ANN., CONST. art. 14, § 1 (West 2022)).

210. *Id.*; *see also* Stop Slots MD 2008 v. State Bd. of Elections, 34 A.3d 1164, 1177 (Md. 2012) ("[T]he Maryland General Assembly has the power to enact general legislation before, and contingent on, the adoption of a constitutional amendment that it had proposed to the voters.").

may not transfer its lawmaking powers to the public. This rule, as with the rule against delegations to the federal government or other state governments, cements the conclusion that the Sovereignty view of nondelegation is not simply a worry about privatization.

3. Delegations to Municipal Corporations

At first blush, municipal corporations would not seem to be a natural target of Sovereignty-based nondelegation claims. After all, municipal corporations are governments. In the nondelegation context, though, this position begs the question. At issue is why municipal corporations can lawfully exercise governmental powers in the first place, while garden-variety corporations engaged in business activities may not. Indeed, unless there is an affirmative legal explanation for state governments re-vesting their power in local governments, then such delegations would appear to offend the nondelegation doctrine in the same way that vesting an entirely private corporation with government power would offend the doctrine.

This issue has been litigated in numerous states, typically with the same result: the delegation of government power to municipal corporations is lawful. But states diverge in how they arrive at that conclusion. Some states, such as Washington, simply recognize delegations to municipal corporations as an outright "exception to the nondelegation rule."[211] While this exception is judge-made, it is not overbroad: delegations to municipal bodies must be "relate[d] to local purposes of regulation or administration," and, so long as that requirement is met, the statute need not contain adequate "standards and guidelines."[212]

Other states, however, rest their exception on explicit constitutional provisions, thus indicating that delegations to municipal bodies would be invalid but for those provisions. This is precisely what the North Dakota Supreme Court articulated in *State v. Brown*,[213] a case involving a conviction under an ordinance against excessive dog-barking. Brown challenged the conviction on the basis that the ordinance was invalid, arguing the state could not grant municipalities the power to create crimes. Brown urged the court to recognize a rule to the effect that "only the state legislature can create a crime."[214] The court characterized Brown's assertions as a "basic misunderstanding of

211. *See, e.g.*, *Amalgamated Transit Union Loc. 587*, 11 P.3d at 799.

212. Am. Fed'n of Tchrs. Yakima Loc. 1485 v. Yakima Sch. Dist. No. 7, 447 P.2d 593, 596 (Wash. 1968) (en banc).

213. 771 N.W.2d 267 (N.D. 2009).

214. *Id.* at 270.

the law of political subdivisions," one that would "essentially wipe out most, if not all, county and municipal ordinances" in North Dakota.[215] But in sustaining the delegation, the court recognized the following rule: the legislature may not delegate rulemaking power *unless* " 'expressly authorized by' the state constitution."[216] Brown's conviction was only sustained because the North Dakota Constitution permits the creation of home rule counties.[217] The implication of *Brown*, though unstated, is that absent such a home rule provision in the constitution, such delegations would be impermissible.

One last point deserves mention regarding municipal delegations. In addition to the volume of cases addressing whether the legislature can delegate government authority to municipalities, many cases arise as to whether the municipality, lawfully vested with power, may then *re*-delegate that power to another entity, such as a private corporation.[218] Importantly, these "subdelegation" cases do not implicate the problem discussed in this Part; rather those delegations would be evaluated similarly to whether the state legislature can delegate powers to nongovernment bodies.

4. Eminent Domain

Courts tend to agree that the eminent domain power is an intrinsic "attribute of sovereignty."[219] Courts, we might think, should then look upon delegations of the eminent domain power with special suspicion. This is not the case, however. Based on the cases that deal with delegation of the eminent domain power—mainly to private entities—courts appear to have coalesced around the understanding that the Takings Clause[220] imposes sufficient restrictions on the eminent domain power such that it can be delegated with little concern, even to private entities.

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215. *Id.*

216. *Id.* at 271 (quoting Kelsh v. Jaeger, 641 N.W.2d 100, 109 (N.D. 2002)).

217. *Id.* (citing N.D. CONST. art. 7, §§ 2, 6).

218. *See* City of Covington v. Covington Lodge No. 1, Fraternal Ord. of Police, 622 S.W.2d 221, 222 (Ky. 1981) ("[A] municipal corporation may not delegate to private individuals legislative or discretionary functions confided to it by the state legislature."). To clarify, the chain of delegated political power is as follows in these cases: people to state government (valid); state government to municipality (valid); municipality to another organization (potentially invalid).

219. Cnty. of Wayne v. Hathcock, 684 N.W.2d 765, 793 (Mich. 2004) (Weaver, J., concurring in part and dissenting in part); *see also* Concerned Citizens, United, Inc. v. Kan. Power & Light Co., 523 P.2d 755, 762 (Kan. 1974) ("The power of eminent domain is an inherent power which is vested exclusively in the sovereign-the State of Kansas."); Boom Co. v. Patterson, 98 U.S. 403, 406 (1878) ("[P]roceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain . . . .").

220. U.S. CONST. amend. V.

Though less infamous than the landmark U.S. Supreme Court case,[221] the Supreme Court of Connecticut addressed precisely this point in its own opinion in *Kelo v. City of New London*.[222] Susette Kelo challenged the taking of her home, in part, on the grounds that the New London City Council "had authorized [a non-profit] development corporation . . . to use the power of eminent domain within the project area if necessary to acquire properties for development,"[223] thus violating Connecticut's nondelegation doctrine. To resolve this question, the court fashioned a unique two-factor test for evaluating delegations of the eminent domain power to private entities. First, the court asked whether "a public purpose is . . . advanced" by the delegation; second, whether the "benefit of the property taken is considered to be available to the general public."[224] The court tied this two-part analysis to the Takings Clause by immediately citing to the part of its opinion assessing the Fifth Amendment's "public use" requirement.[225] The court averred that a private party could run afoul of this test only if acting "exclusively for its own benefit," and thus not at all for the public purpose.[226] In short, the question of delegating the eminent domain power to a private entity, as a matter of Connecticut constitutional law, became entwined with and dependent upon the public use requirement, a matter of Fifth Amendment takings law.

The court justified this very prodelegation test on the grounds that "many governmental endeavors, such as economic development or urban renewal, may be accomplished more expeditiously when governmental authorities are afforded the opportunity to utilize the expertise and resources of the private sector."[227] The Connecticut Supreme Court's decision thus came down to two core points: delegations of eminent domain to private actors are "expeditious[ ]" and the public use requirement of the Takings Clause—which applies to all exercises of the eminent domain power—is a sufficient restraint on the private party's exercise of the power. It might be said, then, that the Takings Clause provides a sufficient principle (an intelligible principle, even) to redeem the delegation to a private party.

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221. *See* Kelo v. City of New London, 545 U.S. 469 (2005).

222. 843 A.2d 500 (Conn. 2004).

223. *Id.* at 548.

224. *Id.* at 551 (quoting Carofano v. City of Bridgeport, 495 A.2d 1011, 1016 (Conn. 1985).

225. *Id.*

226. *Id.* at 552 (citing Conn. Coll. for Women v. Calvert, 88 A. 633 (Conn. 1913)).

227. *Id.* at 551.

Other states have joined Connecticut in setting deferential tests for delegations of the eminent domain power.[228] This has created something of a libertarian nightmare: although the nondelegation doctrine and Takings Clause are thought to be essential protections of individual liberty, the latter has been taken as an independent justification for weakening the former. In general, though, the particular example of eminent domain delegations suggests two conclusions. First, that in some areas Sovereignty motivations for nondelegation are actually of relatively little purchase to state supreme courts; second, that courts may be more likely to sustain delegations when other constitutional provisions can stand in to protect the public.

5. Alternative Dispute Resolution

Suits challenging the validity of mandatory alternative dispute resolution ("ADR") statutes are the most common nondelegation claims brought under the Sovereignty view of nondelegation. Yet, like eminent domain delegations, courts typically sustain these delegations. Two different rationales predominate for sustaining them.

Some challenges to mandatory ADR assert that the statute in question delegates *legislative power* to the arbitrator. Challengers argue that, because the arbitrator or mediator can resolve the dispute according to their considered judgment, the legislature has effectively abandoned policymaking to the arbitrator. The Supreme Court of California easily swept away these arguments in a recent case about mandatory mediation after failed collective bargaining processes.[229] In particular, the court noted that the very decision to require ADR constituted a "fundamental policy determination," which would make a nondelegation challenge inapposite.[230] Moreover, because the mediator was "tasked . . . with resolving the precise terms concerning 'wages, hours, or other conditions of employment' in a single collective bargaining agreement" and because "the mediator's role is limited to resolving . . . *disputed* terms," the mediator was not left with too much discretion.[231] In other words, either no delegation occurred in the first place, or, if a delegation of power did occur, it could be sustained by meeting some version of the intelligible principle test.

The other type of challenge to mandatory ADR insists that such statutes delegate judicial power to arbitrators and mediators. Courts

228. *See, e.g.*, Tex. Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 493 (Tex. 1997) (Cornyn, J., concurring in part and dissenting in part).

229. Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd., 405 P.3d 1087 (Cal. 2017).

230. *Id.* at 1101.

231. *Id.* (quoting CAL. LAB. CODE § 1164.3 (Deering 2021)).

have not had issues dispensing with these charges, either. New York's Court of Appeals—the highest court in that state—has noted that a mandatory arbitration statute would prove unconstitutional only in two circumstances.[232] First, if it "violate[d] rights guaranteed to the parties by the Constitution," such as a jury trial.[233] (Of course, a statute that denied a jury trial where one is constitutionally mandated would not offend the nondelegation doctrine, but the particular provision of the state or federal constitution that in the first instance mandates a jury trial.) Second, the delegation will be "constitutional if there are [1] 'standards to guide the delegate body' and [2] judicial oversight 'to assure that there is a reasonable basis for the action by [it] in compliance with the legislative standards.' "[234] The court pointed to many common features of arbitration to satisfy the first prong: that selection of the arbitrator is conducted in accordance with "detailed standards"; that arbitrators are "required to follow a specific procedure outlined in the statute and regulations to resolve fact-specific disputes"; and that the grounds for relief are well defined.[235] Moreover, the court observed that parties can ensure compliance with such standards via judicial review, thus satisfying the second prong. Although the Court of Appeals' formulation for the nondelegation test tracks the intelligible-principle test, it still sets a high bar for challenges to mandatory arbitration.

These cases point to the conclusion that, when mandatory ADR is subject to judicial review, the sovereign power of the state—either in the form of legislative power or judicial power—has not yet entered the dispute. As a result, the state's power remains available to the parties if and when ADR fails. ADR exemplifies one limit of the Sovereignty view of nondelegation: courts must be confident that sovereignty power was, in fact, transferred to a nonsovereign actor before striking down a law.

6. Experts and Professionals

In the interbranch context, delegations to executive-branch agencies are most frequently justified by expertise: Congress does not have the specialized knowledge needed to determine pollutant levels,

232. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State, 550 N.E.2d 919, 924 (N.Y. 1990).

233. *Id.*

234. *Id.* (quoting Mount St. Mary's Hosp. v. Catherwood, 260 N.E.2d 508, 515 (N.Y. 1970)).

235. *Id.* at 924–25.

nor the time to catch up to speed.[236] On this view, a strong nondelegation doctrine would stand in the way of experts making necessary policy choices; the only way to ensure experts can make necessary decisions is to relax the doctrine. In the Sovereignty context, everything is reversed: courts tend to look unfavorably at government actors shifting decisionmaking power to experts or other professionals with specialized knowledge. Here we examine two iterations of this problem: first, when trial courts permit experts to make decisions on behalf of the court; second, when legislatures peg laws to changing professional standards.

Appellate courts are uniformly skeptical when a trial court farms out its decisionmaking powers to experts. This kind of delegation occurs regularly in family law proceedings. In a very recent case, *In re Children of Richard E.*,[237] the Supreme Judicial Court of Maine invalidated a parental rights order that "contact between the father and the older child shall resume 'as therapeutically recommended.' "[238] The appellate court concluded that such a provision violated the nondelegation doctrine because, while "the court can consider a therapist's opinion" in determining parental rights, "the court cannot make the visitation outcome dependent upon that opinion."[239] Fundamentally it is the trial court's duty to ascertain the best interests of the child, not an expert's. Other courts have extended this line of reasoning to other professionals, such as "parenting coordinators."[240]

States adopt different approaches to delegations of lawmaking power to experts. For example, the supreme courts of New Mexico and Pennsylvania have both addressed nondelegation challenges to statutes that tethered eligibility for workers' compensation benefits to American Medical Association ("AMA") standards.[241] (The central difference between the statutes was that Pennsylvania's required doctors to use AMA guidelines in evaluating "impairment," while New Mexico's statute itself defined "impairment.") Because both statutes tethered the law to "the most recent edition" of the AMA guide, changes to the statutory standards were effectively triggered when the AMA updated

236. *See, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2151–52 (2004) (citing expertise as the most commonly invoked prodelegation argument).

237. 227 A.3d 159 (Me. 2020).

238. *Id.* at 169.

239. *Id.* (internal quotation marks omitted).

240. *See* Bautista v. Picone, 419 P.3d 157, 158 (Nev. 2018).

241. Madrid v. St. Joseph Hosp. 928 P.2d 250, 256 (N.M. 1996); Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827, 830 (Pa. 2017).

their guide. In this respect, these cases resemble the cases delegating legislative power to the federal government or parallel states.[242]

The Pennsylvania court roundly rejected the statute as offending the nondelegation principle. In particular, the court held that the statute gave the AMA virtually limitless power:

> The General Assembly did not favor any particular policies relative to the [AMA] *Guides'* methodology for grading impairments, nor did it prescribe any standards to guide and restrain the AMA's discretion to create such a methodology . . . . The AMA could add new chapters to the *Guides*, or it could remove existing ones. It could even create distinct criteria to be applied only to claimants of a particular race, gender, or nationality.
>
> Consider also that the AMA could revise the *Guides* once every ten years or once every ten weeks. If the AMA chooses to publish new editions infrequently, Pennsylvania law may fail to account for recent medical advances. By contrast, excessive revisions would likely pose severe administrative headaches, inasmuch as the *Guides* automatically have the force and effect of law once published. As these hypotheticals illustrate, the General Assembly gave the AMA *de facto*, unfettered control over a formula that ultimately will determine whether a claimant's partial-disability benefits will cease after 500 weeks.[243]

In contrast, the Supreme Court of New Mexico determined that this type of statute was *not* an invalid delegation of legislative power. The court cited a number of mitigating factors that weighed in favor of sustaining the delegation, including expertise, practical necessity, and the independence of the AMA.[244] The most doctrinally interesting factors it relied on, however, regard what might be understood as the "mental state" of the AMA when it edits its guides. The court pointed out that the AMA's standards "have significance independent of a legislative enactment," and thus the standards "cannot be construed as a deliberate law-making act when their development of the standards is guided by objectives unrelated to the statute in which they function."[245] In other words, although the AMA's language becomes law, the writers did not write them with that purpose in mind. To the court, this lessens the risk of abuse because the draftsmen are unaware of their ability to affect law or, if they are aware, simply disregard that power. While this point is philosophically interesting, it remains vulnerable to the attack that it is probably desirable to have legal draftsmen aware that their writing will have legal effect.

Although the Supreme Court of New Mexico provides some compelling reasons for sustaining delegations such as the AMA delegations at issue in *Madrid* and *Protz*, in the end courts remain quite skeptical of such delegations. That result fits with courts' general skepticism of all laws that automatically update when a

242. *See supra* Part III.C.1.

243. *Protz*, 161 A.3d at 835–36.

244. *Madrid*, 928 P.2d at 258.

245. *Id.* at 257.

nongovernment body, such as the federal government, chooses to update them. As a result, these types of cases are of a piece with the other applications of the Sovereignty theory of nondelegation.

* * *

The Sovereignty theory of nondelegation is well accepted among the states, applies widely, and is not reducible to a straightforward prohibition on private delegations. Nevertheless, there are some limits on its reach. The eminent domain cases suggest that certain sovereign powers might be delegated if there are other constitutional checks on the delegation. Likewise, there may be categorical exceptions, such as for municipal corporations.

IV. IMPACT ON THE FEDERAL NONDELEGATION DOCTRINE

What affirmative reasons might there be for the Supreme Court to take note of state nondelegation doctrines? And, if they do so, what lessons can they extract from the states' broad experience with the doctrine? This Part answers these questions. First, it presents some reasons why state nondelegation cases should rightly be considered persuasive authority at the federal level if and when the federal doctrine is revived. Not only can specific applications from the states map easily onto federal applications, but the current Supreme Court nondelegation precedent already recognizes the persuasiveness of state law. Second, this Part draws out particular lessons of both the SOP and Sovereignty theories of nondelegation. In particular, while the SOP theory may threaten to swallow all of separation-of-powers law, there are at least two doctrinal tools the Supreme Court could use to limit this effect: first, the Court might confine nondelegation to transfers of power that are voluntary; second, the Court could sustain delegations where the delegate branch already has some inherent power that approximates the delegated power. The Sovereignty theory yields a parallel result: it may disrupt long-settled relationships between the federal government, the states, and international bodies. The Supreme Court, I argue, may wish to embrace these results given that the Sovereignty theory has traditionally enjoyed more support across the legal and political spectrum.

A. Authority and Persuasiveness

Some may contend that the Supreme Court should disregard state nondelegation jurisprudence when it crafts a revived federal nondelegation doctrine. After all, the federal nondelegation doctrine is a matter of federal constitutional law, which is supreme over state constitutional law.[246] Moreover, as we saw, state nondelegation doctrines are often derived from explicit state constitutional provisions that have no analog in the federal Constitution.[247] As a result, state cases expounding the text, history, and structure of their constitutional provisions may not carry over cleanly to the federal doctrine.

Yet the "intelligible principle" test—the current test used by federal courts to evaluate nondelegation claims—was crafted under the influence of state nondelegation law. In *J.W. Hampton*,[248] which announced the intelligible principle test, Chief Justice Taft relied significantly on state nondelegation cases. He quoted the supreme courts of Ohio and Pennsylvania for the notion of a "true distinction . . . between the delegation of power to make the law . . . and conferring an authority or discretion as to its execution."[249] Strikingly, Chief Justice Taft then cited the opinion of the Minnesota Supreme Court in a case for which the United States Supreme Court subsequently granted certiorari—evidently preferring the state court's analysis of the issue.[250] The Minnesota court distinguished between mere administration and lawmaking, the latter of which was defined as having authority or "discretion as to what [the law] shall be."[251] Some have suggested that the intelligible principle test was promulgated simply to "operationalize" these state distinctions—implying that the current federal nondelegation test is a direct outgrowth of state nondelegation cases.[252] The Court therefore cannot meaningfully repudiate or affirm the precedents on federal nondelegation without addressing nondelegation in the states. Incorporating state

246. U.S. CONST. art. VI, cl. 2.

247. *See supra* Part II.A (separation of powers clauses); Part III.A (private delegation clauses, separation of powers clauses).

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

249. *Id.* at 407 (internal quotation marks omitted) (quoting Cincinnati, Wilmington & Zanesville R.R. v. Comm'rs, 1 Ohio St. 77, 88 (1852)) (first citing Moers v. Reading, 21 Pa. 188, 202 (1853); and then citing Appeal of Locke, 72 Pa. 491, 497 (1873)).

250. *Id.* at 408–409 (first citing State v. Chi., Milwaukee & St. Paul Ry. Co., 37 N.W. 782, 786 (Minn. 1888); and then citing Chi., Milwaukee & St. Paul Ry. v. Minnesota *ex rel.* R.R. & Warehouse Comm'n, 134 U.S. 418 (1890)).

251. *Id.* at 407.

252. Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 256 (2010).

jurisprudence into a federal nondelegation revival would therefore respond to the present doctrinal framework.

Over and apart from the doctrinal issues, many of the facts to which states apply the nondelegation doctrine also arise at the federal level. True, some state applications are absent at the federal level: the federal government has never conditioned legislation on a successful plebiscite vote, for instance.[253] Yet, at present time, there are numerous government actions that do yield colorable nondelegation claims under either the SOP theory, the Sovereignty theory, or both. For example, only recently has any academic work pointed out the possibility that certain broad treaty provisions could pose nondelegation problems.[254] And over the last few years, the Supreme Court has handed down a line of cases on the boundaries of Article III, each of which could be recast in nondelegation terms.[255] The risk in employing state nondelegation jurisprudence at the federal level is not that there are too few federal laws, regulations, or doctrines for the exercise to be worthwhile. On the contrary, the risk is that that *too many* of these will run afoul of the states' conception of the nondelegation doctrine.

And even where state and federal applications of the doctrine are out of sync, two considerations nevertheless suggest referencing state jurisprudence at the federal level. One is that politics and law are not frozen: that some legal maneuver has not yet been implemented at the federal level does not mean it never will be. Congress has never made legislation contingent on a plebiscite, but it very well may in the future. Who can say? Thus, in crafting a revived federal doctrine, the Supreme Court should be aware of the full extent of the doctrine's applications, even if those applications seem far-fetched now.

The second consideration—related to but distinct from the first—is that state cases may provide guidance on how to avoid

253. To be sure, statutes such as the one at issue in *Currin v. Wallace*, see text accompanying note 285, do angle in the direction of a plebiscite. But crucially, the vote required by the statute in *Currin* was taken only by tobacco farmers—that is, those involved in the industry regulated in the first place. This raises an interesting question about where to draw the line between delegations to plebiscite votes and delegations to private bodies, especially when the private body takes an internal vote that decides the law. In any event, for our purposes now, the federal government has never enacted a statute contingent on the popular vote of the entire American electorate or a state.

254. *See, e.g.*, Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); James M. Rice, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CALIF. L. REV. 539, 543 (2017).

255. *See* Bank Markazi v. Peterson, 578 U.S. 212 (2016); Patchak v. Zinke, 138 S. Ct. 897 (2018); Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365 (2018).

administrability problems. Courts[256] and scholars[257] have worried that a strong nondelegation doctrine will invalidate much of the administrative state, imperiling modern, complex government. Yet many states evidently apply their nondelegation doctrine with aplomb while nevertheless maintaining a functioning government. Certainly, this has much to do with the fact that no state supreme court seems to support an absolute bar on the transfer of power to other branches or to actors outside the government.[258] If deciding a nondelegation issue is often a question of degree, as Justice Scalia suggested in *Mistretta*,[259] then looking to state courts' use of the doctrine may help avoid administrability problems.

Having established that the Supreme Court has good reason to consult state nondelegation jurisprudence, what particular lessons can they learn from it? The next two sub-Parts review the particular lessons of the SOP theory and the Sovereignty theory, respectively.

B. Impact of the Separation of Powers Theory

The primary lesson of the SOP theory is its comprehensiveness. States have made it clear that no interbranch delegation (save, perhaps, those from the judiciary to the legislature) are immune from a nondelegation challenge. And even delegations from the judiciary to the legislature may *seem* exempt only because a case properly raising the issue has not come before a state supreme court. The reach of the nondelegation doctrine over and across separation-of-powers law is so long that the term "delegation" may even seem inapposite, and Hamburger's suggestion to shift toward a language like "vesting" and "divestment" may better characterize the doctrine.[260]

Thus, while delegations from the legislature to executive-branch agencies would remain most vulnerable to nondelegation claims, nondelegation claims would proliferate in other contexts. This move would echo the work of Margaret Lemos and others, who have argued that legislative delegations to courts "raise the same constitutional concerns as delegations to agencies."[261] Lemos singles out section 1 of

256. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

257. For a general overview of the scholarship on administrability, see Wurman, *supra* note 18, at 981 n.30.

258. *See supra* note 109 and accompanying text.

259. *See Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

260. Hamburger, *supra* note 108, at 91.

261. Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 476 (2008); *see also* Aaron Nielson, Erie *as*

the Sherman Act[262] as especially susceptible to a nondelegation attack, seeing as "Congress did not purport to resolve the many difficult puzzles of antitrust itself."[263] Parallel arguments about delegations from the legislature to the judiciary could be made about a wide range of statutes, including such bedrock laws as the Rules of Decision Act, the Religious Freedom Restoration Act, and the Alien Tort Statute.[264] Or consider the Rules Enabling Act, which grants the Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals."[265] If Congress has the power to promulgate rules of procedure for federal courts,[266] expressly authorizing the Supreme Court to determine those rules may constitute an unlawful interbranch delegation.

If the Supreme Court takes the states' counsel seriously on nondelegation, it will not stop with delegations of legislative power to the executive or the judiciary. Instead, it will extend the reach of the nondelegation doctrine to *all* interbranch delegations. This would mean that colorable nondelegation claims could be raised regarding delegations of executive power to the judiciary or legislature and delegations of judicial power to the executive or legislature.

Here the problem arises. If nondelegation (at least under the SOP theory) is so broad that it applies to all interbranch delegations, does it swallow up all of separation-of-powers law? For example, cases that have blessed Congress's interventions into litigation, such as

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Nondelegation, 72 OHIO ST. L.J. 239 (2011) (evaluating *Erie R.R. Co. v. Tompkin* as a product of the nondelegation doctrine). *But see* Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391 (2017) (arguing that federal courts have inherent power to make procedural rules and also common law, thus saving many statutes that otherwise would constitute invalid delegations to the judiciary).

262. 15 U.S.C. § 1.

263. Lemos, *supra* note 261, at 463.

264. Volokh, for his part, suggests the Religious Freedom Restoration Act, the Alien Tort Statute, and the Rules of Decision Act, and provides prima facie reasons why these statutes may offend the nondelegation doctrine, even though he ultimately argues against that result. *See* Volokh, *supra* note 261, at 1421, 1446–58.

265. 28 U.S.C. § 2072(a).

266. The Supreme Court held precisely this in *Sibbach v. Wilson & Co.*, where Justice Roberts wrote that "Congress has undoubted power to regulate the practice and procedure of federal courts." 312 U.S. 1, 9 (1941). Yet he went to further state in the same sentence that Congress may exercise that power by "delegating to this [i.e., the Supreme Court] or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States." *Id.* at 9–10 (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825)).

Patchak v. Zinke,[267] *Bank Markazi v. Peterson*,[268] and *United States v. Sioux Nation of Indians*,[269] could all be recast in nondelegation terms and thus make them vulnerable to reversal. *Bank Markazi*, for instance, regarded a statute that specified the outcome of a pending case in the federal courts; could the Court understand that congressional action as delegating away (or divesting) the federal courts of judicial power?[270] Likewise, the Court might need to rethink seminal cases permitting the creation of non–Article III tribunals for the resolution of disputes—*Crowell v. Benson*,[271] *CFTC v. Schor*,[272] and *Stern v. Marshall*[273]—on the theory that they delegate power from Article III courts to the executive. Without a principle to limit the SOP theory of nondelegation, the Supreme Court must choose between the logic of nondelegation and a number of doctrines federal courts have developed to police the separation of powers. Will expanding the nondelegation doctrine along the lines the states overwhelm separation-of-powers jurisprudence?

For opponents of the nondelegation doctrine, this result would be a catastrophe, for not only would a strong nondelegation doctrine threaten a powerful administrative state, but it would also redefine all of modern separation-of-powers law. But this is not the sole lesson of state nondelegation for the SOP view. State cases suggest at least one way to avoid this result and Alexander Volokh suggests another.

First, the Supreme Court could toss out nondelegation challenges based on threshold questions, thus narrowing the

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267. 138 S. Ct. 897 (2018) (statute directing court to dismiss certain actions after making substantive findings, without changing the underlying substantive law, did not offend separation of powers).

268. 578 U.S. 212 (2016) (concluding that a new statute designed to resolve a pending case did not violate the separation of powers).

269. 448 U.S. 371 (1980) (statute allowing the reopening of a case that had received a final judgment did not violate the separation of powers).

270. *Bank Markazi*, 578 U.S. at 236–37 (Roberts, C.J., dissenting).

271. 285 U.S. 22 (1932) (approving the adjudication of private rights by administrative tribunal).

272. 487 U.S. 833 (1986) (extending administrative tribunal's jurisdiction to state-law counterclaims).

273. 564 U.S. 462, 471 (2011) (permitting bankruptcy courts to issue final judgments on "core" bankruptcy claims). *Stern* resembles the other cases less, for two reasons. First, *Stern* actually constrained the jurisdiction of bankruptcy courts by denying them the constitutional capacity to issue final judgments on "non-core" claims. In that sense, the case actually relied on, rather than chipped away at, separation-of-powers values. Second, it is not obvious that bankruptcy courts, viewed through the lens of nondelegation, are indeed a delegation from the judiciary to the executive. What branch do bankruptcy judges work for? Judges are appointed for fourteen-year terms not by the president, but by the court of appeals in which they sit. *See* 28 U.S.C. § 152. But core claims heard in bankruptcy court can be given a final judgment, which are not reviewed de novo by the district judge, similar to administrative courts. *See* Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25 (2014).

applicability of the doctrine. For example, it could follow the lead of Rhode Island and formally distinguish between the nondelegation doctrine and one or more separation-of-powers doctrines.[274] Although the Rhode Island Supreme Court left the waters a little muddied, recall that it suggested that the distinction between nondelegation and separation of powers rested on whether the transfer of power was voluntary or not. Thus, when power is transferred voluntarily, the nondelegation doctrine is implicated. But when a branch *usurps* power from another—which was the central concern of the Framers—the more general separation-of-powers doctrine is implicated, not the nondelegation doctrine. Thus, questions of inherent branch power—such as seizing a steel mill during a war[275] or international relations[276]—would likely remain outside the ambit of nondelegation. This solution would preserve whatever distinction currently exists between delegation and divesting.

This "voluntariness" limitation, however, does require courts to decide what governmental acts are in point of fact voluntary. This question could create a distinct doctrinal thicket. Recall that in *Wagstaff* the court construed the problem before it as a "delegation of executive authority to the judiciary."[277] Yet the case concerned a *statute* that conveyed authority over an executive function to the judiciary. Can we say that the Governor of Arizona voluntarily "delegate[ed] . . . executive authority to the judiciary" simply because he signed that statute?[278] Or should *Wagstaff* be construed as a usurpation case because the legislature initiated the transfer of power, albeit for the benefit of the judiciary? The more narrowly the Supreme Court construes this "voluntariness" requirement, the narrower the nondelegation doctrine will become, leaving more room for separation-of-powers jurisprudence.

The second limitation that the Supreme Court could develop is a set of categorical exceptions to delegation. Alexander Volokh has suggested an "Inherent-Powers Corollary" to the nondelegation doctrine, which states that the doctrine is relaxed (or not applied) "when the delegate already has some inherent power over the subject matter."[279] Thus delegations of quasi-judicial power to executive agencies might be excepted from nondelegation claims on the thought

274. *See supra* Part II.B.

275. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

276. *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1 (2015).

277. State v. Wagstaff, 794 P.2d 118, 126 (Ariz. 1990).

278. *Id.* Note that the Arizona Constitution requires presentment before a bill becomes law. ARIZ. CONST. art. 5, § 7.

279. Volokh, *supra* note 261, at 1394.

that some agency adjudications are, in truth, a more proceduralized exercise of prosecutorial discretion. Because prosecutorial discretion is an inherent executive power,[280] such adjudications would not be vulnerable to a nondelegation attack. In general, this move might provide grounds for creating different doctrinal frameworks for different types of delegations, and it may even provide grounds for insulating some delegations categorically from nondelegation challenges. As a result, entire lines of cases, such as *Crowell* and its progeny, might be preserved.

The lessons of the SOP theory are thus twofold. The first lesson is that the SOP theory might prove a problem simply because its logic might bring *all* separation-of-powers controversies within its vortex. Some might embrace this sea change in public law, but all can agree that it would send a tremendous shock through the federal courts, upending decades of settled law. The second lesson, directed at nondelegation naysayers, is that state experience and other literature on nondelegation indicates that there exist effective ways to prevent the nondelegation doctrine itself from running riot. By inserting threshold questions and adjudicating inherent powers, courts can enforce nondelegation without disrupting effective governance—a feat that state nondelegation itself attests to.

C. Impact of the Sovereignty Theory

Although the Supreme Court is most likely to revive the federal nondelegation doctrine in a separation-of-powers case, if it takes note of nondelegation in the states, then it will by necessity take note of the Sovereignty theory of nondelegation. Where can we expect the doctrine to go from this point?

The most likely and most substantial consequence would be enforcing the nondelegation doctrine against private delegations, a shift some scholars have recommended for some time.[281] The Supreme Court

280. *See, e.g.*, Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375 (2d Cir. 1973).

281. *See* Metzger, *supra* note 175, at 1374 (insisting that "private exercises of government power must comport with constitutional requirements, yet recogniz[ing] that in the context of private delegations, the method of enforcing these requirements, as well as their substance, may differ from when government officials act alone"); Rice, *supra* note 254, at 543 ("Fundamental principles of government accountability demand a rigorous analysis of the constitutional limitations on delegations of regulatory power to private parties and international organizations."); Calvin R. Massey, *The Non-Delegation Doctrine and Private Parties*, 17 GREEN BAG 2D 157, 170 (2014) ("Delegation of the federal government's legislative authority to private entities is a dangerous expedient that undermines public accountability, incites private rent-seeking at the expense of less favored private citizens, and expands government power through the use of shadow proxies.").

has admittedly confronted private delegations before. In *Carter Coal*,[282] the Court observed that private delegations amounted to "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."[283] *Carter Coal* might have been read to set out a clear rule against private delegations, but the history is not so. *Carter Coal* was ambiguous in holding that the statute under review was invalid according to the nondelegation doctrine, and Justice Sutherland's opinion simultaneously indicated that the delegation issue was more properly analyzed under the Fifth Amendment's Due Process Clause.[284] Three years later, in *Currin v. Wallace*,[285] the Court held that a statute conditioned on a successful vote of local tobacco farmers did not delegate legislative power to those farmers.

In a more recent case, *Department of Transportation v. Association of American Railroads* ("*Amtrak*"), the Court paid homage to the Sovereignty theory of nondelegation but sustained the delegation anyway.[286] In the majority opinion, Justice Kennedy found that Amtrak was not a private entity, a fact that he urged disposed of the case. At the same time, this conclusion implied that if Amtrak *had* been private, then the statute at issue would have violated the nondelegation doctrine.[287] In a concurrence, Justice Alito more fully articulated this conclusion, and he reiterated the rationale from *Carter Coal*: there is not even "a fig leaf of constitutional justification" for vesting [private parties] with legislative power.[288] Even if *Amtrak* did not present a genuine problem of private delegation, private delegations remain in theory prohibited.

If the Supreme Court revives the nondelegation doctrine, it is likely to make good on the promise of *Carter Coal* and Justice Alito's *Amtrak* concurrence. Statutes that give private organizations power over lawmaking will be vulnerable to these attacks. One consequential

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282. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

283. *Id.* at 311.

284. *Id.*; *see also* Massey, *supra* note 281, at 162.

285. 306 U.S. 1 (1939).

286. 575 U.S. 43, 43–44 (2015) (holding that Amtrak was not a private entity). *Amtrak* has been roundly criticized for "sidestepp[ing] . . . entirely" the issue of private delegations, instead "merely holding that Amtrak is a governmental actor for purposes of the nondelegation doctrine." Alexander "Sasha" Volokh, *The Shadow Debate over Private Nondelegation in* DOT v. Association of American Railroads, 2014-2015 CATO SUP. CT. REV., at 359, 377.

287. *Amtrak*, 575 U.S. at 55 ("[T]he Court of Appeals' decision was based on the flawed premise that Amtrak should be treated as a private entity, [so] that opinion is now vacated.").

288. *Id.* at 62 (Alito, J., concurring).

example, which obtains at the federal level but is entirely absent at the state level, are delegations to international nongovernmental bodies such as the World Trade Organization ("WTO"). As Curtis Bradley notes, the WTO has considerable rulemaking power, thus "[t]he WTO's interpretations . . . could, in effect, create new obligations for the United States not foreseeable at the time that it ratified the relevant treaties."[289] Bradley points to many other international organizations that pose similar problems, including the U.N. Security Council, the International Court of Justice, and the International Criminal Court.[290] These organizations are not plausibly public in the same way that Amtrak was deemed to be, even if they are highly interconnected with the federal government and other foreign governments. Indeed, such delegations might even more flagrantly offend the nondelegation principle because they can be made through the Treaty Power—thus eluding the House of Representatives and appearing less democratic.

Beyond private delegations, employing the Sovereignty theory of nondelegation could lead to some rather outlandish applications. Two of these applications are worth mentioning here, because their outlandishness underscores the significance of strengthening the federal nondelegation doctrine along the lines of state nondelegation doctrines.

The first of these applications is a corollary of the states' jurisprudence on delegations to municipalities. Recall that many states have addressed the question of whether state legislatures can re-delegate legislative authority—at least over certain matters of local concern—to municipalities created by the state.[291] While states routinely sustain these delegations, some have held that they are permissible only on account of home rule provisions in the state constitution. Without a home rule provision, such delegations would amount to vesting *private* parties with legislative authority.[292] What impact would this have at the federal level? It would create a colorable claim that the government of the District of Columbia may not make local law on the theory that the United States Constitution lacks a home rule provision for the District. The Court could follow the lead of the State of Washington,[293] inferring from the Constitution an implied authorization to create a municipal government like the District of Columbia. One piece of evidence in favor of this conclusion is Madison's

289. *See* Bradley, *supra* note 254, at 1574.

290. *Id.* at 1568, 1570, 1578.

291. *See supra* Part III.C.3.

292. *See supra* notes 213–217 and accompanying text.

293. *See supra* notes 211–212 and accompanying text.

suggestion in *The Federalist* that "a municipal legislature for local purposes . . . will of course be allowed [to the residents of the District]."[294] On the other hand, the Constitution's text vests "exclusive" legislative authority over the District of Columbia in Congress, a stronger statement than Article I's general Vesting Clause.[295] Moreover, the Twenty-Third Amendment, which allocates Electoral College votes to the District of Columbia, fails to mention a municipal government at all.[296] Inferring a home rule principle from these textual sources may amount to finding an elephant in a mousehole.[297] Whatever the outcome, moving the federal nondelegation doctrine more toward the states' conception of the Sovereignty theory of nondelegation would make currently laughable claims like this one into close calls.

A second application of the Sovereignty theory of nondelegation would imperil numerous federal programs administered by the states. On the Sovereignty theory of nondelegation, it is flatly impermissible for a sovereign government to delegate power to a lower, higher, or parallel government.[298] Yet Congress routinely empowers the states to administer federal programs.[299] Consider the Clean Air Act, which permits "[e]ach State [to] develop and submit to the Administrator for approval a program for the implementation and enforcement . . . of emission standards and other requirements for air pollutants."[300] This section could pose two problems on the Sovereignty theory of nondelegation. First, it could constitute an impermissible delegation of

294. THE FEDERALIST NO. 43, at 274 (James Madison) (Clinton Rossiter ed., 1961).

295. The clause vesting the federal government with power over the federal district is actually textually much stronger than the Vesting Clause of Article 1, Section 1. The former reads, "The Congress shall have Power . . . [t]o exercise *exclusive Legislation* in all Cases whatsoever, over such District." U.S. CONST. art I, § 8, cl. 2, 17 (emphasis added). Compare with "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art I., § 1. Article I's general vesting clause can be read as a provision vesting legislative power, and prohibiting alienation of that legislative power, but not barring the delegation of power. *See* Mortenson & Bagley, *supra* note 5, at 281–82. The addition of "exclusive" in the discussion of power over the federal district makes it absolutely clear that power may not be alienated or even delegated.

296. *See* U.S. CONST. amend. XXIII.

297. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.") (first citing MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994); and then citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

298. *See supra* Part III.C.1, 3.

299. *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011). Lemos observes that numerous federal statutes provide for state enforcement of federal law, typically "singl[ing] out the state attorney general as the primary agent of state enforcement and empower[ing] him or her to bring a civil action to obtain specified remedies." *Id.* at 708. Most such statutes appear in consumer protection statutes. *Id.* at 708–09.

300. 42 U.S.C. § 7412(*l*)(1). This section likewise authorizes local governments to submit plans to enforce the Clean Air Act, so long as they receive the approval of the state government.

executive authority outside Article II.[301] Second, the Clean Air Act prohibits the states only from "set[ting] standards *less stringent* than those promulgated by the Administrator."[302] It stands to reason that the statute authorizes a state to set and enforce *more stringent* emissions standards (whether or not setting such standards is done with EPA approval), thus the Court could find that the section delegates rulemaking power to the state in violation of the Sovereignty theory of nondelegation.[303]

Unlike the SOP theory, it is much harder to find limiting principles for the Sovereignty theory of nondelegation. To be sure, the Supreme Court could craft categorical exceptions to Sovereignty-theory nondelegation challenges as the state of Washington did with delegations to municipalities. But each of these exceptions would be difficult to identify in advance, and finding themes that connect them may prove to be a fool's errand. Similarly, the Court might find that no colorable delegation claim exists when other constitutional safeguards—such as the Takings Clause—provide adequate protection. It also could look at the states' cases on delegations to alternative dispute resolution, and find that when judicial review is available, an impermissible delegation is unlikely to have occurred. These limitations will be sufficiently narrow and few in number that they may not prevent the SOP theory of nondelegation from effecting a sea change. As a result, critics of a strong nondelegation doctrine might worry that embracing the states' logic of nondelegation would truly upend public-private partnerships, federal-state relations, federal-D.C. relations, and federal relations with international bodies. Critics certainly have a point.

But rejecting delegations to outside parties has enjoyed more consensus across the legal spectrum. The outcome in *Amtrak* was unanimous, with all Justices agreeing that the delegation of rulemaking power to a private entity putatively violates the

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301. Such a rule would be a kind of reverse commandeering rule. In *Printz v. United States*, the Supreme Court held that a federal statute could not require a state or local official to enforce federal law, for it would constitute an "intrusion upon state sovereignty." 521 U.S. 898, 928 (1997). Here, the exact obverse obtains. The federal government may not authorize a state to act on its behalf, for that would constitute a conveyance of federal sovereignty.

302. 42 U.S.C. § 7412(*l*)(1) (emphasis added).

303. The Supreme Court brushed aside a version of this argument in *The Selective Draft Law Cases*. *See* Arver v. United States, 245 U.S. 366 (1918). The Court found the argument "that the act is void as a delegation of federal power to state officials because of some of its administrative features," to be "too wanting in merit to require further notice." *Id.* at 389. Strengthening the Sovereignty theory of nondelegation would probably require overturning this holding. That said, strengthening the nondelegation doctrine at all will likely require overturning far more significant precedents.

nondelegation doctrine.[304] And in *Carter Coal*, even Justice Cardozo's dissent seemed to concede that delegations to private entities raise a serious problem; he departed from the majority's holding on this point only because, by his lights, the delegation was not "excessive."[305] And, to be sure, there is considerable intuitive appeal to the Sovereignty theory: If the force of government power can be delegated outside the walls of the government and thereby escape public scrutiny, what use are democratic institutions in the first place?

CONCLUSION

The only certainty about the federal nondelegation doctrine is that it is sure to change. When it does, what will result? The Justices may flesh out a new test from originalist sources such as constitutional text, constitutional structure, Farrand's Records, Elliot's Debates, and early congressional statutes. But, as some observers have noted, what if these sources "give no useful specifics for what the content or stringency of that limit might be"?[306] The Court should look to state nondelegation jurisprudence for guidance.

For many decades the states have built up a broad and deep familiarity with the logic of nondelegation. And while the states are not of one mind about every nondelegation issue—whether it be the particular test used or even whether the doctrine applies at all—their collective wisdom about the reach and development of the doctrine deserves careful study by the Supreme Court.

It is true that the state nondelegation doctrines are largely motivated by two concerns: separation of powers and sovereignty. These concerns are common enough to be intuitive to every American and powerful enough to reach meaningfully into all different types of litigation on questions of public importance. For that reason alone, state nondelegation is worthy of independent study. But in a time such as this one, when a federal doctrine is likely to be revived with vast consequences, study of state nondelegation is not just worthwhile. It is indispensable.

304. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43 (2015).

305. Carter v. Carter Coal Co., 298 U.S. 238, 332 (1936) (Cardozo, J., dissenting in part and concurring in the judgment).

306. Parrillo, *supra* note 5, at 1299.

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