# NOT DEAD YET—OR NEVER BORN? THE REALITY OF THE NONDELEGATION DOCTRINE

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## ABSTRACT

Until recently, scholarship has concluded that the nondelegation doctrine limited delegations of power to administrative agencies until a shift that occurred in the early twentieth century. Recent revisionist scholarship has challenged that claim, often by noting that courts rarely invalidated statutes on nondelegation grounds. We challenge the revisionist view by examining the importance of the doctrine in early American legislative debates, in early state and federal cases that applied the nondelegation doctrine (even if they upheld the statutes in question), and by showing that leading legal scholars during the early twentieth century believed, contrary to the revisionists, that the doctrine was a powerful obstacle to legislative delegations to administrative agencies.

KEYWORDS: *administrative law, nondelegation doctrine, administrative power, Progressive Era, Wayman v. Southard, constitutional history*

SCHOLARS OF ADMINISTRATIVE LAW generally agree that the principle of "nondelegation"—that it is constitutionally illegitimate for legislators to delegate

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their lawmaking power to others—is moribund if not quite dead.[3] Recently, Keith E. Whittington and Jason Iuliano have taken this argument a step further by denying that the not-quite-dead nondelegation was alive in the first place. In "The Myth of the Nondelegation Doctrine," Whittington and Iuliano argue that the prevailing narrative about the nondelegation doctrine is in need of dramatic revision. While the dominant view is that the nondelegation doctrine "served as a meaningful check on the unbridled expansion of the administrative state" during the nineteenth and early twentieth centuries, they maintain that a careful examination of the actual practice of the courts in the first century of the early republic reveals that "there was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power" (Whittington and Iuliano 2017, 380–81).

To demonstrate this, Whittington and Iuliano compiled a dataset of "every federal and state case that involved a nondelegation challenge between 1789 and 1940" that features over two thousand cases involving the nondelegation doctrine. This dataset shows that "[t]here was no golden age in which the courts enforced a robust nondelegation doctrine that compelled legislators to make hard policy choices." Of the 2,506 nondelegation cases they canvassed that were decided by federal or state courts between 1825 and 1940, only 421 cases "resulted in the partial or total invalidation of a statutory provision" (Whittington and Iuliano 2017, 383, 418).

With an invalidation rate of 17 percent (18 percent at the state level and 12 percent at the federal level), Whittington and Iuliano conclude that "the actual invalidation rate of litigated cases raising nondelegation challenges to legislation was generally low," which "suggests that the courts were increasingly accommodating to legislative innovations." In short, they conclude, "[n]either the state nor the federal courts were much of an obstacle to the delegation of legislative power to non-legislative actors." The narrative of a once-enforced nondelegation doctrine "is more mythic than historical. . . . Traditional constitutional principles were thought to be capacious enough to accommodate the new administrative structures" that state legislatures and Congress devised (Whittington and Iuliano 2017, 426, 429).

Whittington and Iuliano have amassed an impressive dataset of nondelegation cases, and their findings serve as an important contribution to the study of the nondelegation doctrine.[4] However, the conclusions they draw from the data are too strong. To infer from their observations that the nondelegation doctrine never

3. But see Alexander and Prakash (2003).

4. This conclusion is drawn from the data and conclusions presented in the article itself. The dataset upon which the article relies is still unpublished, but we anticipate that once made public it will greatly aid in future research.

"served as an important check on the unbridled expansion of the administrative state" and that "there was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power," three additional premises would have to be true, and none of them is.

First, to show that the nondelegation doctrine never checked delegations of *legislative* power, one would have to demonstrate that it was never used by legislatures to avoid delegating power in the first place. The historical record reveals that, on many important occasions, Congress and the state legislatures rewrote statutory provisions as a consequence of the nondelegation principle. Sometimes this occurred as a direct result of nondelegation objections. In many other cases the legislatures avoided delegating power simply because they were disinclined to do so, as if the nondelegation principle governed their conduct but did not need to be invoked (Alexander and Prakash 2003, 1327). We discuss these occasions in the first section of this article.

Second, to show that the nondelegation was seldom used by *courts* to limit legislative delegations of power, one would have to differentiate delegations of executive power and delegations of legislative power. Perhaps the government won nondelegation cases before 1900 because the delegations at issue were legitimate delegations of executive power, not illegitimate delegations of legislative power. They may have been, as Chief Justice John Marshall put it, not "important subjects, which must be entirely regulated by the legislature itself," but rather "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details" (*Wayman v. Southard*, 25 U.S. 1 [1825], 43–46). We cannot infer that simply because nondelegation challenges failed that the nondelegation doctrine was not in force—just as we could not infer that if freedom of religion challenges to government policies generally fail there is no robust freedom of religion doctrine. We can only infer that the nondelegation doctrine was not robust if the courts were unwilling to enforce it in cases where a robust nondelegation doctrine would have been enforced. The second section of this article explores the substantive issues in many of the pre-1900 nondelegation cases to show that many statutes were upheld because they did not delegate legislative power in the first place. Therefore, the number of cases in which the statutes were upheld is not a sufficient indicator of the strength of the nondelegation doctrine in the nineteenth century.

Third, to show that the judiciary did not enforce a robust nondelegation principle, one would have to clearly define the concept of a robust nondelegation principle. An invalidation rate of 17 percent of statutes on nondelegation grounds might actually be indicative of a robust doctrine. (Indeed, progressive critics of

the Supreme Court often claimed that an almost identical invalidation rate was evidence of a dangerous and robust substantive due process doctrine.) Certainly the progressive reformers of the early twentieth century believed that there was a robust nondelegation doctrine and explained they were revising, not continuing, established constitutional doctrines. The third section of this article explains that reformers of the Progressive Era and New Deal periods believed that the courts had enforced the nondelegation doctrine and that they had to challenge the established understanding of the nondelegation doctrine to pave the way for a modern administrative state. While not dispositive, the testimony of these reformers suggests that the invalidation rate was high enough prior to 1940 to dramatically affect the status of delegations to the executive.

## I. LEGISLATIVE ENFORCEMENT OF THE NONDELEGATION PRINCIPLE

Because legal academics dominate the discussion of the nondelegation doctrine, scholarly attention focuses on case law and judicial elucidation of the principle. This focuses too narrowly on the *litigation* of a constitutional principle. Constitutional principles bind not only courts of law but also all officials who take an oath to uphold the Constitution and to carry out its provisions. Perhaps nobody has been more influential than Whittington in calling attention to the importance of nonjudicial "construction" of constitutional meaning in American history (Whittington 1999). Therefore, any investigation into the application of the nondelegation doctrine in the early republic must begin not with the judiciary but with the legislatures that wrote statutes granting authority to the executive. A relatively brief examination of congressional debates in the first decades of American history reveals that, on many important questions, the nondelegation principle was employed to limit statutory delegations to the executive.

### A. Congress's Confrontation with Nondelegation

The most famous and one of the most illustrative episodes involving delegation came in the Second Congress. From 1790 to 1792, members of Congress engaged in a vigorous debate on the specificity of the law establishing post roads. Did Congress itself have to specify the route of the roads in detail or could it delegate that authority to the president or postmaster general? As Leonard White, the great historian of administrative power in America, has explained, "With great persistence the Federalists tried on five successive occasions to vest the power in the executive

but without success" (White 1948/1965, 78). They introduced an amendment to a bill that, instead of specifically designating the route by which the mail was to be carried, would authorize mail carriage "by such route as the President of the United States shall, from time to time, cause to be established" (*Annals* III [1791], 229). Representative John Page of Virginia objected: "If the motion . . . succeeds," he said, "I shall make one which will save a great deal of time and money, by making a short session of it." If Congress can give this power to the president, he argued, "it may leave to him any other business of legislation, and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction" (*Annals III* [1791], 233). Samuel Livermore of New Hampshire opposed the Federalists' amendment because Congress could not "with propriety delegate that power which they were themselves appointed to exercise."

Some Federalists took the nondelegation argument head on. Theodore Sedgwick argued that while "it was impossible precisely to define a boundary line between the business of Legislative and Executive," he believed that "as a general rule, the establishment of principles was the peculiar province of the former, and the execution of them, that of the latter" (*Annals III* [1791], 239–40). Sedgwick turned the opponents' *reductio ad absurdum* on its head. The Constitution empowered Congress to borrow money, "but is it understood that Congress are to go into a body to borrow every sum that may be required?" Congress can "coin money"; did this mean that "they might be obliged to turn coiners, and work the Mint themselves?" Even those who defended the delegation of this decision to the executive believed that there were limits to delegation. They simply denied that the specification of the postal routes was anything more than the execution of law. Nevertheless, as White indicates, the Federalists lost the argument, and the statute specified the route of the post roads in great detail.

Congress was reluctant to delegate legislative powers in other contexts and often invoked the nondelegation principle as a constraint on its ability to delegate. Referring matters to executive departments for reports and proposed legislation, common during the early republic, prompted much criticism from members of Congress on nondelegation grounds. In 1792, while debating one such reference, John Mercer took a swipe at Alexander Hamilton, saying that "I have long remarked in this House that the executive, or rather the Treasury Department, was really the efficient Legislature of this country" (*Annals III* [1792], 351). Madison agreed: "[A] reference to the Secretary of the Treasury on subjects of loans, taxes, and provision for loans . . . was, in fact, a delegation of the authority of the Legislature, although it would admit of much sophistical argument to the contrary" (*Annals III* [1792], 722).

In response, Federalists did not scoff at the notion of a nondelegation principle. Instead, they argued that referring matters to department heads was legitimate, as long as Congress has the final word in passing the legislation proposed. William Smith of North Carolina, for instance, responded that "[t]he ultimate decision . . . in no one point, is relinquished by such a reference. If such a reference was unconstitutional, he observed, much business had been conducted by the House in an unconstitutional manner, by repeated references to the Heads of Departments" (*Annals III* [1792]: 697). Again, both sides of the debate agreed that the nondelegation doctrine was legitimate; they simply disagreed about what the doctrine required. In this instance, the Federalists likely had the better of the argument. Congress was not delegating its power to decide on legislative matters but merely allowing an outside body to advise it. So while the practice was upheld, this would not be evidence that the members of Congress were not serious about the nondelegation doctrine.

Debates invoking the nondelegation principle as a check on lawmaking extended into the nineteenth century. In 1808, in the midst of war between France and Britain, Congress enacted a statute that allowed the president to suspend an embargo upon the suspension of hostilities or when one of the nations stopped violating the United States' neutral commerce. Philip Hamburger explains that this law "led to lengthy protests in the House of Representatives and in the press" (Hamburger 2014, 108). One representative, Philip Key, claimed that the law represented "the most anti-republican doctrine ever advanced on the floor of this House." He stressed that "to suspend or repeal a law is a legislative act, and we cannot transfer the power of legislating from ourselves to the president" (*Annals XVIII* [1808], 2125).[5]

The nondelegation principle was powerful enough during this legislative debate to persuade members who supported the policy of suspending the embargo nevertheless to oppose the measure. John Rowan, for instance, stated that "I believe . . . that the Constitution does not permit us to pass it, if expediency does. . . . I am willing to repeal [the embargo], or to define certain events upon which it shall be repealed; but I am unwilling to vest a discretionary power in the President to repeal or modify it" (*Annals XVIII* [1808], 2232).[6] "So far, then, as we choose to confine ourselves to

5. Key was joined by John Randolph in opposing the legislation, but the *Annals* merely state that "Mr. Randolph opposed the resolution at considerable length." Therefore, we cannot say whether Randolph voiced similar constitutional concerns.

6. Rowan also articulated the rationale for the nondelegation principle in the principal-agent theory undergirding the social compact: "I take it as correct, that our power is itself derivative. Those who

the Constitution for authority," he concluded, "it seems to me none will be found there which will sanction the delegation of the power contended for" (*Annals XVIII* [1808], 2234). It is true that Philip Key, John Rowan, and others were in the minority, and the measure passed, but as Philip Hamburger notes, "their logic prevailed for much of the rest [of] the century." Subsequent statutes clarified that the president could not suspend the law at his own discretion but was merely declaring the facts that Congress declared would trigger or suspend the law. These subsequent statutes, it could be argued, cured the legislation of its constitutional defect, so that when its constitutionality was challenged in the Supreme Court in the 1813 case *Cargo of the Brig Aurora v. United States* (discussed later in Section II), the law was allowed to stand. This episode illustrates an important context in which the nondelegation principle was applied. It was not immediately used to strike down legislation in the courts and did not even prevail initially within Congress itself, but over time, the argument changed the law, which avoided the necessity of judicial invalidation. Like the other episodes covered in this section, therefore, this debate reveals the importance of the nondelegation principle within Congress during the early republic.

Admittedly, as scholars have noted, many early statutes enacted by Congress granted power to the president to make regulations governing matters such as pensions for wounded soldiers, trade with Indian tribes, and foreign trade. In each of these cases, however, the regulatory powers granted were executive merely for the sake of carrying out the law contained in the statute. As Philip Hamburger summarizes in his treatment of these statutes, "All such executive regulations affected the public, but did not purport to bind them" (Hamburger 2014, 87). The kinds of regulations envisioned by the law, in other words, had to deal with matters that were properly executive, such as the methods for applying for pensions, the methods for estimating the value of goods to be subjected to tariffs, and the like.

It should not be surprising that we see a great deal of "legislative self-restraint" and few significant delegations in the early national period. The principal legislative pathology of the Confederation Period was not reckless delegation but the tendency of legislatures to suck executive and judicial powers into their "impetuous vortex," as James Madison colorfully wrote in *Federalist* no. 48. It was not until the twentieth century that legislators began to discern the advantages of delegation.

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have given powers to us have carefully guarded them. . . . The people, then, are the fountain of power, and power must be derived from them by delegation or usurpation. If by delegation, it must be by a decided expression of their will. The Constitution is the instrument which contains this expression. . . . By this bill the responsibility is confounded, and the legislative responsibility committed to the Executive. Is there any such authority delegated by the Constitution?" (*Annals XVIII* [1808], 2233).

We can see the internalized nondelegation force at work on the subject that preoccupied Congress constantly throughout the nineteenth century: tariffs. Members of Congress wrote the tariff schedule in excruciating detail and kept tight control over the spending of the revenue that resulted from it. It was not until the 1890s that Congress began to delegate tariff discretion to the president and not until the 1920s that it established an "executive budget." Late into the nineteenth century proto-progressive reformers complained that Congress still meddled too much in the administrative details of government, as the title of Woodrow Wilson's first work, *Congressional Government*, indicates (Wilson 1885/1956).

Admittedly, the previous examples, spanning from the establishment of post roads and references to the executive to tariff and trade legislation, do not conclusively demonstrate that Congress never delegated its legislative powers or that the nondelegation doctrine was the sole basis for the outcomes of the debates. It is certainly plausible that Congress refused to delegate the details of tariff or post road legislation to the executive because it wanted to make those decisions itself for political reasons—namely to provide benefits to constituents through the designation of post roads or tariff rates. Still, these examples demonstrate that members of Congress repeatedly articulated the logic and basic principles of nondelegation in a variety of contexts and that these arguments correlated with actual legislative outcomes in which Congress did not delegate its powers. This is evidence that must be considered in determining whether the nondelegation doctrine was mythical or real.

### B. State Legislatures and the Reluctance to Delegate

In short, Congress was generally reluctant to delegate discretionary power to the executive prior to the Civil War, a fact that scholars in many fields have long noted. The same was true at the state level as well. In most states during the antebellum period legislatures entered into the business of administration, assuming direct control over matters that could rightfully be considered executive, such as the establishment of prisons and the construction of canals. One economic history of New York State concludes that during the antebellum period the state legislature was "the principal regulatory agency in state government." The legislature "consumed countless hours and days overseeing the day-to-day affairs of counties, cities, and towns, administering the construction and maintenance of roads and highways, and supervising the collection of taxes" (Gunn 1988, 81, 84). Another writer observes that in New Jersey the state legislature directly administered debt relief and tax relief on particular commodities rather than leaving such activities to the executive (Shumer 1989, 79–80).

The great administrative law scholar Ernst Freund, writing at the end of the nineteenth century, explained why the state legislatures behaved this way. Unlike bureaucratic systems in France and Germany, where the chief executive possessed control over all subordinates, at the state level legislatures "withheld from the chief executive all the functions of control, direction and review, which in Europe and also in our federal government hold the administrative organization together." In short, the American states lacked "unitary executives"; and the chief executives in the states had no control over subordinates, "the laws are framed in such a manner that the duty of executing their provisions is laid upon ministerial officers directly, and upon them alone; that is to say, each officer has his specific and independent jurisdiction." Instead of a unified, hierarchical system of chief executive control over administration, state legislatures established a disjointed, individualized system of administrative offices. This meant that states' administrative officers were not held accountable by an elected chief executive and therefore could not be trusted with discretion. As Freund explained, "This system compels the legislature to specify in detail every power which it delegates to any authority" so that "the officer has no one to look to for instruction and guidance except the letter of the statute. Thus we arrive at the fundamental principles of our administrative system: no executive power without express statutory authority—the principle of enumeration; minute regulation of nearly all executive functions, so that they become mere ministerial acts" (Freund 1894, 409–10). Again, Freund's explanation for the refusal of state legislatures to grant discretion to administrative actors does not explicitly mention the nondelegation doctrine as a fundamental rationale. Nevertheless, Freund was able to articulate the broad and coherent vision of administrative law that prevailed in the states in the nineteenth century, one which relied upon specific statutory requirements and the reduction of discretion enforced by independent courts.

Given how frequently state legislatures constrained administrative discretion, it is little wonder that Alexis de Tocqueville observed that in antebellum America "the legislative power extends to more objects, than among us [in France]. The legislator penetrates in a way into the very heart of administration; the law descends to minute details . . . it thus encloses secondary bodies and their administrators in a multitude of strict and rigorously defined obligations" (Tocqueville 1835/2000, 69). A century later, the administrative law scholar Louis Jaffe similarly acknowledged that "[t]he nineteenth century expressed a preference for the specific rule, avowedly to promote certainty, but perhaps even more because it reduced the role of administration" (Jaffe 1947a, 364). As Congress handled the tariff, state legislatures passed highly detailed statutes in the antebellum period, often assuming

control over administrative details that could have been delegated to executive officials. The leading progressive legal scholar of his day and Dean of Harvard Law School Roscoe Pound noted in 1936 that "[i]n more than one of our states until well after the Revolution, legislatures claimed and exercised the plenary powers over adjudication and administration which belonged to the British Parliament" (Pound 1938, 42).[7] And in many instances, as shown previously, Congress discussed the nondelegation principle in its legislative debates. These cases display a general commitment to the nondelegation doctrine, and statutes were even revised in light of nondelegation objections. All of this is certainly admissible evidence that the nondelegation doctrine existed and affected the way laws were written and carried out, yet it goes unnoticed if one only looks at court cases in which the doctrine was litigated. Nevertheless, as the next section will demonstrate, the nondelegation doctrine's effect was not limited to legislative debates. It was also an important principle of constitutional law that influenced both state and federal legislative decisions.

## II. JUDICIAL ENFORCEMENT OF THE NONDELEGATION PRINCIPLE

Whittington and Iuliano compiled their dataset by doing a Westlaw search of all federal and state cases with "delegation" and/or cognate terms and then excluding those that did not actually involve a nondelegation challenge (Whittington and Iuliano 2017, 418 n. 251). However, this method of searching might be insufficiently inclusive. It may fail to identify cases that do not contain "delegation" terms but that actually were, or could be interpreted as, nondelegation cases. A close look at some of the major federal and state cases that debated the nondelegation principle, which we undertake in this section, reveals that the doctrine was profoundly important and that the courts developed a jurisprudence that enforced it, even if imperfectly.

### A. Federal Cases

Although significant congressional delegations were rare, the courts were not inattentive to the doctrine. Most often noted were John Marshall's decisions in *Aurora*

7. See also Pound (1938), 54–55: "there was a tendency of legislatures [in the nineteenth century] to interfere with executive administration. . . . There were legislative prescribings of appointment of particular persons to particular offices by the governor. There was special legislation as to local highway improvements where today we should leave the matter to a board or commission."

and *Wayman*. In 1810, trying to vindicate American neutral rights in the Anglo-French war, Congress enacted a law that opened American commerce with both Britain and France and let the president reinstate an embargo against either power thirty days after he determined that the other had stopped violating American rights. In November President Madison declared that France had complied, and so an embargo would be applied to Britain as of February 1811. The *Aurora* left Liverpool in December 1810, arrived in New Orleans in February 1811, and was seized and sold for violating the embargo. The Supreme Court rejected the owners' factual claim that the ship had left Britain before the president's declaration had been publicized, as well as their constitutional argument that Congress could not give the president the legislative power to impose an embargo. Justice William Johnson saw "no sufficient reason why the legislature should not exercise its discretion . . . either expressly or conditionally, as their judgment should direct" (*Cargo of the Brig Aurora v. United States*, 11 U.S. 382 [1813], 388).

The *Aurora* case concerned foreign policy where, as Locke theorized and history confirmed, constitutional limits are necessarily looser than in domestic policy (Schoenbrod 1993, 31). A decade later the Court addressed the delegation question in a domestic matter in what has become the most famous founding-era statement on the question. In the Judiciary Act of 1789 and subsequent acts, Congress empowered the courts to make rules concerning judicial proceedings. The Supreme Court used this to require that all court judgments be paid in gold or silver coin. This rule conflicted with a Kentucky law that made the paper notes of the Bank of Kentucky legal tender.[8] The defendants denied that the national government could limit state power in this matter. Or, if Congress did have the power, they argued that it could not constitutionally delegate this power to the courts.

Chief Justice John Marshall upheld the courts' power and Congress' power to delegate it. Congress could not delegate "powers which are strictly and exclusively legislative," he admitted, but it could delegate "powers which the legislature may rightfully exercise itself." Congress could have prescribed particular rules of judicial process because it could amend rules adopted by the courts. Similarly, it could coin money itself, or let the Mint do it. He distinguished "important subjects, which must be entirely regulated by the legislature itself" and "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details." Marshall explained that

8. Five years later, the Court held that state bank notes were altogether unconstitutional, violating Article I, Section 10's prohibition of state "bills of credit." Seven years later the Court reversed that decision—*Craig v. Missouri*, 29 U.S. 410 (1830); *Briscoe v. Bank of Kentucky*, 26 U.S. 357 (1837).

"the maker of the law may commit something to the discretion of other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily" (*Wayman v. Southard*, 25 U.S. 1 [1825], 43–46).

Marshall's decision did hold that there was a line beyond which Congress could not delegate. It was similar to his ruling in *McCulloch v. Maryland* that, while the Court would give Congress the benefit of the doubt, it would declare laws that were "pretexts" for exercising unconstitutional powers "not the law of the land." Like the Constitution itself, a statute could never provide for every possible contingent case that might arise under it. As he stated in *McCulloch*:

> A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. (*McCulloch v. Maryland*, 17. U.S. 316 [1819], 407)

But the chief justice did not offer much guidance as to how to define the delegation limit. As one scholar put it, his decision was a tautology, that "Congress must make whatever decisions are important enough to the statutory scheme in question so that Congress must make them" (Lawson 2002, 358).[9] Marshall appeared to say that delegation was a "political question," one not justiciable, except perhaps in clear and egregious cases. This established the approach that the Supreme Court would take toward the question until the present day.

The *Aurora* and *Wayman* cases upheld acts challenged on nondelegation grounds, while confirming that there were *some* limits to delegation. In other cases, the nondelegation principle is discernable, though the case may not be classified as a nondelegation one. For example, during the 1790s "quasi-war" with France, Congress prohibited American trade with France, and empowered the president and the Navy to capture sell any vessels that were bound *to* French ports. President Adams issued an order directing American naval vessels to capture ships that had departed *from* French ports. In 1799 two American frigates intercepted the *Flying*

9. See also Ziaja (2008), 931.

*Fish*, which had left a French Caribbean port and was headed to the United States. They took her to Boston to be sold as a prize. The federal district court ruled that they had exceeded their authority under the act of Congress and restored the *Flying Fish* to her owners. The ship's owners then won an award of $8504 against Captain George Little of the frigate *Boston*. Little appealed that judgment to the Supreme Court.

Marshall upheld the award to the owners of the *Flying Fish*. He recognized that President Adams was only trying to help correct a hastily drafted piece of legislation. "It was so obvious that if only vessels sailing *to* a French port could be seized on the high seas, that the law would be very often evaded." The president's interpretation was "much better calculated to give it effect" (*Little v. Barreme*, 6. U.S. 170 [1804], 177). Nevertheless, the Court could not assume that Congress had not meant what it said. (Congress ultimately paid the judgment levied against Captain Little.) In cases like this, where the courts hold the executive to have exceeded power given to him by the legislature, the courts respect the nondelegation doctrine by holding that delegation is not to be implied. *Little* is usually seen as a case of *ultra vires*, simply holding that the president cannot exceed the power that Congress grants. But in a broader sense every such case contains a nondelegation kernel.

The Court was notably deferential to the federal government when it came to foreign policy and the related question of immigration. Indeed, it let immigration enforcement officers exercise powers to deport allegedly illegal aliens in ways that showed the danger of delegated power becoming arbitrary and capricious.[10] Anti-Chinese prejudice in California was potentially checked by the Reconstruction amendments, which prohibited the states from abridging the privileges and immunities of citizens; depriving any person of life, liberty, or property without due process; or denying to any person the equal protection of the law (Maltz 1994). To get around these constitutional guarantees, the city of San Francisco devised clever schemes of delegation to harass the Chinese. San Francisco required the approval of "twelve citizens and taxpayers in the block in which the laundry is to be established" as a way of driving the Chinese out of business. A federal circuit court voided this ordinance in 1882. Justice Stephen Field wrote that "the supervisors are, it is true, empowered to license . . . but their power cannot be delegated by them to others, or its exercise made dependent upon others' consent. The power of legislation vested in them is a public trust."[11]

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10. See, for example, *United States v. Ju Toy*, 198 U.S. 253 (1905), especially Justice Brewer's dissenting opinion.

11. *In re Quong Woo*, 13 F. 229 (C.C. CA, 1882).

Undaunted, the city prohibited the operation of laundries in wooden buildings unless the owners secured a license from the Board of Supervisors. The Board granted these licenses to all but one white applicant and denied them to all Chinese operators. Yick Wo, who had operated a laundry for over twenty years with the approval of the city fire warden, was fined for continuing to work without a license. The California Supreme Court and a federal circuit court upheld the conviction, but the U.S. Supreme Court unanimously overturned it.

*Yick Wo* is not usually seen as a nondelegation case but could be classified as such. Justice Stanley Matthews wrote that the San Francisco ordinances "seem intended to confer, and actually do confer, not discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power." The law provided no standards to the supervisors. They could refuse licenses "without reason and without responsibility." This was not "discretion in the legal sense of the term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint." It offended the fundamental principle that we had "a government of laws and not of men." It practically invited discrimination against unpopular groups. So, although the law was neutral on its face, it still amounted to a denial of the equal protection of the laws (*Yick Wo v. Hopkins*, 118 U.S. 356 [1886], 366, 373). While deferential in foreign policy cases, the Court successfully resisted this effort to extend foreign prerogative to domestic affairs.

*Yick Wo* could be seen as a nondelegation case because the city had established a board to do indirectly what it knew it could not do directly. Certainly the Court would have struck down an ordinance that explicitly prohibited only Chinese from operating laundries in wooden buildings. It reinforces the point that legislators cannot delegate powers that they do not possess (see discussion of the Labor Board cases later in this section), akin to the holding in *Little* that the president cannot assume undelegated executive powers. Years later the Court similarly used the nondelegation principle to prevent Texas from disfranchising black voters.[12]

Similarly, the nondelegation principle can be seen at work in the creation and initial judicial review of the first independent regulatory commission, the Interstate Commerce Commission (ICC). Some members of Congress objected that the commission violated the principle of the separation of powers by combining legislative, executive, and judicial powers.[13] The commissioners were appointed by the president and confirmed by the Senate, which made them look like traditional

12. *Nixon v. Condon*, 286 U.S. 73 (1932).

13. See Haney, Lewis H. 1910. *A Congressional History of Railways in the United States*, Vol. 2. New York: Augustus M. Kelley, 308, 312.

executive-branch officers, but rate-making looked like a legislative function and the commission's determination of particular cases looked judicial. The commission could hear complaints, subpoena records and witnesses, and issue "cease and desist" orders if it found unreasonable rates, but the act did not explicitly give the commission the power to set reasonable rates in their place. Here too, as one historian has noted, "[n]obody really knew what the act meant or how it could be applied" (Jones 1966, 612).

But the federal courts kept the commission limited to executive functions, making it look like a parallel to the Justice Department (Ely 2012). In 1889 a federal circuit court indicated that the commission's findings of fact were not entitled to any judicial deference. The ICC was not an inferior court but was "invested with only administrative powers of supervision and investigation" (*Kentucky & Indiana Bridge Co. v. Louisville & Nashville Ry.*, 37 F. 567 [1889]). The Court regarded the commission as at best an advisory body to the judges, "in essence a master in chancery to the Court." The determination of whether a rate was "reasonable" was a judicial question, and the commission was not a court. The Supreme Court held that the commission had no power to fix rates after it had determined that a rate was unreasonable. The Court would not assume that Congress had given such power by implication. Rate-setting was a legislative power, and the commission was not a legislature (Prouty 1909). However, the Court did assume that Congress could delegate its rate-setting power to "some subordinate tribunal" if it chose (*ICC v. Cincinnati, New Orleans & Texas Pacific Ry.*, 167 U.S. 479 [1897], 494). The Court also held that attempts to compel shippers to testify violated the Fifth Amendment's protection against self-incrimination. Congress responded by providing for compulsory testimony with immunity, which the Court narrowly upheld.[14] The Court would eventually allow more explicit delegation of legislative power to the ICC under the Hepburn Act of 1906; these interpretations of the 1887 act show a lively suspicion of implied delegation.

Most scholars maintain that the U.S. Supreme Court only used the nondelegation principle to invalidate legislation in two cases—the *Panama Refining* and *Schechter* cases, both involving the National Industrial Recovery Act, in 1935.[15] This act was particularly egregious. Although the Court did explicitly invoke the nondelegation principle ("this is delegation run riot," as Justice Benjamin N. Cardozo famously put it), the act suffered from other constitutional infirmities that could have killed it

14. *Brown v. Walker*, 161 U.S. 591 (1896).

15. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter v. United States*, 295 U.S. 495 (1935).

without such invocation. Sometimes the 1936 case of *Carter v. Carter Coal Co.* makes it onto the list as a third, as Justice George Sutherland condemned the challenged act as "legislative delegation in its most obnoxious form."[16] Yet almost nobody cites *United States v. L. Cohen Grocery*, in which the Court overturned a conviction under the World War One Lever Act, which punished people for charging "unjust or unreasonable prices," leaving to enforcement officers the definition of those terms.[17] One scholar has recently interpreted *Erie Railroad v. Tompkins* as a nondelegation case.[18] Though the Court did not put in such terms, it held that "Congress cannot empower federal courts to govern the nation's commercial law without providing an intelligible principle" (Nielson 2011). This famous (or infamous) decision, which even a sympathetic Brandeis scholar has called "Gnostic and pragmatic . . . abstract, abbreviated, and to some extent, purposely misleading" (Purcell 2000, 151, 195), and another has called "wrong, out of step, and pernicious . . . the worst decision of all time" (Sherry 2012), has been very difficult to categorize. An argument can be made that it fits into the penumbra of nondelegation cases.

Other New Deal cases followed a similar pattern of laws that violated the nondelegation principle but which the Court struck down on other grounds and therefore did not reach that issue. The dissenters in the Labor Board Cases (such as *Jones & Laughlin*) would have struck down the National Labor Relations Act on nondelegation grounds, but they instead focused on the limited nature of Congress's power to regulate interstate commerce. As they explained, Congress was delegating powers *that it did not have* (as in *Little* and *Yick Wo*) to the Labor Board. If Congress cannot delegate legislative powers that the people delegated to it through the Constitution, it certainly follows that Congress cannot delegate powers that were *not* given to it, they reasoned. In these cases, the doctrine of limited and enumerated powers precluded or eclipsed the nondelegation rationale, which would have otherwise applied.

In short, a narrow focus on the word "delegation" and its cognates potentially excludes a large body of law dealing with the nondelegation doctrine. Many of the cases discussed previously are overlooked as nondelegation cases in spite of the fact that the Courts applied some version of a nondelegation principle in resolving them. Overlooking these cases makes it easy to think that the federal courts refused to enforce the nondelegation doctrine outside of two cases decided in 1935, at the height of the New Deal. A more careful reading reveals a very different picture:

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

17. *United States v. L. Cohen Grocery*, 255 U.S. 81 (1921). See Schoenbrod (1993).

18. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

the Supreme Court frequently discussed the nondelegation principle, consistently defended it, and applied it in many important cases to invalidate statutes or executive actions.

## B. State Delegation Cases

The nondelegation principle was enforced even more widely at the state level, where most government activity was undertaken prior to the twentieth century. Many of the cases involved were "local option" laws or referenda. Under local option laws, state governments allowed local elections to determine whether a statewide law would be enforced within that municipality. (Today we are mostly familiar with these laws because they address the legality of liquor sales.) Referenda, of course, involve submissions of proposed laws by state legislatures to the people for an up-or-down vote in a statewide election. The nineteenth-century versions of these laws typically involved school taxes or bans on alcohol sales. As Whittington and Iuliano acknowledge, the preponderance of nondelegation cases prior to 1880 (74 percent) involved delegations either to local governments or to the voters themselves (Whittington and Iuliano 2017, 420). While they allege that "all these cases were understood to implicate the same basic principle of American constitutional law," namely "the extent to which legislatures could delegate power to other entities," the constitutional issues differ significantly when the legislature delegates back to the voters as opposed to the executive, the judiciary, or an administrative agency (Whittington and Iuliano 2017, 423). Therefore, citing the lower invalidation rate of local option laws and referenda under the nondelegation doctrine should not be accepted as evidence that the doctrine did not exist. Referenda are the opposite of nondelegation—the legislative agents are giving back to the constituent people a power that they did not wish to retain. It would be more accurate to examine the invalidation rate of cases where the legislature delegated power to the executive, judiciary, or an agency and then examine the facts of those cases to see whether the legislature truly delegated the power to make law.

Most courts prior to 1880 understood that the delegation analysis had to change when the legislature enacted local option laws or referenda. In *Barto v. Himrod* (1853), for instance, the New York Court of Appeals declared that a statewide referendum to establish free public schools throughout the state was unconstitutional. In the words of the court, "The Senate and Assembly are the only bodies of men clothed with the power of general legislation. . . . The people reserved no part of it to themselves, except in regard to laws creating a public debt, and can,

therefore, exercise it in no other case" (*Barto v. Himrod*, 8 N.Y. 483 [1853], 488).[19] This case, therefore, would count under Whittington and Iuliano's analysis as a nondelegation invalidation. However, because the delegation was to the people—to the principal that had established the agent legislature and that could never fully alienate its power—the analysis in this case was actually flawed. It was not a correct application of the nondelegation doctrine because the legislature returned the power back to the people rather than subdelegating it to another body.[20] The court struck down what might be called "supra-delegation" rather than "sub-delegation."

By contrast, the Supreme Court of Ohio correctly applied the nondelegation doctrine in this area in a prominent 1852 case that was eventually cited by the Supreme Court in *Field v. Clark* and *J. W. Hampton, Jr., & Co. v. United States*. In the Ohio case, involving a state law requiring county commissioners, after referendum, to subscribe to the stock of a company established to build a new railroad, the court affirmed that "the general assembly cannot surrender any portion of the legislative authority with which it is invested" and proclaimed that this "is a proposition too clear for argument, and is denied by no one" (*Cincinnati, Wilmington & Zanesville Railroad Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77 [1852], 87). Here, then, is a state case that *upheld* the statute but correctly applied the nondelegation doctrine and articulated its rationale. Like other cases that failed to overturn statutes because they were compatible with the nondelegation doctrine, Whittington and Iuliano's analysis would fail to account for this evidence.

In short, while Louis Jaffe explained that "a considerable majority of the state courts held a state-wide referendum unconstitutional" and added that "[f]or a time local option met the same fate," these cases should not be considered part of the overall nondelegation picture (Jaffe 1947b, 562–3). *Locke's Appeal*, one of the most famous nineteenth-century cases involving local option laws, like *Cincinnati, Wilmington & Zanesville Railroad*, applied the rationale correctly. In *Locke's Appeal*, the court acknowledged that "a power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another." However, in this instance, the legislature did not delegate lawmaking power but merely gave the people the opportunity to say when the law takes effect. Under this rationale,

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19. The New York State Constitution had a legislative "vesting" clause nearly identical to the U.S. Constitution's.

20. The language of "subdelegation" is used by Philip Hamburger (2014, 377ff). The subdelegation analysis, while accurate, must be buttressed by social compact theory, which holds that the people can never alienate their sovereign power to make the laws. This explains why delegations by the legislature back to the people are not subdelegations. "See Joseph Postell, "'The People Surrender Nothing': Social Compact Theory, Republicanism, and the Modern Administrative State," *Missouri Law Review* 81 (2016): 1003–1022.

the local option law was merely another example of "conditional legislation" that the Supreme Court upheld in *Brig Aurora* and *Field v. Clark*. The court explained that "[t]he law takes effect just as the judges determine, yet who says it is the Court that legislates?" (*Locke's Appeal*, 72 Pa. 491 [1873], 496, 498) Similarly, in this case, the court argued that the people did not write the law but merely determined whether it would take effect.

In short, to gain an accurate picture of the relevance of the nondelegation doctrine in the nineteenth century, one would have to disaggregate the conditional legislation, local option, and referenda cases out of the analysis. Those cases did not involve delegations analogous to those prevalent in statutes enacted in the twentieth and twenty-first centuries. And in many of these cases the courts laid out the nondelegation principle, grounded it in social compact theory and agency law, and then on those grounds proceeded to uphold the statute. These cases applied a real nondelegation doctrine, albeit not invalidating the statute. They did not ignore a fictional nondelegation doctrine. As Jaffe explains, "The local option cases gave us the inadequate terminology for which until very recent times there was no substitute" (1947b, 565). In other cases, where the delegation of power was to the executive or to an agency rather than the people, state courts often intervened to invalidate the laws. Jaffe observes, for instance, that "state legislatures originally delegating the preparation of standard fire insurance forms were forced by adverse judicial decision to do the work themselves" (1947a, 361–2).

While the nondelegation doctrine played a role in modifying state statutes prior to 1900, it played an even greater role in the states between 1900 and 1940. It was a major issue in late-nineteenth- and early-twentieth-century politics. In several cases courts struck down insurance laws on nondelegation grounds.[21] A 1936 case in New Hampshire invalidated a state law authorizing price fixing and general regulation of the milk industry.[22] Several other agricultural acts were invalidated in cases in Washington, Oregon, Connecticut, and Maryland.[23] Judge Rosenberry of the Wisconsin Supreme Court, a particularly prominent figure in the nondelegation debates, upheld insurance laws but invalidated a "Mini-NIRA"—a law authorizing an administrative officer to eliminate unfair competition in barbering. "If the legislature may delegate to an individual or a group legislative power to do what the administrative did in this case," he concluded, "we have taken a long step

21. See, for instance, *O'Neil v. American Fire Ins. Co.*, 166 Pa. 72 (1895); *Anderson v. Manchester Fire Ass. Co.*, 59 Minn. 182 (1895); and *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63 (1896).

22. *Ferretti v. Jackson*, 88 N.H. 296 (1936).

23. See Jaffe 1947b, n94, for cases.

in becoming a nation of licensees instead of a nation of freemen."[24] The Illinois Supreme Court, which Jaffe called "a veritable graveyard of delegation," struck down many statutes even after 1900.[25] In *People* ex. rel. *Gomber v. Sholem* the court invalidated a law authorizing fire marshals to order demolition or repair of buildings that posed a fire hazard on the grounds that the law offered no standards to guide the marshals' discretion.[26] After describing this and a litany of other cases, Jaffe concluded in a 1947 article that "[t]he judicial uncertainty and subjectivism shown by these cases is not restricted to Illinois, and is an undoubted weakness of the delegation doctrine as presently interpreted in the states" (Jaffe 1947b, 584). Even at this late date, Jaffe held, many of the state courts were using the nondelegation doctrine to invalidate statutes, causing much consternation. This is hardly the stuff of a mythical constitutional principle.[27]

## III. THE ROBUSTNESS OF THE NONDELEGATION PRINCIPLE BEFORE AND DURING THE PROGRESSIVE ERA

The previous sections have attempted to demonstrate that the nondelegation doctrine served as a potent limit on legislative delegations to administrative actors by showing that the principle was invoked both during the legislative process and in some judicial decisions. In fact, because of the importance of nondelegation principles to legislatures, many potential delegations were prevented before they could become objects of constitutional litigation. Some scholars have claimed that, although judicial invalidation of progressive social welfare legislation on due process/liberty of contract grounds may not have been as numerous as Progressives complained, they were prophylactic, preventing legislatures from enacting them (Kens 1991). This section supplements this evidence in favor of the nondelegation doctrine's significance with Progressive Era statements by leading thinkers and jurists about the need to move away from the prevailing nineteenth-century understanding of the doctrine for the sake of constructing an administrative state. If the

24. *State v. Neveau*, 237 Wis. 85 (1940), *rehearing* 237 Wis. 108 (1941).

25. Jaffe, "Delegation of Legislative Power: II," 564.

26. *People* ex. rel. *Gomber v. Sholem*, 294 Ill. 204 (1920).

27. However, in fairness, Jaffe also concluded that "it cannot be justly charged that the doctrine has been essentially restrictive. . . . This judicial waywardness has promoted confusing and conflicting results, but it is not demonstrable that such decisions have, unless perhaps in Illinois, done more than temporarily delay reforms." He did warn, however, that "[t]here is nevertheless a danger that restrictive and negative conceptions concerning delegation will hamper its potentialities" (Jaffe 1947b, 593).

nondelegation doctrine were as toothless as Whittington and Iuliano suggest, there would have been no need for reformers to modify the doctrine in order to accommodate the administrative state. Nevertheless, reformers insisted upon the need to modify the doctrine.[28] This is perhaps the most compelling evidence against Whittington and Iuliano's thesis. After all, if the nondelegation doctrine were indeed mythical, Progressives would have not needed to be so concerned about it, nor would they have described the relaxed posture of twentieth-century courts as a fundamental change.

### A. 17 Percent Is a Nondelegation Doctrine with Teeth

Whittington and Iuliano note that in their dataset of nondelegation cases, 17 percent of statutes were struck down by reviewing courts. While this percentage might appear small in the abstract, it could be interpreted as evidence of a robust nondelegation doctrine. If the federal courts invalidated regulatory statutes at a similar rate in the twenty-first century, it is likely that legal commentators would have noted the influence of the doctrine, not its irrelevance. Progressives, in fact, were highly concerned about a nearly identical invalidation rate in the "substantive due process" and "liberty of contract" arenas despite the fact that Harvard Law Professor Charles Warren believed such an invalidation rate showed "the progressiveness of the Supreme Court (Warren 1913a, 1913b, and 1922, II: 741). This article has already noted many cases in the first century of American history as evidence of a robust nondelegation doctrine. This section describes how some of these cases exercised a major influence on politics and policy during the Progressive Era before proceeding to examine major statements by leading thinkers and reformers that there was a powerful nondelegation doctrine, one which needed to be overcome to accommodate the modern state.

As Logan Sawyer has recently explained, the notion "that the nondelegation doctrine is merely a pass-through for functional concerns . . . would have surprised the government lawyers who fought for more than a decade to establish the constitutionality of what are now known as administrative crimes." After all, "every court that heard a criminal prosecution for violations of Interior's grazing regulations dismissed them as inimical to the nondelegation doctrine," and "Interior abandoned criminal prosecutions" as a result (Sawyer 2008, 172). In Sawyer's telling, the nondelegation doctrine "was a significant obstacle to the approval of an

28. See Duff, Patrick W., and Horace E. Whiteside. 1929. "*Delegata Potestas Non Potest Delagari*: A Maxim of American Constitutional Law." *Cornell Law Review* 14: 168–96.

authority widely recognized [by reformers] as necessary to advance an important government interest" (Sawyer 2008, 173). Over several years, federal district courts repeatedly dismissed cases where the Department of Interior brought a criminal prosecution for violating its grazing regulations, "because they applied the classical version of the nondelegation doctrine" (Sawyer 2008, 187).

As mentioned previously, in the early twentieth century the Illinois Supreme Court was responsible for striking down many statutes on nondelegation grounds, and agricultural statutes were struck down in many states. These state cases caused as much consternation to Progressives as the federal cases invalidating Department of Interior prosecutions. Yet if the 17 percent invalidation rate in substantive due process cases mirrored the invalidation rate of nondelegation cases, why did the Progressives focus so much more on the former? The reason is that as the prevalence of legislative delegation increased in the twentieth century, Progressives found that the courts were more willing to acquiesce in the practice of delegation. Instead of agitating for a change in nondelegation jurisprudence, they instead simply explained the shift from the old, robust nondelegation doctrine to the new, lax enforcement of the principle.

### B. "The Administration Has Been Steadily Aggrandized"

Progressive Era reformers were frank and honest about the need to alter established understandings of American constitutionalism. They were more forthright than contemporary defenders of the administrative state. They accepted the tension between the modern administrative state and the traditional approach to America's political institutions. For the sake of clarity they even highlighted these tensions. As Herbert Croly explained in his 1914 book *Progressive Democracy*, since 1900 "the administration has been steadily aggrandized at the expense both of the legislature and of the courts. Legislatures have been compelled to delegate to administrative officials functions which two decades ago would have been considered essentially legislative, and which under the prevailing interpretation of the state constitutions could not have been legally delegated" (Croly 1914, 351). In his view, the nondelegation principle had been enforced up to the turn of the century, and it would have been used to invalidate many contemporary delegations had a significant change in the doctrine not occurred. The law, Croly claimed, had to change in order to accommodate the new administrative arrangements.

This argument—that necessity required that the law yield to the demands of modern government and society—was ubiquitous during the Progressive Era. As Charles Nagel, William Howard Taft's Secretary of Commerce and Labor declared, "the sharp distinction of three departments might be suitable for our

country in the early days; but as the conditions and need for their control became more complicated and novel . . . we bowed to necessity; and when the constitutional right to do this was challenged we had the letter of the Constitution yield to the spirit of the demand" (Nagel 1923, 203). Marvin Rosenberry, Chief Justice of the Wisconsin Supreme Court, wrote for the *American Political Science Review* that "[t]hose who have opposed the creation and extension of administrative tribunals have as a rule had the best of the argument on legal and constitutional grounds, but have been obliged to yield to an irresistible social pressure." In his view, the law was on the side of the nondelegation doctrine, but like Nagel, he believed that necessity was too overwhelming for the law to withstand. Unlike those who sought to fit the delegation of power to administrators within the existing legal and constitutional framework, he advocated for a frank acknowledgement and acceptance of the change in the law. "An attempt to fit administrative law into our legal system," he claimed, "without recognizing that there is no place for it if the doctrine of the separation of powers is to be applied as it was understood in the nineteenth century is an attempt to attain the unattainable." Rather than hide behind equivocations, such as the claim that administrative commissions are exercising "quasi-legislative" and "quasi-judicial" powers, Rosenberry acknowledged that "[t]he doctrine of the non-delegation of governmental power had sufficient force and vitality to set limits for a time," but that "these ideas have lost their vitality, and in many instance are frankly ignored" (Rosenberry 1929, 35–7, 40).

It was Rosenberry who, as Chief Justice of the Wisconsin Supreme Court, sustained the constitutionality of the delegation of the power to prescribe rules for an insurance rating bureau to the state's insurance commissioner in *State v. Whitman*. Writing for the Court, Rosenberry summarized the change that had occurred in the last over the past generation:

> Beginning with the creation of the Interstate Commerce Commission, which in the beginning was little more than an extra legislative committee, there has been a development in our law brought about chiefly by the creation of boards, bureaus and commissions, which has worked and is working a fundamental change. Not only are legislative and judicial powers delegated, but they are exercised in combination, and we not infrequently find powers belonging to the three co-ordinate branches of government combined in a single administrative agency. The change is fundamental, because the law at least in some of its aspects, no longer emanates from the legislature, is no longer wholly declared and enforced by the courts, and, to the extent that this is true, we have departed from the fundamental principles upon which our political institutions rest. (*State v. Whitman*, 220 N.W. 929 [1928])

Rosenberry's opinion three times highlighted the "fundamental change" that had occurred in this new acceptance of delegation to the administrative state. He did not oppose this change, but he also acknowledged that it was a significant departure from established principles of constitutional practice. While "we are on our way back to where we were when the doctrine of separation of powers was enunciated as a political theory," he concluded, "[a] refusal to recognize the facts as they exist and to give administrative law its rightful place in our legal theory has prevented a logical and symmetrical development of that law" (*State v. Whitman*).

Characteristic of all of these statements is a frank admission that something had changed dramatically in constitutional law. While in an earlier era the nondelegation principle would have, or did, stand in the way of the creation of modern administrative agencies, these authors openly acknowledged that the old way of understanding the nondelegation doctrine had been abandoned. As John B. Cheadle, a legal scholar who eventually became Dean of Oklahoma Law School, wrote in the *Yale Law Journal* in 1918:

> In order to legislate intelligently and in detail, the members of Congress individually must know more things and know them more accurately and intimately than is humanly possible. The result has been that Congress has increasingly delegated to others the duty of doing things which in the inception of the government it might have done itself. . . . For whenever a new rule of this type has been laid down an act essentially legislative in character has been done. (Cheadle 1918, 892)

Freund wrote in the *American Political Science Review* in 1915 that commissions governing utilities, industry, banking, insurance, and railroads "have indeed been vested with powers of a type hitherto withheld from administrative authorities under our system, powers which are not intended to serve as instruments of a fully expressed legislative will, but which are to aid the legislature in defining requirements that on the statute book appear merely as general principles." This, he concluded, "undoubtedly constitutes in a sense a delegation of legislative power," although he denied that the legislature refused in such cases to offer guidance on how the administration was to exercise its power (Freund 1915, 666). And Elihu Root famously observed in 1916 that "the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight" (Root 1916, 584). Those who favored and those who opposed the delegation of legislative power to modern administrative agencies equally recognized that the twentieth century ushered in a new era in constitutional law, where the nondelegation doctrine would be relaxed to accommodate the necessities of a complex society.

## IV. CONCLUSION

Whittington and Iuliano are correct to suggest that there is a prevailing narrative about the nondelegation doctrine: that it was originally robust but at some point in the twentieth century the courts stopped enforcing it. They are not, however, the first to attack this narrative. Legal scholars have challenged it for some time. Jerry Mashaw has argued that "[f]rom the earliest days of the republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking" (Mashaw 2012, 5). Decades earlier, the great scholar of administrative law Kenneth Culp Davis examined several early American statutes and concluded that Congress delegated regulatory power to agencies from the very beginning (Davis 1969, 719–20). In response, several scholars have sought to distinguish between legitimate delegations of executive power and illegitimate delegations of legislative power to the executive and to show that early statutes merely granted the former (Lawson 2002; Hamburger 2014).

This article takes no position on the legitimacy of this sea change in constitutional and administrative law. It merely seeks to describe accurately the historical shift from the enforcement of the nondelegation doctrine to the accommodation of legislative delegation to the executive. The historical record is clear: for the first century of American history, legislatures wrote statutes that avoided delegating their powers to administrative actors to avoid violating the nondelegation doctrine, and courts enforced the principle in many cases. A dramatic shift away from this approach occurred sometime around 1900 and continues to the present day. There is no myth of the nondelegation doctrine—it is a principle that was once honored, eventually abandoned, and still contested today.

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