

# THE NONDELEGATION DOCTRINE: ALIVE AND WELL

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*The nondelegation doctrine is dead. It is difficult to think of a more frequently repeated or widely accepted legal conclusion. For generations, scholars have maintained that the doctrine was cast aside by the New Deal Court and is now nothing more than a historical curiosity. In this Article, we argue that the conventional wisdom is mistaken in an important respect.*

*Drawing on an original dataset of more than one thousand nondelegation challenges, we find that, although the doctrine has disappeared at the federal level, it has thrived at the state level. In fact, in the decades since the New Deal, state courts have grown more willing to invoke the nondelegation doctrine. Despite the countless declarations of its demise, the nondelegation doctrine is, in a meaningful sense, alive and well.*

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## INTRODUCTION

The story of the nondelegation doctrine's demise is a familiar one. Eighty years ago, the New Deal Court discarded this principle, and since then, this once-powerful check on administrative expansion has had no place in our constitutional canon. Although lawyers continue to invoke the doctrine—like mystics trying to raise the dead—their efforts inevitably prove

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futile. As Cynthia Farina colorfully noted, “If Academy Awards were given in constitutional jurisprudence, nondelegation claims against regulatory statutes would win the prize for Most Sympathetic Judicial Rhetoric in a Hopeless Case.”<sup>1</sup> Today, most scholars agree that the nondelegation doctrine is nothing more than an artifact of history—perhaps curious to examine and interesting to ponder, but of no import beyond the borders of academia.

In this Article, we question the scope of the doctrine’s death. Drawing upon an original dataset of more than one thousand nondelegation cases, we find that, despite the doctrine’s disappearance at the federal level, it has become an increasingly important part of state constitutional law. Contrary to the conventional wisdom, the nondelegation doctrine is alive and well, albeit in a different location.

Through our analysis, we challenge a core aspect of what we have previously referred to as the myth of the nondelegation doctrine.<sup>2</sup> There are two distinct parts to this mythology. The first commemorates the doctrine’s life. This part of the narrative maintains that the doctrine was once a robust and important part of the pre-New Deal order. Across the nineteenth and early twentieth century, it supposedly served as a powerful constraint on the exercise of political authority.

The second part of the nondelegation myth recounts the death of the doctrine—placing its collapse in the late 1930s. The story goes that, alongside such rules as substantive due process and dual federalism, the nondelegation doctrine was cast into the “constitution in exile” during the judicial revolution of 1937. What was a vibrant constitutional rule in the early twentieth century was banished from the constitutional landscape following the New Deal. In a previous article, we showed that the first part of this myth is wrong.<sup>3</sup> In this Article, we show that the second part fails to capture an important way in which the nondelegation doctrine has survived. Our argument proceeds as follows.

In Part I, we detail the myth of the nondelegation doctrine and present the conventional wisdom regarding how the doctrine was cast into darkness during the New Deal. In Part II, we test the empirical claims that follow from this traditional narrative. In particular, we discuss the structure one would expect to observe if the nondelegation doctrine were part of a constitutional revolution. We then present findings from our database of nondelegation cases to show that the doctrine does not fit this structure. Unlike the constitutional principles underlying dual federalism and economic substantive due process, the pattern of litigation surrounding the nondelegation doctrine was not affected by the New Deal revolution. Finally, in Part III, we detail the types of nondelegation challenges that have arisen and been successful over the past eighty years.

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1 Cynthia R. Farina, Essay, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL’Y 87, 87 (2010).

2 See generally Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017).

3 See *id.* at 417–29.

## I. THE LIFE AND DEATH OF THE NONDELEGATION DOCTRINE

Read any article on the subject, and you will hear the same story: throughout the nineteenth and early twentieth centuries, courts aggressively invoked the nondelegation doctrine to rein in excessive governmental expansion.<sup>4</sup> Then, following the New Deal, the doctrine lost its luster and was relegated to the constitutional dustbin.<sup>5</sup> In this Part, we briefly recap the false story of the doctrine's life and then shift focus to the mythology of its death.

### A. *The Doctrine's Life*

In *The Myth of the Nondelegation Doctrine*, we examined state and federal nondelegation challenges between 1789 and 1940.<sup>6</sup> What we found was surprising. Contrary to accepted wisdom, this period was not marked by vigorous enforcement of the nondelegation doctrine. Instead, pragmatic considerations dominated the era.<sup>7</sup> When evaluating the merits of nondelegation challenges, judges tended to permit those delegations that were necessary to a well-functioning government—intervening only when the legislature had ceded power that threatened to undermine the system of checks and balances. To most courts, this principle meant that it was only appropriate to strike down a statute on nondelegation grounds if the legislature had wholly abdicated its responsibility to the public or shielded itself from electoral accountability.<sup>8</sup>

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4 See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–41 (1994) (discussing the death of limited government and the death of the nondelegation doctrine).

5 See *id.*

6 Whittington & Iuliano, *supra* note 2, at 383.

7 See *id.* at 409 (“[C]ourts generally took a pragmatic view of the situation and upheld those delegations that they deemed necessary for the government to accomplish its goals.”).

8 See *id.* at 411–12; see also *State v. Denny*, 21 N.E. 252, 258 (Ind. 1889) (finding a legislative delegation unconstitutional because it granted a politically unaccountable board “absolute and exclusive control over the construction of all sewers, the water supply, and supply of lights, with no voice in the matter left to the people of the city”); *State v. Frear*, 125 N.W. 961, 966 (Wis. 1910) (upholding a legislative delegation to the voters on the grounds that such a delegation would not cause “legislators [to] shirk [their] responsibility and become cowardly and corrupt”). This interpretation of the nondelegation doctrine has carried through to the present day. See, e.g., *United States v. Horn*, 679 F.3d 397, 401 (6th Cir. 2012) (“[A]n administrative agency cannot be granted the power to issue legislative rules (unrelated to any adjudication) without having any political accountability and without having to follow any procedure whatsoever.” (quoting Resentencing Order at 14, *United States v. Horn*, 590 F. Supp. 2d 976 (M.D. Tenn. 2008) (No. 3:01-00142))) (internal quotation marks omitted); *United States v. Green*, 654 F.3d 637, 649 (6th Cir. 2011) (“Just as the executive and judicial branches may not encroach on the power of Congress, Congress may not abdicate its responsibility to either of these two branches.”); *Mich. Pork Producers Ass’n v. Campaign for Family Farms*, 174 F. Supp. 2d 637, 646 (W.D. Mich. 2001) (reading “the authorizations for delegation in the Act narrowly, consistent with the

Despite this seemingly stringent hurdle, some nondelegation challenges were successful. In fact, seventeen percent of all nondelegation cases between 1789 and 1940 resulted in the invalidation of a state or federal statute.<sup>9</sup> Although this success rate may seem impressive, the actual cases suggest that the nondelegation doctrine was not an overly restrictive constraint. As we showed in our previous article, the legislative delegations that were invalidated during this period generally conferred substantial discretion on the delegate.<sup>10</sup> Consider the following two cases that are representative of successful nondelegation challenges of the time.

In *Marr v. Enloe*, the Tennessee Supreme Court reviewed a statute that granted unbridled taxing power to the county courts.<sup>11</sup> In the challenged law, the legislature failed to specify the rate of taxation or the distribution of taxes upon different forms of property.<sup>12</sup> The only instruction to the courts was that they should assess taxes sufficient “to meet the current expenses of their county for the ensuing year.”<sup>13</sup> Alarmed by the scope of the delegation, the Tennessee Supreme Court asked:

[W]hat limit to exactions is imposed by the act . . . ? We answer, none. [The courts] may tax every acre in their respective counties to its full value, and if the tax is not paid, cause the land to be sold and bought in by the sheriff . . . if there be no other bidders.<sup>14</sup>

Due to the complete discretion allotted to the county judges, the court found this statute to be an unconstitutional delegation of legislative power.<sup>15</sup>

Another representative case is *State v. Field*.<sup>16</sup> This nondelegation challenge centered on a Missouri statute that governed the maintenance of roads. Of particular concern was a provision that gave county courts authority to suspend the operation of the law.<sup>17</sup> Finding this portion of the statute to be an unconstitutional delegation of legislative authority, the Missouri Supreme Court held that “[i]t appears impossible to doubt, that the power which has been exercised by the court . . . and which has the effect of deter-

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principles of the non-delegation doctrine, for the purpose of preserving the Separation of Powers and the political accountability intended by the Constitution”); *Steen v. Appellate Div., Superior Court*, 331 P.3d 136, 145 (Cal. 2014) (emphasizing the importance of “maintaining clear lines of political accountability” during its evaluation of the constitutionality of a delegation of legislative power).

9 For a detailed breakdown of invalidation rates, see Whittington & Iuliano, *supra* note 2, at 426 tbl.4.

10 *Id.* at 413–14 (discussing representative invalidations).

11 *Marr v. Enloe*, 9 Tenn. (1 Yer.) 452, 453 (1830) (delegating to courts the power to set taxes “upon all polls and property subject to taxation by the laws of this State”).

12 *Id.*

13 *Id.*

14 *Id.* at 454.

15 *Id.* at 455 (“That the act of 1827 was passed by the legislature with good intentions we do not doubt, but that it is unwise as well as unconstitutional, its execution in this district has tested . . .”).

16 17 Mo. 529 (1853).

17 *See id.* at 530.

mining what law shall be in force in the tribunals of the state . . . is a part of the legislative power which cannot be entrusted to the county courts.”<sup>18</sup>

We offer these cases as illustrations of the types of delegations that were invalidated in the pre–New Deal era. If the same delegations were to occur today, modern courts would invariably declare them unconstitutional. As we concluded before: “If anything about the nondelegation doctrine’s history is surprising, it is that legislatures once thought it appropriate to delegate such expansive powers, not that courts saw fit to strike them down.”<sup>19</sup>

Contrary to the prevailing narrative, the nondelegation doctrine was not an overly restrictive check on legislative delegations of power during the nineteenth and early twentieth centuries. In reality, the courts adopted a pragmatic approach. If the delegation was necessary to advance a governmental interest and did not substantially undermine the system of checks and balances, then the delegation would withstand constitutional scrutiny. If, however, the statute granted near absolute discretion to the delegate or shielded the legislature from electoral accountability, then it would not withstand judicial review.

### B. *The Doctrine’s Death*

In one of the critical cases in the battle between the U.S. Supreme Court and President Franklin D. Roosevelt, the progressive Justice Benjamin Cardozo shocked the administration by joining his conservative colleagues on the Court in striking down the National Industrial Recovery Act, a centerpiece of the first New Deal.<sup>20</sup> This scheme, which granted boards composed of private actors and government officials the power to develop legally binding industrial codes, was—even Justice Cardozo thought—“delegation running riot.”<sup>21</sup> According to conventional wisdom, this case (*A.L.A. Schechter Poultry Corp.*) and *Panama Refining Co.*<sup>22</sup>—both decided in 1935—marked the high point of the nondelegation doctrine. A mere two years later, the story goes, the doctrine no longer stood as an obstacle to legislative delegations.

Legal scholars view this shift in the nondelegation doctrine’s status as part of a broader revolution that occurred during the New Deal.<sup>23</sup> After 1937, the old Court and its constitutional verities passed into history, and the

18 *Id.* at 534.

19 Whittington & Iuliano, *supra* note 2, at 414.

20 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

21 *Id.* at 553 (Cardozo, J., concurring).

22 *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

23 See generally CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 40–67 (1993) (discussing “The Revolution of 1937”). Although legal scholars generally accept that the New Deal marked a revolutionary era, historians have debated this point. Compare CARL N. DEGLER, *OUT OF OUR PAST: THE FORCES THAT SHAPED MODERN AMERICA* 412–50 (1959) (commenting on the “revolutionary” nature of the New Deal), with Barton J. Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in *TOWARDS A NEW PAST: DISSENTING ESSAYS IN AMERICAN HISTORY* 263, 264 (Barton J. Bernstein ed., 1968) (arguing that “[t]he liberal reforms of the New Deal did not transform the American system”).

New Dealers rewrote the constitutional rules to accommodate novel uses of state power.<sup>24</sup> Constitutional fetters that had made it difficult for the national government to regulate economic actors and adopt social policy, for the states to restrict property in the name of the public good, and for executive officials to make and implement desired public policy were removed. The venerable nondelegation doctrine is widely considered one of the primary casualties of that tumultuous period.<sup>25</sup> As Martin Flaherty has observed, “[w]ith the New Deal” came the “death of the nondelegation doctrine.”<sup>26</sup>

Most legal scholars accept this narrative and maintain that the doctrine remains lifeless to this day.<sup>27</sup> As then-professor Elena Kagan wrote, “It is, after all, a commonplace that the nondelegation doctrine is no doctrine at all.”<sup>28</sup> Matthew Stephenson has noted that “the nondelegation doctrine . . . is basically a dead letter.”<sup>29</sup> And Matthew Adler has similarly observed that “we live in a constitutional world where the nondelegation doctrine remains dead.”<sup>30</sup> Other scholars went even further, calling the doctrine “a constitu-

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24 See, e.g., Vincent M. Barnett, Jr., *Constitutional Interpretation and Judicial Self-Restraint*, 39 MICH. L. REV. 213, 236 (1940) (characterizing the period following 1937 as “laissez-faire for legislatures” (internal quotation marks omitted)).

25 See, e.g., *Sierra Club v. Watt*, 608 F. Supp. 305, 329 (E.D. Cal. 1985) (“As the leading American authority on administrative law points out, however, even in 1932 the lack of power to delegate was unclear, and shortly thereafter ‘the nondelegation doctrine died gradually and the rise of legislative rules came during its dying period.’” (alteration in original) (quoting 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7:9, at 44 (2d ed. 1979))); Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 938 (2006) (“As demonstrated by the past seven decades of case law, the nondelegation doctrine has become virtually unenforceable.”).

26 Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1820 (1996). At least one notable scholar had already declared the death of the nondelegation doctrine by the time of the New Deal. See Elihu Root, *Public Service by the Bar*, in *ADDRESSES ON GOVERNMENT AND CITIZENSHIP* BY ELIHU ROOT 519, 535 (Robert Bacon & James Brown Scott eds., 1916) (announcing, in 1916, that “the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight”).

27 See Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 780 (2016) (noting that “conventional wisdom holds that the nondelegation doctrine is dead, or at least unenforceable” (footnote omitted)); Alexander Volokh, *The New Private Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931, 974 (2014) (observing “the widespread perception that [the] non-delegation doctrine is mostly dead”). Even some judges have adopted this view. See, e.g., *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1396 n.3 (9th Cir. 1995) (“The vitality of the nondelegation doctrine is questionable . . .”); *Massachusetts v. Simon*, Nos. 75-0129, 75-0130, 1975 WL 3636, at \*3 (D.D.C. Feb. 21, 1975) (“The non-delegation doctrine is almost a complete failure.”).

28 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364 (2001).

29 Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 145 (2005).

30 Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 839 (1997).

tional lost cause”<sup>31</sup> that has the potential to “do more harm than good to [ ] clients’ interests.”<sup>32</sup> Even those who were unwilling to pronounce the nondelegation doctrine’s death conceded that it appeared to be “on life support, with the Supreme Court neither willing to pull the plug nor prepared to revive it.”<sup>33</sup> The academic consensus was clear: following the New Deal, this once vital constitutional principle had, in essence, become a “non-doctrine.”<sup>34</sup>

Accordingly, few believe that a constitutional challenge based on nondelegation could expect to win in the current era.<sup>35</sup> Although modern conservative justices still discuss the nondelegation doctrine in dissenting or concurring opinions, even they seem to acknowledge that their hopes of reviving the doctrine are more fanciful than realistic.<sup>36</sup> As Mark Tushnet noted, “No revolutionary return to the past seems likely.”<sup>37</sup> With the end of the New Deal revolution, so too came the end of the nondelegation doctrine.

Although this dour view of the doctrine dominates the constitutional discourse, a few scholars have adopted less pessimistic stances.<sup>38</sup> Notably, however, these scholars still accept that the doctrine, as a standalone mechanism of enforcement, is dead. Their optimism stems not from a belief in the viability of nondelegation challenges today, but rather from a belief that the doctrine has affected other judicial principles.

Cass Sunstein—a prominent member of this group—argues that the nondelegation doctrine has influenced certain canons of constitutional construction. He believes that the doctrine “has been relocated rather than

31 Farina, *supra* note 1, at 88.

32 KENNETH CULP DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 55 (1960).

33 Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1038 (2007); *see also* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (maintaining that the doctrine exists in an “undead state”).

34 Alexander & Prakash, *supra* note 33, at 1036 (internal quotation marks omitted).

35 *See* Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 943 (2000) (“Since the New Deal, the nondelegation doctrine has been, for all practical purposes, a dead letter.”). *But see* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1193–97 (1999) (discussing successful nondelegation challenges in “‘Strong’ Nondelegation States”).

36 *See* Dep’t of Transp. v. Ass’n of Am. R.Rs., 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) (emphasizing the relationship between a functioning nondelegation doctrine and the constitutional separation of powers); *id.* at 1241–45 (Thomas, J., concurring in the judgment) (same); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 548 (1981) (Rehnquist, J., dissenting); *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 672–74 (1980) (Rehnquist, J., concurring in the judgment).

37 MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 66 (2003).

38 *See, e.g.*, Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 419 (2008) (arguing that “it would be a mistake to say that the nondelegation doctrine is dead”).

abandoned.”<sup>39</sup> According to Sunstein, “Federal courts commonly vindicate not a general nondelegation doctrine, but a series of more specific and smaller, though quite important, nondelegation doctrines.”<sup>40</sup> Endorsing a similar position, John Manning argues that the nondelegation doctrine “now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions.”<sup>41</sup> Like Sunstein and Manning, we too are nondelegation optimists. Our view, however, is quite distinct from theirs. We argue that the doctrine itself is still viable.<sup>42</sup>

There is a straightforward explanation for why the academic consensus is mistaken on this point. Thus far, the literature on the nondelegation doctrine has focused almost exclusively on Supreme Court cases. By restricting the analysis in this manner, all but a few scholars have failed to account for the diverse set of nearly ten thousand nondelegation cases that have arisen in the state and lower federal courts.<sup>43</sup> It is these cases—not the handful heard in the Supreme Court—that tell the true story. By analyzing an original dataset of state and lower federal court cases, we are able to offer a better, more developed understanding of the nondelegation doctrine. As we show in the remainder of this Article, the empirical evidence suggests that the nondelegation doctrine not only survived the New Deal revolution, but has thrived in the eighty years since.

## II. THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION

The New Deal seemed to exemplify, for many contemporary and subsequent commentators, something entirely new—a constitutional revolution. The great constitutional scholar—and Franklin Roosevelt advisor—Edward Corwin set the tone early in a much-discussed set of lectures titled simply, “Constitutional Revolution, Ltd.”<sup>44</sup> For Corwin, the “switch in time” on the Court in 1937 marked both the death of the laissez-faire theory of government constitutionalized in the Gilded Age by lawyers such as Thomas Cooley and Christopher Tiedeman and the birth of a New Deal constitutional order that embraced concentrated political power and active governmental responsibilities. Unsurprisingly, in the immediate aftermath of 1937, Corwin and

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39 Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000).

40 *Id.* at 316.

41 John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223. *But see* David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 2–3 (2002) (arguing “that the nondelegation doctrine has played little or no role in statutory construction”).

42 *See infra* notes 68–120 and accompanying text.

43 Indeed, the small number of scholars who have looked at state nondelegation cases have observed that the doctrine may have continued vitality at the state level. *See, e.g.*, Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 578–601 (1994) (analyzing the different standards that state courts use when considering nondelegation challenges); Rossi, *supra* note 35, at 1191–1201 (dividing states into “weak,” “strong,” and “moderate” enforcers of the nondelegation doctrine).

44 EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1941).



others thought that what the Court had primarily accomplished was “self-abnegation” and the sweeping away of “certain legal obstacles to effective action.”<sup>45</sup> The “judicial revolution of 1937” had placed firmly in congressional hands the power to take action in the national interest and had dismantled “impediments in the way of the democratic process” that had previously tied the hands of legislative majorities.<sup>46</sup>

While this conclusion regarding what the New Deal revolution ushered onto the constitutional stage would require modification after a few more years, there was little question that contemporaries in the 1930s were witnessing the “dissolution of traditional concepts of power.”<sup>47</sup> As the constitutional views of Justice Stephen Field were discarded and those of Justice Oliver Wendell Holmes were embraced, observers marveled that “[p]erhaps never in the history of the Court has there been such a period as that since 1937 for the modification or reversal of the results of predecessors’ wisdom.”<sup>48</sup> The Court might have needed to emphasize the point after 1937, for as the constitutional historian Robert McCloskey put it, “sometimes a coup de grace is necessary to convince both executioners and observers that the condemned is well and truly dead.”<sup>49</sup> By the start of World War II, it was “apparent beyond question that the turnabout was complete, that the constitutional future belonged to men like Stone, that not even a remnant remained for men like McReynolds.”<sup>50</sup> A new constitution was being written, and an old one was being discarded. It was a “new constitutional era.”<sup>51</sup>

Subsequent scholars have largely reaffirmed that initial reading of events.<sup>52</sup> The New Deal historian William Leuchtenburg has recounted how the “traditional doctrines of the Supreme Court” came under challenge, “precipitated a constitutional crisis, and, in the end, resulted in nothing less than a ‘Constitutional Revolution.’”<sup>53</sup> A “new constitutional order” was

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45 Elias Huzar, Book Review, 27 CORNELL L. REV. 152, 154 (1941) (internal quotation marks omitted) (reviewing CORWIN, *supra* note 44). See generally David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93 (1990).

46 Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 883, 947 (1946).

47 Percy Thomas Fenn, Jr., Book Review, 55 HARV. L. REV. 307, 309 (1941) (reviewing CORWIN, *supra* note 44, and ERIK MCKINLEY ERIKSON, *THE SUPREME COURT AND THE NEW DEAL* (1940)).

48 Barnett, *supra* note 24, at 236.

49 Robert G. McCloskey, *Introduction* to BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* vii (1967).

50 *Id.*

51 *Id.*

52 For two notable exceptions, see generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998) (challenging the conventional account that the New Deal era marked a “constitutional revolution”); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000) (same).

53 WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 214 (1995).

established over the course of Franklin Roosevelt's second term of office.<sup>54</sup> The New Deal period ushered in a new constitutional "regime" that separated what came after from what had come before as decisively as the adoption of the U.S. Constitution itself had done.<sup>55</sup>

But how should we recognize a constitutional revolution? Observers seemed united in thinking that they had experienced one in the late 1930s, but that is of limited assistance in determining whether one has really taken place—and of more immediate relevance, determining whether it incorporates a particular area of law. In order to determine whether the nondelegation doctrine was caught up in the constitutional revolution of 1937, it would be useful to characterize the structure of this phenomenon.

For present purposes, the descriptive features of a constitutional revolution are of primary interest. Bruce Ackerman's account of the transition from one constitutional regime to another through an act of extraordinary higher lawmaking, for example, is only partly descriptive.<sup>56</sup> There is an important normative (or normative-interpretive) component to the theory that is concerned with outlining the procedure by which higher lawmaking should occur and how legal interpreters might recognize legitimate constitutional change. If the Constitution is being changed through unconventional means, we need a rule of recognition to distinguish authoritative change in the law from mere error.<sup>57</sup> Ackerman suggests a four-part sequence of signals, proposals, deliberation, and institutionalization.<sup>58</sup>

A political movement that has managed to pass through those phases of the higher lawmaking process can expect constitutional interpreters both to recognize that new constitutional rules have been authoritatively adopted and to implement them accordingly. While Ackerman believes this model of constitutional change is roughly characteristic of the American experience, its primary purpose is to establish a normative framework roughly analogous to Article V for channeling pressures for constitutional reform. Others have focused on the explanations for constitutional change, examining, for example, whether the New Deal revolution is best accounted for by internal (e.g., legal and intellectual considerations) or external (e.g., political pressure) factors.<sup>59</sup> The existence of a constitutional revolution itself is taken as a given. Here, we tackle this fundamental issue and seek to identify the key characteristics of a constitutional revolution.

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54 WILLIAM F. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 1932–1968*, at 115 (1970).

55 Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 488 (1989).

56 See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266–94 (1991) (describing the concept of "higher lawmaking").

57 See H.L.A. HART, *THE CONCEPT OF LAW* 100–09 (3d ed. 2012).

58 1 ACKERMAN, *supra* note 56, at 290–91.

59 See CUSHMAN, *supra* note 52.

Revolutions in constitutional law are best thought of as a kind of Kuhnian paradigm shift.<sup>60</sup> Thomas Kuhn argued that science develops not only through gradual evolutionary gains but also through sudden revolutionary leaps.<sup>61</sup> Scientific revolutions cast off old theories, conceptual apparatuses, hypotheses, ways of working, and investigatory agendas. “Normal” science proceeds on the basis of those conceptual assumptions, working within the confines of the established framework and applying and elaborating its basic insights and commitments. Similarly, normal constitutional adjudication is concerned with elaborating and applying inherited rules and principles. Stability and continuity are its hallmarks. By contrast, revolution encompasses “the abrupt, precipitous transformations of American constitutional law.”<sup>62</sup> The paradigms established during those revolutions provide “a complex set of instructions for conceptualizing and adjudicating constitutional controversies under a particular constitutional provision.”<sup>63</sup>

At the heart of a constitutional revolution is discontinuity. It is transformative of the normal state of affairs. The old ways are abandoned and replaced with something different. Of immediate relevance is the abandonment of the old ways. This process occurred when “the Supreme Court suddenly and substantially reversed its position in the cases decided in the spring of 1937.”<sup>64</sup> The revolution of 1937 overthrew the constitutional order that had been built during the course of the late nineteenth and early twentieth century. Well-established doctrines were buried. Old law was overruled. Constitutional claims that were once common and successful became rare and fruitless.

This description implies two observable patterns about what happens to an established constitutional doctrine that passes through a revolution. First, the rate of success in raising a given constitutional claim in court should decline precipitously. Even when a given constitutional rule is vibrant, it will not always meet with success. Nonetheless, courts will regularly invoke that rule to enforce constitutional limits against deviating government officials. After a constitutional revolution, however, courts should oppose such constitutional claims, and their success rate should plummet. The number of successful cases might not drop to zero—given both the possibility of outlier judges who continue to adhere to the old constitutional sensibilities and renegade legislatures who might push the boundaries of even the newly relaxed jurisprudential regime—but constitutional claimants should find their argumentative burden to be substantially heavier after the revolution.

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60 See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 92–110 (4th ed. 2012) (developing the concept of “paradigm shifts”).

61 See *id.*

62 ROBERT JUSTIN LIPKIN, *CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM* 15 (2000).

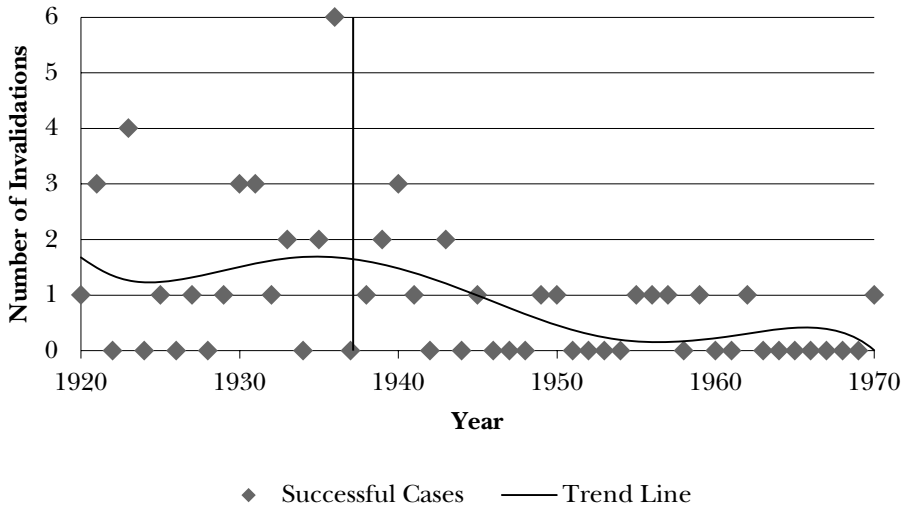
63 *Id.* at 134.

64 CUSHMAN, *supra* note 52, at 5. Cushman takes issue with a key component of this descriptive account of the New Deal revolution, arguing that, though decisive, the change was more gradual and less sudden than conventional wisdom would hold. See *id.*

The constitutional revolution of 1937 was wide-ranging, but it is universally recognized that a key feature of that transformation was the abandonment of what the New Dealers derided as “substantive due process”—the protection of substantive property rights against legislatures through the due process clause.<sup>65</sup> If substantive due process and its principle of “liberty of contract” were not completely dead after 1937, legislatures were certainly given a much freer hand in determining how far private property interests should give way to the legislature’s own judgment of what was in the interest of the community as a whole.

Figure 1 illustrates this expectation about the transformation of the number of successful constitutional claims across a constitutional revolution and shows how the actual pattern of economic due process challenges conformed to this broad pattern. Litigants hoping to invoke that traditional constitutional rule had a reasonable prospect of success before 1937, and only a minimal prospect of success afterwards.

FIGURE 1: NUMBER OF SUCCESSFUL ECONOMIC DUE PROCESS CLAIMS, 1920–1970



A second observable implication for adjudication across a constitutional revolution is that there should be a substantial drop in the volume of such cases in the postrevolutionary period. When courts are amenable to invoking a given constitutional claim, litigants are incentivized to bring that claim forward. A live doctrine should be visible through a steady stream of litigation that requires the courts to elaborate on the existing rule.

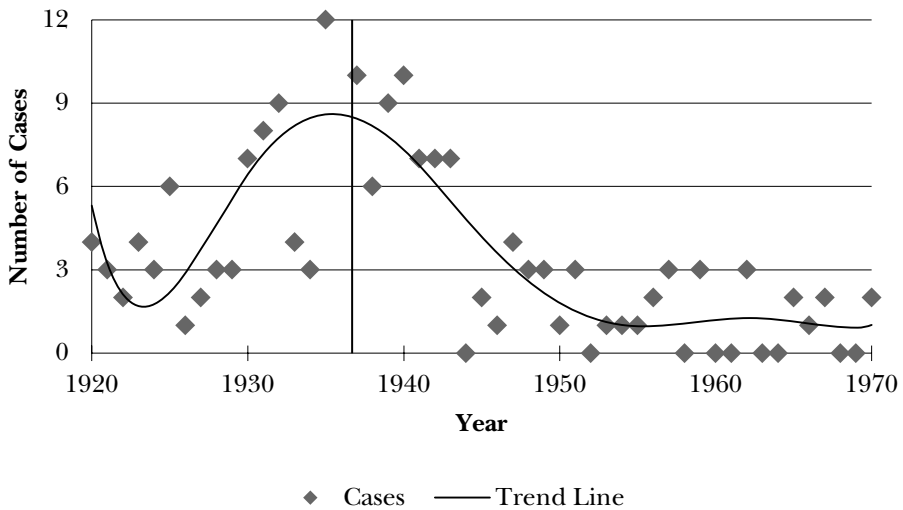
As the prospects for success decline, however, litigants will soon learn that it is not worth the effort of even raising the challenge, and these types of claims should largely disappear from the judicial docket. Cases involving the

65 See LEUCHTENBURG, *supra* note 53, at 178; WRIGHT, *supra* note 49, at 215–17.

now-defunct constitutional rule are unlikely to vanish immediately, however, since it will require some time for existing cases to clear the judicial pipeline and for potential litigants to learn that bringing new cases will be fruitless. Moreover, judges will need to continue to discuss the issue for some period of time simply in order to announce and clarify the new status of the traditional constitutional rule.

Figure 2 illustrates this dynamic in the specific case of economic due process claims in federal courts. Once again, the flow of cases raising constitutional challenges to legislation based on arguments that economic regulations interfered with rights of property protected by the Due Process Clause was reduced to a trickle after the revolution of 1937.

FIGURE 2: ECONOMIC DUE PROCESS CASES, 1920–1970



This graph depicts a paradigmatic example of a constitutional revolution. The reversal of the *Lochner*<sup>66</sup> line of cases in New Deal decisions like *West Coast Hotel*<sup>67</sup> and *Carolene Products*<sup>68</sup> created a sharp discontinuity in the development of American constitutional law. Constitutional challenges that were successful before the switch in time ceased to be so afterwards. Constitutional issues that were regularly heard and resolved by the courts disappeared from the judicial docket.

The nondelegation doctrine did not follow this pattern. Indeed, there is little in the history of the nondelegation doctrine over the twentieth century that would suggest the existence of a New Deal constitutional revolution at all. This is not to call into question whether there was a New Deal revolution in constitutional law, but rather to call into question whether the nondelega-

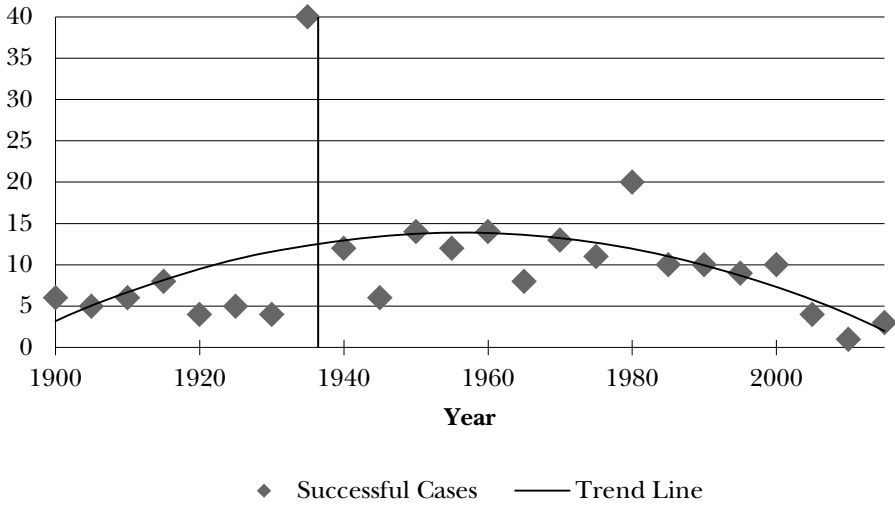
66 See *Lochner v. New York*, 198 U.S. 45 (1905).

67 See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

68 See *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

tion doctrine was a part of it. The evidence suggests that the principle of nondelegation of legislative power was largely unaffected by the events of the 1930s. Contrary to conventional wisdom, the doctrine was not cast into exile. It continued to play a role in American constitutional law no different from the one it had played before the New Deal.

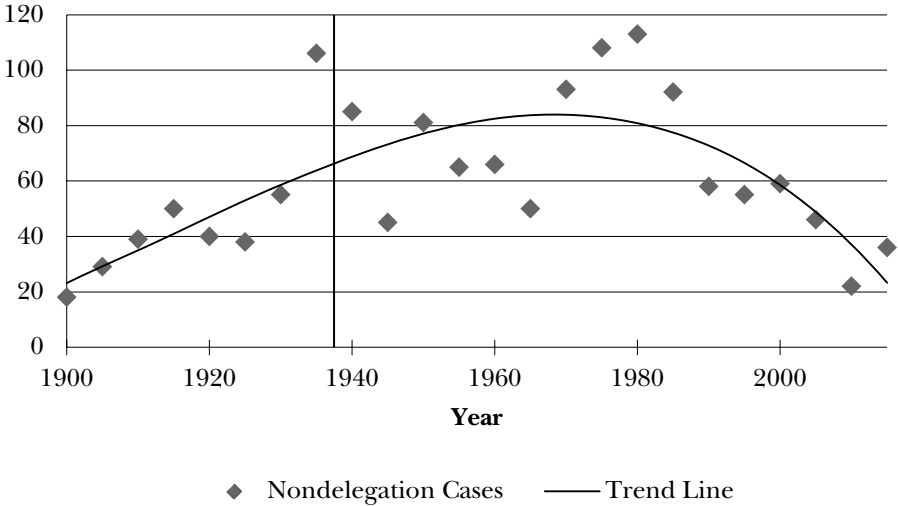
FIGURE 3: NUMBER OF SUCCESSFUL NONDELEGATION CASES, 1900–2015



The pattern of constitutional nondelegation cases over the course of the twentieth century does not match the expected pattern for either constitutional invalidations or volume of litigation. Figure 3 shows the number of successful nondelegation challenges in state and federal cases decided during the twentieth and early twenty-first centuries. The graph reports a sample in which cases were identified and coded in five-year intervals, with a trend line superimposed over the raw data. A vertical line demarcates 1937, the year after which we should expect to observe a strong downward trend if the nondelegation doctrine were part of the New Deal revolution. As the data show, no such trend exists.

Whereas Figure 1 depicted a pattern consistent with a constitutional revolution—a sharp discontinuity, with a period of relatively successful claims followed by a period of limited success for economic due process claims—Figure 3 shows that successful nondelegation challenges have occurred at comparable levels throughout the last century.

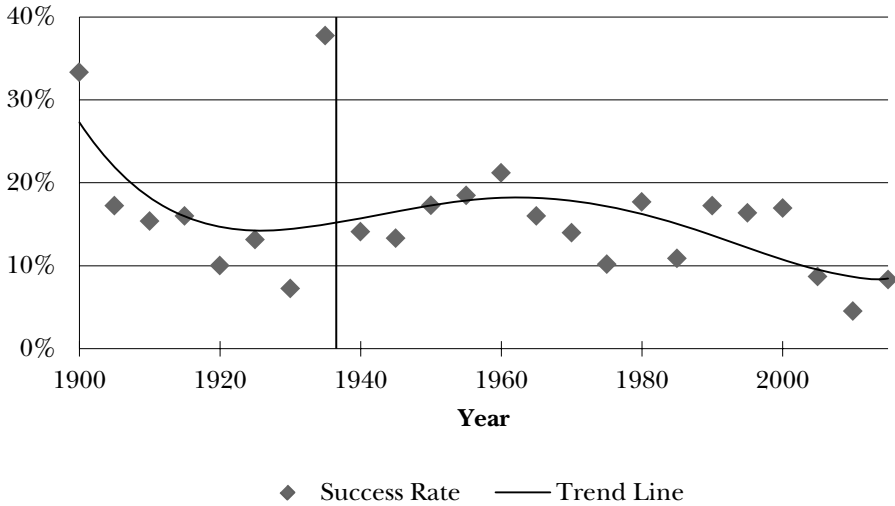
FIGURE 4: NUMBER OF NONDELEGATION CASES, 1900–2015



The volume of constitutional adjudication involving nondelegation challenges in the twentieth century tells a similar story. Figure 4 reports on the same sample taken at five-year intervals, but here the focus is on the absolute number of cases. As we saw, Figure 2 suggested that frustrated litigants stopped trying to raise economic due process challenges in the courts following the successful constitutional revolution. Here, however, Figure 4 shows that nondelegation cases were just as common—if not more so—after the New Deal as they had been before. Again, a vertical line marks 1937. The data show that the number of nondelegation cases continued rising after that point for more than forty years.

The relative spike of such cases in 1980 and dearth of such cases in 2010 creates an apparent downward slide in the nondelegation doctrine in the twenty-first century, but it is too soon to reach any firm conclusions about the future of such litigation. That said, Figure 5 provides one reason to be optimistic about the doctrine’s prospects. As the graph shows, the success rate has remained markedly stable over the past century. Setting aside three outliers (1900, 1935, and 2010), the success rates fall within a rather narrow range. Although the future of the doctrine is yet to be written, one aspect of its past is certain: the nondelegation doctrine not only survived the New Deal era, but increased in strength for decades after.

FIGURE 5: SUCCESS RATE OF NONDELEGATION CLAIMS, 1900–2015



One concern we must address is that the volume of nondelegation challenges might be affected by larger tendencies in the judicial caseload over such a long time period. It is possible that the pattern observed among nondelegation cases is swamped by the overall growth in the judicial docket. A comparison with the economic substantive due process claims, however, suggests that this is not the case. If there were any broader environmental factors that buoyed the nondelegation cases across the twentieth century, they had no similar effect on economic due process cases. The number of cases raising these challenges simply diverged after the 1930s, with nondelegation cases persisting and due process cases falling into desuetude. The true story of the nondelegation doctrine is one of stability and continuity, not one of instability and discontinuity.

### III. THE PERSISTENCE OF THE NONDELEGATION DOCTRINE

The nondelegation doctrine is one of the most extensively studied topics in constitutional law.<sup>69</sup> Despite this, nearly all research on the subject has focused on the small number of Supreme Court decisions that address the doctrine. Scholars rarely venture more than a few words about nondelegation cases in state or lower federal courts.<sup>70</sup> Notably, the lack of work in this area has neither stopped researchers from proclaiming the death of the

69 See Posner & Vermeule, *supra* note 33, at 1721 (calling the nondelegation doctrine “[o]ne of the most exhaustively analyzed topics in public law”); see also Lemos, *supra* note 38, at 405 (“The nondelegation doctrine is the subject of a vast and ever-expanding body of scholarship.”).

70 For notable exceptions, see Greco, *supra* note 43; Rossi, *supra* note 35; Volokh, *supra* note 27, at 963–70.



nondelegation doctrine<sup>71</sup> nor dissuaded them from asserting that the doctrine has experienced “nearly two hundred years of rejection by the courts and political branches.”<sup>72</sup> Quite simply, the Supreme Court has been the beginning and the end of most legal inquiry into the nondelegation doctrine.

Although unfortunate, this exclusive focus on the high court is part of a much broader problem in legal scholarship. As Jack Balkin and Sandy Levinson have observed, “constitutional law is much too centered on the opinions of the Supreme Court of the United States.”<sup>73</sup> Likewise, when discussing the issue of statutory interpretation, Aaron-Andrew Bruhl argued that researchers’ “preoccupation with the Supreme Court [leaves them] ill-equipped to answer [many] questions.”<sup>74</sup> Increasingly, scholars have begun to emphasize the need to “look beyond the Supreme Court” in order to fully understand how the law operates.<sup>75</sup> In this Part, we take that step with respect to the nondelegation doctrine.

### A. Success Rate

Our dataset consists of all state and federal nondelegation cases between 1940 and 2015 that were decided in a year divisible by five (i.e., 1940, 1945, 1950 . . . 2015).<sup>76</sup> By drawing data at five-year intervals, we were able to obtain a representative sample of nondelegation cases in the post-New Deal era. Given the large number of nondelegation cases, we believe this protocol represents the best tradeoff between descriptive power and the resources needed to collect the data.

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71 See *supra* Section I.B.

72 Farina, *supra* note 1, at 89 (footnote omitted).

73 J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 970, 1002–06 (1998).

74 See, e.g., Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 437 (2012).

75 See, e.g., Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 363 (2015) (noting that the Supreme Court has been “the focus of most scholarly writing on amicus curiae” and emphasizing the need to examine the lower courts to better understand this topic); Bruhl, *supra* note 74, at 437; Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 185 (2014) (looking “beyond the Supreme Court to explain how debates over the scope of precedent depend on the unique structural characteristics of the courts that issue decisions and the courts that apply them”); Jonathan Remy Nash, *Expertise and Opinion Assignment on the Courts of Appeals: A Preliminary Investigation*, 66 FLA. L. REV. 1599, 1605 (2014) (noting “the almost complete failure of scholars to look beyond the Supreme Court” and arguing that doing so can deepen our understanding of opinion assignment).

76 In order to identify nondelegation cases, we conducted the following search on Westlaw for all state and federal cases in the relevant years: “TO(‘delegation #of powers’) or (delegat! /2 legislative /1 (power! or authority)) or (delegat! /2 lawmaking /1 (power! or authority)).” We then examined each search result to see if the case involved a nondelegation challenge.

In total, our sample included 1075 nondelegation cases. Of these, 156 (15%) resulted in the invalidation of a statute on nondelegation grounds. A large majority of the nondelegation cases (85%) took place in state courts. State courts were also more likely to rule that a statute violated the nondelegation doctrine (16% to 3%). Given the Supreme Court’s unreceptiveness to nondelegation claims, this federal-state divide is unsurprising.<sup>77</sup> Table 1 provides a more complete look at the success rate of nondelegation challenges.

TABLE 1: NONDELEGATION SUCCESS RATE, 1940–2015

	State	Federal	Total
Nondelegation Cases	919	156	1075
Successful Challenges	151	5*	156
Invalidation Rate	16%	3%	15%

\* Four of these cases were reversed on appeal.

Thus far, three points stand out. First, there was a substantial number of nondelegation cases over this period. On average, sixty-seven cases arose each year. Assuming our sample is representative, state and federal courts heard more than five thousand nondelegation challenges between 1940 and 2015. For a living doctrine, that is a noteworthy figure. But for one that is allegedly dead, that number is all the more impressive.

The second notable item is the sheer number of successful challenges. Since the end of the New Deal, courts have used the nondelegation doctrine to invalidate approximately 750 statutes (about ten a year). That may not sound like a substantial figure at first, but if you consider what the number represents, it is rather remarkable. Every year, ten statutes that have been duly enacted by a legislature and signed by a chief executive are held to be unconstitutional violations of the nondelegation doctrine. If the doctrine has, indeed, been dead all these years, that number is very hard to explain.

Perhaps even more impressive than the absolute number of cases is the fact that a full fifteen percent of all nondelegation challenges are successful. This rate is very close to the seventeen percent success rate for nondelegation cases between 1789 and 1939. Given that this earlier period is considered the high point of nondelegation enforcement, the lack of a meaningful—or even statistically significant<sup>78</sup>—difference in success is striking.<sup>79</sup> Notably, this rate

77 This disparity is also explained in part by the fact that some “states’ non-delegation doctrines are stricter than the federal one.” Volokh, *supra* note 27, at 964.

78 The chi-square statistic is 2.6777, and the p-value is 0.101759. This result is not significant at the conventional levels of significance ( $p < 0.05$  or  $p < 0.01$ ).

79 Because we focus on the success rate as an indicator of the nondelegation doctrine’s vitality, it is worth discussing the Priest-Klein hypothesis and why their account of litigation does not undermine our findings. The Priest-Klein hypothesis’s central claim is that one cannot extrapolate from a legal doctrine’s success rate to the vitality of that doctrine. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). They argue that, due to the possibility of settlement, plaintiff success rates trend toward a fixed rate which is “unrelated to the position of the decision standard or to the

is also in line with many other types of constitutional challenges and is even far higher than the success rates of some doctrines that are considered alive and well today.

As one point of comparison, the success rate for all constitutional challenges in the Supreme Court between 1940 and 2015 was twenty percent—not that far above the overall nondelegation success rate.<sup>80</sup> Admittedly, very few nondelegation cases took place in the Supreme Court—and of those that did, none were successful—so this is not the most comparable statistic. That said, data regarding the success rate of constitutional challenges in state courts tells a similar story.

In a study of state supreme court decisions between 1995 and 1998, Melinda Gann Hall found that constitutional challenges were successful about twenty percent of the time.<sup>81</sup> Simply stating the average, however, obscures the variations between the states. In a handful of states, constitutional challenges were never successful,<sup>82</sup> and in others, constitutional challenges were successful more than one-third of the time.<sup>83</sup> In a more recent study of judicial review in state courts, Keith Whittington found that the invalidation rate during the New Deal period was approximately twenty-five percent.<sup>84</sup> With a success rate of fifteen percent, nondelegation challenges fall squarely within the standard range.

The data on specific constitutional challenges provides further evidence of the nondelegation doctrine's vitality. Consider, for example, Fourth Amendment constitutional challenges in criminal cases. The success rate for

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shape of the distribution of disputes.” *Id.* at 19. Although this hypothesis provides reason to be measured in our comparisons with other legal doctrines, we believe its argument does not apply to nondelegation challenges themselves. A fundamental assumption of the Priest-Klein hypothesis is that the parties have the option to settle their dispute outside the litigation process. Nondelegation challenges, however, are not conducive to such settlements. Unlike most cases which have a continuum of outcomes (e.g., in civil cases where monetary awards are possible or in criminal cases where plea bargains are possible), nondelegation cases have only two potential resolutions. Either the legislative delegation is upheld or it is found unconstitutional. For this reason, the parties are unable to reach a mutually agreeable settlement. Therefore, in the absence of settlement alternatives, the observed rate of success for a legal doctrine is indicative of that doctrine's vitality and accordingly not subject to the concern advanced by Priest and Klein.

80 See Harold J. Spaeth et al., *2015 Supreme Court Database*, Version 2015 Release 01, <http://Supremecourtdatabase.org>.

81 See Melinda Gann Hall, *State Courts: Politics and the Judicial Process*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 251, 274 (Virginia Gray, Russell L. Hanson & Thad Kousser eds., 2013) (illustrating the success rate at each state supreme court graphically).

82 See *id.* at 273 (“[C]ourts of last resort in some states are not likely to engage in constitutional conflicts. Particularly notable are Connecticut, Indiana, Maine, and Michigan, which did not invalidate any actions on constitutional grounds.”).

83 See *id.* (finding that “eleven supreme courts are active players in the game of checks and balances by invalidating in at least one of every three opportunities”).

84 Keith E. Whittington, *State Constitutional Law in the New Deal Period*, 67 *RUTGERS U. L. REV.* 1141, 1153 (2015).

these claims is ten percent.<sup>85</sup> Despite falling below the nondelegation doctrine in terms of success, the Fourth Amendment is still considered a relevant part of the Constitution. No scholars have declared the death of the search and seizure provisions; nor have they urged lawyers to refrain from advancing such claims for fear that doing so will damage clients' cases.

Likewise, although First Amendment religious accommodation claims against public education requirements succeed less than ten percent of the time,<sup>86</sup> no one argues that the Free Exercise Clause has been written out of the Constitution and that any claims based on it are dead on arrival. Numerous other examples abound.<sup>87</sup> To give just one more, the success rate for habeas claims is approximately five percent in state cases and less than one percent in federal cases.<sup>88</sup> Nonetheless, many scholars continue to view this writ as a central protection for prisoners.<sup>89</sup>

Compared with these constitutional provisions, the nondelegation doctrine has fared well. Nondelegation challenges may not be unusually likely to succeed,<sup>90</sup> but neither are they unusually likely to fail.<sup>91</sup> They are rather ordinary in their level of success, but that, in itself, is quite

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85 Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 426 (2012) (reviewing federal appellate cases decided between 2005 and 2009 and finding that Fourth Amendment criminal constitutional challenges failed ninety percent of the time).

86 Lewis M. Wasserman, *Overcoming Obstacles to Religious Exercise in K-12 Education*, 40 J. LEGIS. 96, 133–34 (2013–2014).

87 See, e.g., Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 523 (1989) (noting that “[n]onprisoner constitutional tort plaintiffs win only 9 percent of district court judgments, and prisoner constitutional tort plaintiffs win less than 1 percent of judgments”); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 370 (1999) (between 1971 and 1996, plaintiffs whose rational basis equal protection claims were reviewed by the Supreme Court were successful a mere nine percent of the time).

88 Anup Malani, *Habeas Settlements*, 92 VA. L. REV. 1, 63–64 (2006); see also Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 73 (1998) (“The success rate for all state habeas petitions filed in the four states represented in the study was just under five percent; for federal claims, the overall success rate was *less than one percent*.” (footnote omitted)).

89 See, e.g., Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 89–91 (2012) (arguing that habeas claims are important in safeguarding the constitutional rights of prisoners).

90 See, e.g., Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 809 (finding that First Amendment challenges in the Courts of Appeals that involve intermediate scrutiny are successful twenty-seven percent of the time); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1172–73 (1991) (reviewing cases decided between 1976 and 1988 and concluding that the success rate for equal protection challenges was approximately forty percent during that period); Michelle M. Mello et al., *Policy Experimentation with Administrative Compensation for Medical Injury: Issues Under State Constitutional Law*, 45 HARV. J. ON LEGIS. 59, 87 (2008) (finding that twenty-seven percent of constitutional challenges to malpractice reforms are successful).

extraordinary. Combined, all of this evidence provides strong support for our argument that the nondelegation doctrine did not undergo a substantive change during the New Deal.

### B. *Pre- and Post-New Deal Comparison*

In this Section, we compare pre- and post-New Deal nondelegation cases along a number of dimensions. As part of our analysis, we look at the types of powers delegated, the entities to whom the powers were delegated, and the kinds of support that judges relied upon in their opinions. The post-New Deal cases come from this Article's dataset and cover the timeframe from 1940 through 2015. The pre-New Deal data draw upon cases we collected for an earlier paper and cover the timeframe from 1789 to 1939.<sup>92</sup> As we will show, the comparability between these two periods further suggests that the New Deal did not represent a break in nondelegation jurisprudence.

Perhaps the most similar aspect of nondelegation cases in the two eras is the type of power that legislatures sought to delegate. After reviewing thousands of cases, we identified four main categories of delegated power: regulation,<sup>93</sup> taxation,<sup>94</sup> spending,<sup>95</sup> and other.<sup>96</sup> As Table 2 shows, the two

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91 See, e.g., Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 830–32 (2005) (discussing the success rate of various constitutional challenges heard by the Supreme Court).

92 See Whittington & Iuliano, *supra* note 2, at 418.

93 See, e.g., *Lamberty v. State*, No. 232, 2014, 2015 WL 428581, at \*3 (Del. Jan. 30, 2015) (holding that a statute requiring sex offenders to register at locations designated by the Superintendent of the State Police did not amount to an unconstitutional delegation of legislative power); *Clarke v. Morgan*, 327 So. 2d 769, 770–74 (Fla. 1975) (finding that a state statute empowering the city of Tampa to grant zoning variances is not an unconstitutional delegation of legislative power); *City of Oklahoma City v. State ex rel. Okla. Dep't of Labor*, 918 P.2d 26, 29–30 (Okla. 1995) (ruling that a state statute that tied the prevailing wage rate to the U.S. Department of Labor was an unconstitutional violation of the nondelegation doctrine).

94 See, e.g., *Assessors of Haverhill v. New Eng. Tel. & Tel. Co.*, 124 N.E.2d 917, 920 (Mass. 1955) (upholding a delegation to the local commissioner of the power to fix property value for purposes of taxation); *Meyersdale Borough Refuse Serv. v. Wentworth*, 36 Pa. D. & C.3d 654, 658 (Ct. C.P. 1985) (holding that “the discretion given the borough’s solid waste enforcement officer to set rates for garbage collection different from those established by the borough council is an unconstitutional delegation of legislative authority”).

95 See, e.g., *McCall v. State*, 654 N.Y.S.2d 933, 935 (Sup. Ct. 1995) (finding that a statute postponing payment of supplemental pension benefits from public employee retirement systems fund in event of litigation challenging related statutory amendment was an unconstitutional delegation of legislative power to private citizens); *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs. of Wash.*, 12 P.3d 144, 150 (Wash. 2000) (upholding a statute that delegated to the Department of Social and Health Services the power to determine the amount which the state would reimburse assisted living facilities for their services).

96 See, e.g., *United States v. Ali*, 799 F.3d 1008, 1019–20 (8th Cir. 2015) (finding that a statute delegating authority to designate organizations as foreign terrorist organizations to the Secretary of State is not an unconstitutional delegation of power); *Sims v. State*, 754 So.

periods are remarkably consistent along this dimension. Both the spending and other categories are identical—staying at seven percent and twenty-five percent, respectively. The remaining categories—regulation and taxation—exhibited only a small degree of variation, with the former increasing from fifty-two percent to fifty-eight percent and the latter decreasing from sixteen percent to eleven percent.

TABLE 2: TYPE OF POWER DELEGATED

	Regulation	Taxation	Spending	Other
Post–New Deal	58%	11%	7%	25%
Pre–New Deal	52%	16%	7%	25%

Not only are the types of powers delegated the same, but also, as Table 3 shows, the political actors to whom power is delegated are broadly similar. Three of the objects of delegation—the chief executive,<sup>97</sup> the judiciary,<sup>98</sup> and other<sup>99</sup>—were within five percentage points. Two larger changes are the

2d 657, 668–70 (Fla. 2000) (upholding statute delegating to Department of Corrections the power to establish drug protocols for lethal injection); *City of Auburndale v. Adams Packing Ass’n*, 171 So. 2d 161, 164–66 (Fla. 1965) (holding unconstitutional, on nondelegation grounds, a statute that gave courts the power to determine whether land may be annexed by a municipality).

97 See, e.g., *Dorst v. Pataki*, 633 N.Y.S.2d 730, 736–37 (App. Div. 1995) (finding that a statute delegating to the governor the power to exclude inmates from eligibility for a temporary release program is not an unconstitutional delegation of legislative power).

98 See, e.g., *In re Dailey*, 465 S.E.2d 601, 610–11 (W. Va. 1995) (holding that statute granting courts the authority to issue concealed carry permits was an unconstitutional delegation of legislative power).

99 “Other” is a catch-all category that includes such delegates as private parties. See, e.g., *Gumbhir v. Kan. State Bd. of Pharmacy*, 618 P.2d 837, 840–43 (Kan. 1980) (holding that a statute that restricted the licensing of pharmacists to those who had graduated from schools of pharmacy accredited by a private association was an unconstitutional delegation of legislative power); *Associated Builders & Contractors, Saginaw Valley Area Chapter v. Dir., Dep’t of Consumer & Indus. Servs.*, 705 N.W.2d 509, 512–14 (Mich. Ct. App. 2005) (finding that a statute did not unconstitutionally delegate legislative power to private parties by requiring the Department of Labor to use union rates when setting the prevailing wage rate); *State v. Self*, 706 P.2d 975, 979–80 (Or. Ct. App. 1985) (upholding an Oregon statute that made individuals criminally liable for conspiracy to commit crimes in another state even if the crime was not illegal in Oregon). The “other” category also includes state delegations to the federal government. See, e.g., *First Fed. Sav. & Loan Ass’n of New Haven v. Connelly*, 115 A.2d 455, 459–60 (Conn. 1955) (upholding a Connecticut law that defines gross income, exemptions, and deductions according to federal corporate tax provisions).

decrease in delegations to local government<sup>100</sup> (25% to 11%) and the decrease in delegations to voters<sup>101</sup> (11% to 3%).

TABLE 3: OBJECTS OF DELEGATION

	Executive	Agency	Judiciary	Local Gov't	Voters	Other
Post–New Deal	3%	62%	9%	11%	3%	13%
Pre–New Deal	5%	38%	13%	25%	11%	10%

The explanation for these shifts has to do with a broader trend in government. Specifically, with the rise of the administrative state, legislatures took to delegating authority horizontally (e.g., to executive agencies) rather than vertically (e.g., to lower levels of government or to the voters). Indeed, this point is reinforced by the largest change in Table 3—the increase in delegations to agencies<sup>102</sup> (38% to 62%). This disparity, although sizable, should not be taken to suggest that a nondelegation revolution occurred during the New Deal. Upon closer inspection, we found that the change actually occurred much earlier in time. The lower pre–New Deal percentage is simply being influenced by the absence of agency delegations in the early nineteenth century. If we limit the period to 1880 through 1939, the percentage of delegations to agencies rises to fifty-two percent—a number that is comparable to the post–New Deal level.<sup>103</sup>

To the extent there was ever a meaningful shift in nondelegation jurisprudence, it occurred not during the New Deal, but rather during the Gilded Age.<sup>104</sup> It was during that era that state and federal governments expanded existing regulatory systems and relied increasingly on the expertise

100 See, e.g., *Town of Godfrey v. City of Alton*, 338 N.E.2d 890, 894–95 (Ill. App. Ct. 1975) (upholding a law that delegated to municipalities the authority to veto creation of adjacent municipalities); *State ex rel. Wagner v. St. Louis Cty. Port Auth.*, 604 S.W.2d 592, 598–601 (Mo. 1980) (upholding delegation to local port authorities of the power of eminent domain).

101 See, e.g., *Rogers v. Desiderio*, 655 N.E.2d 930, 932–33 (Ill. App. Ct. 1995) (holding that statute that permits voters to annex territory is not an unconstitutional delegation of legislative power); *Halmontaller v. City of Nashville*, 332 S.W.2d 163, 164–66 (Tenn. 1960) (invalidating a statute that delegated to voters the power to determine whether city employees should have a five-day work week).

102 See, e.g., *Atl. City Casino Ass’n v. City of Atlantic City*, 525 A.2d 1109, 1114–15 (N.J. Super. Ct. App. Div. 1985) (sustaining a law that delegated to state treasurer the authority to defer revaluation of real property for tax year).

103 See *Whittington & Iuliano*, *supra* note 2, at 421.

104 See *id.* at 421–23.

of executive agencies.<sup>105</sup> Likewise, it was during that era that the most notable changes in delegation challenges occurred.<sup>106</sup>

Although the powers and parties involved in nondelegation cases remained broadly similar before and after the New Deal, the way in which judges supported their decisions did change. Table 4 summarizes these findings.

TABLE 4: CITED SUPPORT IN COURT OPINIONS

	Precedent	Constitution	Maxim
Post–New Deal	76%	26%	3%
Pre–New Deal	57%	22%	22%

In the pre–New Deal era, it was common for judges to cite common law maxims and inherited traditions to support their understanding of the nondelegation doctrine. During this time, courts frequently invoked the Latin maxim *delegata potestas non potest delegari*,<sup>107</sup> and nondelegation maxims of some kind made an appearance in twenty-two percent of the cases.<sup>108</sup> Following the New Deal, however, this figure dropped to just three percent.

As appeals to maxims decreased, there was a corresponding increase in citations to precedent (57% to 76%). Given that a number of salient nondelegation cases were decided during the New Deal and that the body of case law has grown much larger over the past eighty years, it is not surprising that courts have increasingly relied upon precedent to justify their decisions. The only mechanism of support that did not experience a notable change is citations to constitutional text. In the pre–New Deal era, twenty-two percent

105 See *id.* at 421 (noting that “[t]he use of independent regulatory commissions and other specialized, expert bureaucratic units was pioneered during the Gilded Age”); see also JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 3–25 (2012) (showing that the administrative state has existed in a meaningful form since the founding).

106 See Whittington & Iuliano, *supra* note 2, at 421–23.

107 See, e.g., *Thorne v. Cramer*, 15 Barb. 112, 116 (N.Y. Gen. Term 1851) (“[A legislator] cannot delegate to others the trust which has been expressly confided to him, by reason of his supposed knowledge and sound judgment. *Delegata potestas, non potest delegari*, is a settled maxim of the common law, in full force at the present day; and never more applicable than to the case of a legislator.”); *Parker v. Commonwealth*, 6 Pa. 507, 515 (1847) (“Among the primal axioms of jurisprudence, political and municipal, is to be found the principle that an agent, unless expressly empowered, cannot transfer his delegated authority to another, more especially when it rests in a confidence, partaking the nature of a trust, and requiring for its due discharge, understanding, knowledge, and rectitude. The maxim is, *delegata potestas non potest delegari*.”).

108 See, e.g., *People v. Fleming*, 16 P. 298, 299 (Colo. 1887) (“One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.” (internal quotation marks omitted)); *Slinger v. Henneman*, 38 Wis. 504, 509–10 (1875) (“It is a settled maxim of constitutional law, that the power thus conferred upon the legislature cannot be delegated by that department to any other body or authority.”).



of nondelegation cases referenced a specific constitutional provision. In the post–New Deal era, this figure hardly budged, increasing just four percentage points.

### C. *Representative Cases*

Although aggregate statistics illuminate broader trends, they only tell part of the story. In this final Section, we discuss individual nondelegation cases that are representative of the entire sample. Of particular note is the frequency with which judges addressed the same statutory delegations of power and reached the same conclusions—even when decades, or an entire century, separated the cases. In short, it is remarkable how little has changed with the nondelegation doctrine over the course of its two-hundred-year history.

One example of this continuity involves a line of cases addressing the ability of the legislature to delegate professional licensing requirements. All the way back in 1884, an Iowa state court upheld a statute that delegated the authority to license pharmacists to a board of pharmacy.<sup>109</sup> Four decades later, in 1928, New York’s highest court rejected a nondelegation challenge to a nearly identical statute that conferred the power to revoke pharmacists’ licenses upon an administrative board.<sup>110</sup> Even more recently, in 1955, the Supreme Court of Florida upheld a statute that authorized the American Veterinary Medical Association to set educational requirements for the licensing of veterinarians.<sup>111</sup> And, in 1975, a California court ruled that the legislature could constitutionally delegate the power to set educational requirements for the licensing of psychologists to a private accrediting agency.<sup>112</sup> Nondelegation challenges against boards’ involvement in the licensing of professionals have been common, and no less common has been willingness of courts to uphold such delegations.

Another example concerns the limits of prosecutorial discretion. This topic has long been a focus of nondelegation challenges. For instance, in 1924, a California court upheld a state law that gave prosecutors the ability to determine whether a criminal’s second conviction for the unlawful possession of narcotics should be upgraded from a misdemeanor to a felony offense.<sup>113</sup> In 1975, an Illinois state court ruled that a prosecutor can constitutionally be delegated the authority to decide whether to charge an individual with a felony or misdemeanor.<sup>114</sup> And, in 2005, the Ninth Circuit rejected a nondelegation challenge to a three-strikes law that provided for the possibility of life imprisonment in cases where the prosecutor chose to

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109 See *Hildreth v. Crawford*, 21 N.W. 667, 669 (Iowa 1884).

110 See *Mandel v. Bd. of Regents of Univ. of State of N.Y.*, 164 N.E. 895, 896–97 (N.Y. 1928).

111 See *State ex rel. Kaplan v. Dee*, 77 So. 2d 768, 769 (Fla. 1955).

112 See *Packer v. Bd. of Behavioral Sci. Exam’rs*, 125 Cal. Rptr. 96, 100 (Ct. App. 1975).

113 See *People v. Mock Don Yuen*, 227 P. 948, 949 (Cal. Dist. Ct. App. 1924).

114 See *People v. Graham*, 323 N.E.2d 441, 444 (Ill. App. Ct. 1975).

file a notice with the court listing the prior convictions.<sup>115</sup> Dozens of cases have arisen with similar claims,<sup>116</sup> and they all lead to the same outcome. Invoking the nondelegation doctrine in an effort to limit prosecutorial discretion has been a universally unsuccessful strategy. Not all areas, however, have received such unsympathetic treatment from the courts.

A final prominent example—and one in which the nondelegation doctrine has had considerable success over the years—deals with constraining expansive delegations of the taxing power. *Marr v. Enloe*, a case we discussed above,<sup>117</sup> represents an early example of this type of unconstitutional delegation.<sup>118</sup> In that 1830 case, the court struck down a Tennessee statute that gave the judiciary the unlimited power to set taxes “upon all polls and property subject to taxation by the laws of this State.”<sup>119</sup> Even for its time, this delegation was notable, but more significant is the fact that some modern legislatures still attempt to delegate broad taxing authority.

More than a hundred years after *Marr v. Enloe*, the North Dakota state legislature delegated to the state’s Potato Development Commission the authority to set the rate for an excise tax on potatoes and to determine, at its complete discretion, which areas of the state shall be subject to the tax.<sup>120</sup> Given the lack of guidance regarding the scope of the tax, the Supreme Court of North Dakota held that the act unconstitutionally delegated legislative power.<sup>121</sup>

Similar delegations have been struck down even more recently. For instance, in 1985, a Pennsylvania court ruled unconstitutional a municipal delegation that authorized a Solid Waste Enforcement Officer to set garbage rates “as he shall deem fair and reasonable.”<sup>122</sup> And, in 2000, the Supreme Court of Washington invalidated a statute that required “voter approval of all future state and local tax increases.”<sup>123</sup> As these representative lines of cases

115 See *United States v. Jensen*, 425 F.3d 698, 706–07 (9th Cir. 2005).

116 See, e.g., *United States v. Mayhew*, 380 F. Supp. 2d 936, 943 (S.D. Ohio 2005) (rejecting an argument that the Federal Death Penalty Act violates the nondelegation doctrine because it allows the prosecution to designate additional nonstatutory aggravating factors to be weighed by the jury in its death penalty determination); *People v. Wright*, 490 N.E.2d 640, 652 (Ill. 1985) (upholding law that gave State’s Attorney discretion over whether to seek death penalty); *Commonwealth v. Bannister*, 497 A.2d 1362, 1365 (Pa. Super. Ct. 1985) (ruling that the legislature did not “improperly delegate legislative power to the executive by giving the prosecution discretion whether to invoke the Mandatory Sentencing procedure”); *Hansen v. State*, 904 P.2d 811, 822–23 (Wyo. 1995) (upholding statute that grants prosecutor the discretion to decide whether a juvenile over the age of fourteen who is charged with a violent felony shall be tried as an adult).

117 See *supra* text accompanying notes 11–15.

118 See *Marr v. Enloe*, 9 Tenn. 452, 453 (1830).

119 *Id.*

120 See *Scott v. Donnelly*, 133 N.W.2d 418, 423–26 (N.D. 1965). The only limitation was that the tax could not exceed a maximum rate specified by the statute. *Id.* at 425.

121 See *id.* at 426.

122 *Meyersdale Borough Refuse Serv. v. Wentworth*, 36 Pa. D. & C.3d 654, 657 (Ct. C.P. 1985).

123 *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 772 (Wash. 2000).

and the aggregate statistics both demonstrate, the New Deal was not a turning point for the nondelegation doctrine. Instead, consistency and stability have been the hallmarks of the doctrine's history.

#### CONCLUSION

Although more than two hundred years has elapsed since the first nondelegation case,<sup>124</sup> little has changed during that time. Today, the doctrine is invoked in the same disputes and implemented in the same manner as it was in the nineteenth century. The narrative of decline that has dominated the past eighty years is wrong. The nondelegation doctrine did not die during the New Deal but rather persists to this day.

In reaching this conclusion, we drew upon an original dataset of more than one thousand nondelegation challenges. These cases revealed that the pre- and post-New Deal nondelegation eras are characterized more by their similarities than by their differences. With regard to the objects of delegation, the subjects of delegation, and even the invalidation rate, the two periods exhibit a remarkable degree of uniformity. Ultimately, the nondelegation doctrine is notable not for its demise during the New Deal revolution but rather for its surprising persistence through the twentieth and early twenty-first centuries.

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124 See *Respublica v. Duquet*, 2 Yeates 493, 494 (Pa. 1799).

