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STATE SEPARATION OF POWERS AND THE FEDERAL COURTS

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INTRODUCTION

Federal courts might seem to have few occasions to weigh in on disputes about state separation of powers. With the possible exception in the Guarantee Clause that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government,"[1] the Constitution appears to say little about state separation of powers. The federal Constitution and statutes establish federal government institutions; state constitutions and statutes set up state institutions.

There are, however, currently emerging possibilities for the federal courts to consider state separation of powers issues. Questions have arisen both with respect to states' use of private parties to enforce regulations, such as the anti-abortion regulations in Texas's Senate Bill 8 (S.B. 8),[2] and with respect to state legislatures' claims of near-plenary powers over federal elections under the so-called Independent State Legislature Doctrine (ISLD).[3] A particular impetus for this Article is the recent revival of interest in the nondelegation doctrine, even though that revival primarily addresses federal administrative agencies. Those who argue for a weak or nonexistent nondelegation doctrine point out that the Court in the past only infrequently used the nondelegation doctrine to strike down federal statutes.[4] On the

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[1] U.S. CONST. art. IV, § 4.

[2] TEX. HEALTH & SAFETY CODE ANN. §§ 171.207(a), 171.208(a)(2), 171.005; *see also infra* text accompanying notes 154–86.

[3] *See* Harper v. Hall, 874 S.E.2d 902 (N.C. 2022), *cert. granted* 597 U.S. (2022). The Court heard argument on December 7, 2022. *See also* Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 501–03 (2021); *see also infra* text accompanying notes 187–215.

[4] *See, e.g.*, Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 382 (2017) (emphasizing the relative rarity of the nondelegation doctrine's application, leading to invalidations in federal and state courts); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279–80 (2021) ("There was no nondelegation doctrine if legislative power is defined as 'the power to adopt generally applicable rules of conduct governing future actions by private persons.'"); *id.* at 280, 282 (emphasizing the Founding era evidence, and the lack of support for a nondelegation doctrine in the Constitution).

other hand, as Cass Sunstein has pointed out, and as cases such as *West Virginia v. EPA* illustrate,[5] nondelegation doctrine has played an important role outside of outright statutory invalidation.[6]

The federal cases involving state separation of powers addressed in this Article give additional historical examples of the nondelegation doctrine's role apart from striking down statutes on separation of powers grounds. Of course, one would not expect separation of powers to be the Court's principal reason for holding a state practice unconstitutional, given that state allocations of power are largely matters of state law. But the Court used separation of powers reasoning in service of other constitutional rights—Fourteenth Amendment protections of property from confiscation and requirements of equal protection, Fourteenth Amendment procedural due process protections of liberty and property,[7] and First Amendment protections for speech and association.[8]

During the late nineteenth century and into the twentieth, states repeatedly argued for their preferred characterizations of their governmental entities as a way to lessen judicial review. States argued, for example, that their railroad commissions were legislative and entitled to the same deference in regard to rate-making as the legislatures would get if the legislature itself had set the rate.[9] In some cases states argued that agency adjudicators should be treated as courts, entitled to judicial finality.[10] And in other cases they argued for unreviewable executive finality, or for allowing delegations to private parties.[11]

Based on the Supreme Court's own characterization of state entities, the Court on many occasions rejected claims for deference, thus employing more plenary

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[5] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (holding that Congress had not delegated to the EPA power, in determining the "best system of emission reduction," to restructure the overall mix of electricity generation); Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (holding that Congress had not delegated to the Centers for Disease Control the power to order a nationwide eviction moratorium; "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." (citations and internal quotations omitted)); Nat'l Fed. of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022) (holding that the challengers were likely to succeed on the merits of their claim that Congress had not authorized a vaccine mandate for all employers of at least 100 employees; the act was directed to "occupational" safety and health standards not public health more generally).

[6] *See generally* Cass Sunstein, *The Non-Delegation Canons*, 67 U. CHI. L. REV. 315 (2000).

[7] *See infra* notes 24–41; U.S. CONST. amend. XIV, § 1.

[8] *See infra* notes 45–52; U.S. CONST. amend. I.

[9] *See* Munn v. Illinois, 94 U.S. 113, 133–34 (1877), *overruled by* Smyth v. Ames, 169 U.S. 466, 516–17 (1898).

[10] *See infra* notes 72–98 and accompanying text.

[11] *See infra* notes 120–36 and accompanying text (describing the state's argument in *Yick Wo v. Hopkins*, claiming an executive official could act with unreviewable discretion); *see also infra* notes 137–51 (providing examples of delegation to private enterprises).

judicial review. The Court's classifications of state entities so as to refuse high levels of deference provided less room for the exercise of power without standards and evidence—something that legislatures themselves were to an extent allowed to do.[12] The Court's limiting the ability of the legislature to give arbitrary power to delegees, however, also suggested that the legislature itself was not free to make certain arbitrary decisions.[13] In a sense, the legislature could be restricted from keeping certain types of decisions to itself—or at least could not do so without the Court upping its judicial review.

Not only was access to judicial review generally an issue, but access to federal courts was also a concern. State litigants repeatedly used arguments respecting state separation of powers to try to limit access to federal courts and, particularly, lower federal courts.[14] The Court's use of separation of powers in these cases often helped to assure what it saw as the constitutional role of the federal courts in preserving federal constitutional rights and providing a neutral forum for out-of-staters.[15]

The cases discussed herein mostly surfaced in the regulatory era of the latter half of the nineteenth century and the early twentieth century. This Article first discusses arguments as to state delegations of legislative power, and the Court's rejection of legislative-style deference that state agencies often argued for.[16] This Article next discusses the Court's decisions as to state adjudicative bodies, and its refusal to treat state agency adjudicators as full-fledged courts. This Article then addresses the Court's response to arguments for unreviewable executive discretion and to laws allowing delegations to private parties. It then addresses whether the discussion sheds light on modern debates as to the use of private enforcement and as to the Independent State Legislature Doctrine.

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[12] *See* Ann Woolhandler, *Delegation and Due Process: The Historical Connection*, 2008 SUP. CT. REV. 223, 233–38. Rational basis review continues to be the normal standard for most social and economic legislation. *See, e.g.*, Armour v. City of Indianapolis, 566 U.S. 673, 680–81 (2012).

[13] *See infra* text accompanying notes 28–41, 68–71, 120–36; *see also* Woolhandler, *supra* note 12, at 263–65 (indicating that limitations on delegated power may have limited the extent to which legislatures could retain for themselves certain particularized decisions); Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1532–37 (2021) (discussing the debate about whether a legislature that granted a corporate charter with provisions for revocation under certain circumstances could reserve to itself "unreviewable power to decide whether those circumstances obtained"); *id.* at 1538–43 (discussing the doctrine of unconstitutional conditions as to the grants of certain interests).

[14] *See infra* text accompanying notes 72–102; *see also infra* notes 32–33; Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 629 (1999) (discussing arguments for treating certain state proceedings as judicial).

[15] *See* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 91, 130 (1997) (discussing the Court's seeing access to federal courts as a constitutional entitlement).

[16] This Article also provides some comparable examples involving federal agencies. *See infra* text accompanying notes 42–44, 52, 142–46.

I. THE GUARANTEE CLAUSE

The Court's general indifference to state separation of powers issues was partly manifested in its treating Guarantee Clause claims as nonjusticiable. In *Luther v. Borden*, the Court declined to determine that an incumbent government had been superseded by a rival authority that the President and Congress had not recognized.[17] Similarly, in *Georgia v. Stanton*, the Court refused to decide, as a political question, the legality of the Reconstruction government in a former Confederate state.[18] With the advent of greater regulation in the latter part of the nineteenth century, the Court rejected Guarantee Clause and related challenges to state legislatures' delegating rate-making functions to state-created commissions and challenges to mixing governmental functions within such commissions.[19] With respect to a Mississippi statute, the Court stated:

> No valid objection, [], can be made on account of the general features of this act; those by which the State has created the railroad commission and entrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads of the State.[20]

The Court also rejected a Guarantee Clause challenge to a state tax law adopted by initiative. The challenger argued that only the legislature could impose the tax.[21]

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[17] 48 U.S. 1, 38–40 (1849).

[18] 73 U.S. (6 Wall.) 50, 52 (1868) (statement of the case) ("It set forth further that the intent and design of the acts of Congress . . . was to overthrow and to annul this existing State government, and to erect another and different government in its place, unauthorized by the Constitution and in defiance of its guarantees."). The Court dismissed the bill in equity for want of jurisdiction, holding that the case raised political questions. *Id.* at 74, 76–77; *see also id.* at 60–61 (argument of Attorney General Stanbery) (relying on *Luther v. Borden*); *id.* at 65 (argument for Georgia) (distinguishing *Luther*).

[19] *See infra* note 20 and accompanying text.

[20] Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 394 (1894) (citing the Railroad Commission Cases, 116 U.S. 307 (1887)); *see also* Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902) (holding that allegations that the state indeterminate sentencing law gave to others the judicial power and the governor's pardon power presented no federal question for review); Prentis v. Atl. Coast Line R.R., 211 U.S. 210, 225–26 (1908) (rejecting a challenge to the railroad commission's combination of functions) (citing Dreyer v. Illinois, 187 U.S. 71 (1902)); *cf.* Siler v. Louisville & N. R. Co. 213 U.S. 175, 190–91, 197 (1909) (adverting to a Guarantee Clause argument; deciding on the ground that the commission had not been delegated power to make general rates).

[21] Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 150–51 (1912). The taxpayer also raised equal protection and law of the land arguments, but the Court saw these as basically part of the Guarantee Clause objection. *Id.* at 137–40. Some state courts disapproved of taxation delegations. *See* Whittington & Iuliano, *supra* note 4, at 424.

The Court, in contrast, treated the separation of powers arguments as matters of state law.[22]

II. LEGISLATIVE CHARACTERIZATIONS

The Court's rejection of Guarantee Clause arguments in the railroad commission setting did not result from recharacterizing rate-making as an executive function when performed outside the legislature.[23] Rather, the Court consistently treated rate-making as a legislative function.[24] Treating the delegation of this admittedly legislative function as constitutionally unexceptionable, however, provided some support for state arguments that the courts should accord the commissions the same deference they might accord the regular state legislature with respect to rate-making.

In *Munn v. Illinois*, the Court held that rates set by state legislatures were subject to virtually no judicial review.[25] It was for the legislature, not the courts, to determine rate reasonableness.[26] This deference encompassed both the lack of substantive review for legislative rate setting and the implicit general assumption that state legislatures could act without judicial oversight of their procedures for rate setting. By extension, the states argued that the commissions could proceed with a similar lack of substantive or procedural review. And, for a time, this argument seemed to have some success.[27]

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[22] State R.R. Comm'n Cases, 116 U.S. 307, 335–36 (1887) (although not explicitly referring to the Guarantee Clause, indicating that the state court had held the commission did not violate state separation of powers, with which the Court agreed).

[23] *Cf.* Whittington & Iuliano, *supra* note 4, at 399 ("By the Progressive Era, the Court was willing to characterize almost any action that a government official performed as nonlegislative.").

[24] *See, e.g.*, Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226 (1908).

[25] 94 U.S. 113, 133–34 (1877); *see also* Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2197, 2201 (2022) (in context of allowing the state legislature to intervene to defend state law, relying in part on the important interests in states to structure their own governments).

[26] *See Munn*, 94 U.S. at 134; Chicago, Burlington & Q. R.R. Co. v. Iowa, 94 U.S. 155, 161–62 (1877). In *Munn*, addressing legislation providing maximum rates for grain storage, the Court stated,

> For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. . . . If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

94 U.S. at 132–33.

[27] *See, e.g.*, Chi. Burlington & Q.R.R. Co. v. Nebraska, 170 U.S. 57, 76–77 (1898) (indicating that because the legislature might have apportioned the cost of certain repairs as it saw

The argument for legislative-like deference, however, suffered a setback in the famous *Milwaukee Road* case.[28] The state statute at issue had provided for review of commission action through an action for mandamus in the Minnesota Supreme Court, which held that "as the legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination . . . as to what were reasonable charges final and conclusive."[29] On direct review, the U.S. Supreme Court treated the state court's interpretation as conclusive on the state law question.[30] But the Court held that Fourteenth Amendment due process required that regular courts determine the reasonableness of the rates[31]—in effect requiring substantive review of agency-set rates, by judicial procedures in state or federal courts.[32] Similarly in *Reagan v. Farmers' Loan and Trust*, a case originating in a lower federal court challenge to the reasonableness of commission-set rates, the Supreme Court noted—but rejected—the defendant's denial of "the power of the court to entertain an inquiry . . . insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the government and beyond examination by the courts."[33]

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fit, so too might the city council); Spring Valley Water Works v. Schottler, 110 U.S. 347, 354 (1884) (suggesting that commission-set rates would be final, although based on a judicial characterization).

[28] *See* Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 456–58 (1890) (explaining the deprivation of due process of law as a result of rate setting enacted by legislative statute).

[29] *Id.* at 453 (as described by the U.S. Supreme Court).

[30] *Id.* at 456; *cf. id.* at 464 (Bradley, J., dissenting, joined by Gray and Lamar, JJ.) (reasoning that no one would say that if the legislature had fixed the rate itself that would not have been due process of law).

[31] *See id.* at 458 (stating rates set by a commission can inhibit a railway's use of its property, in which instance the absence of due process is violative of equal protection provided by the Fourteenth Amendment).

[32] *See* Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362, 391 (1894) ("For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defence."). Diversity was a ground for jurisdiction, but the Court also indicated federal question was a ground given that non-confiscatory rates were required by due process. *See* Smyth v. Ames, 169 U.S. 466, 516–17 (1898) (upholding jurisdiction, alluding to diversity and also that the plaintiffs "ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States").

[33] 154 U.S. at 396; *see also Smyth*, 169 U.S. at 516–17 (rejecting an argument that a state law provision for review in the state supreme court could deprive the federal courts of equity jurisdiction, stating "[o]ne who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court").

And although *Milwaukee Road* and other cases suggested that state legislatures' direct enactment of rates might provide a shield from judicial review, the Court eventually rejected that view. In *Smyth v. Ames*, the Court held that even legislatively set rates must be subject to review in the regular courts for due process reasonableness.[34]

The *Smyth* decision did not stop ongoing arguments by commissions and other government officers that their decisions were entitled to legislative-style respect—particularly as to areas other than rate-making in which legislatures may have been thought to have power to make singular decisions with an absence of review. For example, in *Southern Railroad Co. v. Virginia*, the highway commissioner, without a hearing, ordered the railroad to eliminate a grade crossing.[35] The state supreme court treated the determination as effectively final and unreviewable.[36] On direct review before the U.S. Supreme Court, the State argued that the legislature might have ordered elimination of the grade crossing without a hearing, and so the commission could do the same.[37] The Court disagreed.[38] In requiring notice and a hearing, the Court stated, "[t]here is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."[39]

The Court rejected similar arguments by municipalities contending they could make particularized tax assessments on property owners for benefits from street improvements without procedures because it was thought that legislatures held this power.[40] And similar to the result in *Smyth v. Ames*, in which the Court enhanced review of the legislature's rate-making, the Court's later decisions eventually undermined the idea that the legislature itself could make particularized assessments without judicial review. The Court itself occasionally provided, on direct review, review of arbitrariness with close attention to the record.[41]

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[34] 169 U.S. 466, 541 (1898).

[35] 290 U.S. 190, 193–94 (1933).

[36] *Id.* at 194.

[37] *Id.* at 197.

[38] *Id.*

[39] *Id.*; *see also* Washington *ex rel.* Oregon R. & N. Co. v. Fairchild, 224 U.S. 510, 524–26 (1912) (on direct review, indicating that procedures and substantive review were required as to the necessity of a grade crossing elimination); *id.* at 528, 531–32 (holding that the evidence did not support the order despite the adequacy of procedures).

[40] *See* Londoner v. Denver, 210 U.S. 373, 373 (1908); *cf.* Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 257–58 (1905) (Holmes, J., dissenting) (arguing that, putting aside compensation issues, there should be no federal review of a decision of a private company delegated power to condemn property because a legislature could choose such property without review).

[41] *See* Woolhandler, *supra* note 12, at 264–65 (suggesting that delegation's requirement of procedural due process for individual tax assessment suggested it was no longer acceptable for legislatures to make individualized assessments); *id.* at 256–58 (citing cases where the Court reviewed legislative assessments for arbitrariness and examined the factual record).

The Court addressed parallel arguments from federal agencies. The Interstate Commerce Commission (ICC) argued that the 1906 Hepburn Act:

> requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing.[42]

The Court rejected these arguments and required factual support via hearings for agency determinations, in addition to judicial review.[43] And delegation played a significant role not only in providing for added procedures within the agencies but also in the Court's articulation of a more elaborate scheme of review for federal agencies that would lay the foundations for the APA. For example in *ICC v. Illinois Central Railroad Co*., the Court stated that courts would review:

> *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.[44]

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[42] ICC v. Louisville & Nashville R.R. Co., 227 U.S. 88, 93 (1913) (partly relying on the statute's providing a hearing); *cf.* ICC v. Ala. Midland R.R. Co., 168 U.S. 144, 168, 174–76 (1897) (rejecting based on the statute the argument that the ICC's decision not to allow a short haul/long haul differential was unreviewable because it was factual, and holding that the evidence did not support the order).

[43] *Louisville & Nashville R.R. Co*., 227 U.S. at 91–92 (indicating that factual support would be required and that the authority claimed "is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power").

[44] ICC v. Ill. Cent. R.R. Co., 215 U.S. 452, 470 (1909); *see also* ICC v. Union Pac. R.R. Co., 222 U.S. 541, 547 (1912) (providing a similar description of review, as to an order involving distribution of coal cars). This description was more elaborate than the Supreme Court provided on direct review of state decisions, but the lower federal courts could apply similar review under state law. *Cf.* Wichita R.R. & Light Co. v. Pub. Utils. Comm'n of Kan.,

While the late nineteenth- and early twentieth-century cases used separation of powers reasoning in connection with economic rights,[45] later cases also used such reasoning in protecting associational and speech rights. For example, in *Sweezy v. New Hampshire*, the state Attorney General (AG) won a conviction of the petitioner for refusing to answer certain questions as to supposed subversive activities.[46] The AG claimed to be acting as an investigator for the legislature itself—presumably to bolster arguments for limiting review.[47] Given that the case came to the Court on direct review, the Court accepted that the AG was acting as a legislative investigator,[48] but still treated his allowable exercise of authority as more limited than the legislature's.[49] The plurality concluded that the questions the petitioner had refused to answer were of marginal significance and implicated freedom of association and speech.[50] "The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority."[51] The Court reached a similar conclusion in *Kent v. Dulles*, holding that the United States Secretary of State had not been delegated discretion to restrict the right to travel based on Communist Party membership.[52]

What does looking at the Supreme Court's rejection of legislative characterizations of state agencies tell us? The Supreme Court's decisions relying on state separation of powers were not merely artifacts of general common law. Rather the Court repeatedly acknowledged that it was bound by state decisions as to the meaning of state statutes, and many of the cases came to the court by direct review from state courts.

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260 U.S. 48, 58 (1922) (deciding that a hearing was required under state law); Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 73–76 (1937) (although discussing state grounds, ultimately deciding that the Texas Railroad Commission's order violated the federal Constitution by taking private property for public benefit). As Richard Re has observed, it is possible that federal and state non-constitutional administrative law now do much of the work that federal due process did. Federal due process review is still in principle available but need only rarely be applied. Email from Richard Re, Professor, Univ. of Va. Sch. of Law, to author (Aug. 10, 2022) (on file with the author).

[45] Such as confiscatory rates, individualized determinations of necessity for railroad expenditures, or particularized determinations when value or benefit was the measure of taxation.

[46] 354 U.S. 234, 251–54 (1957).

[47] *Id.* at 237–38.

[48] *Id.* (noting that the state law had been "construed to constitute the Attorney General as a one-man legislative committee").

[49] *Id.* at 251–52 ("Petitioner had been interrogated by a one-man legislative committee, not by the legislature itself."); *id.* at 253 (stating that the "respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us").

[50] *Id.* at 249–50 (indicating that the New Hampshire court had found that speech rights had been abridged but also that the infringement was justified).

[51] *Id.* at 254.

[52] Kent v. Dulles, 357 U.S. 116, 129–30 (1958); *see also id.* at 117–18 n.1 (citing regulations under which the Director of the Passport Office refused to issue a passport).

Of course, federal courts must characterize state institutions to determine the level of judicial review thereof—as the Court did in these cases. One may start with the premise that a good bit of legislation (particularly what we would now call social and economic legislation) has been and remains subject to only minimal federal judicial review. For example, consider Congress's imposing a tariff. Respect for the political role of the legislature allows it to make decisions based on political preferences or will without procedures policed by the judiciary and without a record of factual support. A foundation of representative government is that legislatures have leeway in many areas to act—for want of a better word—unreasoningly.

Those executing the law often lack similar leeway. For example, a customs official traditionally was subject to common law–type actions with respect to various factual and legal errors in enforcement of customs laws. While distinguishing between Congress and a customs officer is easy, it may be a necessary—if implicit—step in determining the scope of judicial review. One might argue then, that this was all the Court did in addressing state separation of powers in the cases discussed above.

Railroad commissions, however, had a better claim to being treated more like legislatures than many other official actors. The commissions performed rate-making which the Court consistently characterized as legislative.[53] And operating a railroad was often treated as a privilege or public right, which would allow for more regulation and less regular court involvement.[54] Accordingly, some state legislatures and state courts were willing to treat the commissions as entitled to legislative-style deference.[55]

But by rejecting these arguments and by treating the commissions as different from legislatures, the Court limited the legislature's ability to extend to other government actors the power to act unreasoningly. The Court stated, "[i]n creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."[56] A pure delegation would seem to be one in which the agency was left at large as to standards and as to factual support—similar to the legislature itself.[57]

Of course, given the Court's treatment of the Guarantee Clause as nonjusticiable, the Court's decisions implicating state separation of powers were linked to

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[53] *See supra* text accompanying notes 23–34.

[54] *See generally* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007) (discussing how entitlements to regular court review might turn on the distinctions between public rights and privileges on the one hand versus private rights).

[55] *See supra* text accompanying notes 25–39.

[56] *See* Wichita R.R. & Lt. Co. v. Pub. Utils. Comm'n of Kan., 260 U.S. 48, 59 (1922).

[57] *Cf.* S. Ry. v. Virginia, 290 U.S. 190, 197 (1933) (commenting on the commission's claim that it had the power to determine that eliminating a grade crossing was necessary without notice or evidence, and without judicial review, "[t]his, we think, amounts to the delegation of purely arbitrary and unconstitutional power").

other constitutional provisions. Thus, Fourteenth Amendment principles of substantive non-confiscation and procedural due process featured in the Court's cases discussing state delegations.[58] Indeed, the fact of delegation helped the Court to crystallize the Fourteenth Amendment's non-confiscation norm, with respect to state agencies[59] and later legislatures,[60] and the requirements for procedural due process with respect to state agencies.[61] Insisting on procedural due process dovetails with nondelegation because it suggests adherence to substantive standards including requiring evidence to support application of the standards to individuals.[62]

Many scholars have characterized the nondelegation doctrine as unimportant because there were few statutes that the Court treated as nullities on nondelegation grounds.[63] That is, for some scholars, the Court's 1935 decisions in *Panama Refining*[64] and *Schecter Poultry*[65] gutting the National Industrial Recovery Act manifested the only significant impact of the nondelegation doctrine,[66] putting aside some modern efforts to revive the doctrine. On the other hand, Cass Sunstein called attention to the role that nondelegation may play as an interpretive canon in sometimes limiting the scope of agency authority[67] without necessarily determining that a statute is contrary to the Constitution.

The above discussion of state separation of powers in the federal courts underlines nondelegation's importance, not for invalidating statutes but as limiting delegations by requiring adherence to standards and process.[68] These limitations circumscribed the ability of legislative bodies to invest their delegees with the same

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[58] *Cf.* Sunstein, *supra* note 6, at 331 ("A number of nondelegation canons have constitutional origins. They are designed to promote some goal with a constitutional foundation.").

[59] *See* Chi., Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418, 453 (1890), discussed *supra* text accompanying notes 28–33.

[60] *See* Smyth v. Ames, 169 U.S. 466 (1898), discussed *supra* text accompanying note 34.

[61] *See, e.g.*, Londoner v. Denver, 210 U.S. 373 (1908), discussed *supra* text accompanying note 40; Southern Ry. v. Virginia, 290 U.S. 190, 197 (1933), discussed *supra* text accompanying notes 35–39.

[62] *Cf.* Whittington & Iuliano, *supra* note 4, at 390 (indicating that due process and nondelegation considerations would generate similar constitutional principles).

[63] *See id.* at 382.

[64] *See generally* Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935).

[65] *See generally* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[66] Miriam Seifter recently stated, "[t]he doctrine has famously had 'only [one] good year' in which the Supreme Court used it to invalidate a statute." Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1746 (2021) (quoting Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 332 (1999)); Whittington & Iuliano, *supra* note 4, at 392 (seeing New Deal battles as idiosyncratic departures from the constitutional norm of deference to congressional delegations).

[67] Sunstein, *supra* note 6.

[68] These limitations showed up as part of substantive constitutional norms such as "non-confiscation," and also in requirements of procedural due process. The standards of review for federal agencies that now appear in the APA also reflect these limitations.

room for the exercise of political preferences without attention to standards and facts the legislature itself enjoyed. If allowing wide room for the legislature to act unreasoningly is a foundation of representative government, allowing the same leeway for agencies is not.

What is more, the prohibitions on delegations to act unreasoningly could end up heightening standards for the legislature itself—thus narrowing its own powers to act unreasoningly. If delegees could not make rate determinations without providing a reasonable return on the current value of the railroad, then perhaps the legislature itself could not make rates without standards and evidence. When the Court held legislatively set rates were subject to review in the regular courts in *Smyth v. Ames*, it stated that it would not presume that the state constitution gave power to the legislature to provide unreasonable rates—even here relying, to an extent, on nondelegation reasoning for a substantive non-confiscation result.[69] If legislatures purported to make particularized factual determinations of tax assessments, their results could similarly become subject to at least some review.[70] So too, the clear statement principles applied to delegees in associational contexts suggested constitutional limitations on legislatures themselves.[71]

III. JUDICIAL CHARACTERIZATIONS

The federal courts also adverted to state separation of powers when state entities claimed to be courts exercising state judicial power. In doing so, state officials were seeking a way to limit federal judicial power, particularly lower federal court jurisdiction.

The issue of judicial characterizations surfaced in state eminent domain proceedings. State systems often called for an initial determination of value of condemned property by a specially appointed commission or jury. A party dissatisfied with the result could seek review in a regular court, often de novo.[72] For example, in *Boom Co. v. Patterson*, the county district court appointed a commission to determine the value of the property but an appeal could be taken in the same court by either party.[73] At the point of review in the county court, the out-of-state condemnee removed to federal court.[74]

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[69] Smyth v. Ames, 169 U.S. 466, 526–27 (1898).

[70] *See supra* note 41.

[71] *See supra* text accompanying notes 45–52.

[72] *See* Woolhandler & Collins, *supra* note 14, at 627–29 (discussing eminent domain cases).

[73] 98 U.S. 403, 404 (1879).

[74] *Id.* at 405. *See also* Madisonville Traction Co. v. State Bernard Mining Co., 196 U.S. 239, 241–42 (1905) (describing a similar procedure of appointment of commissions by the county court, and that if exceptions were filed a jury would be empaneled). Removal required that the case be one that the plaintiff in the state tribunal could have filed originally in federal court, for example in diversity.

In *Boom Co.* and in other cases, the condemnor claimed that the initial commission itself was a court, which, if correct would mean that removal was now untimely.[75] In addition, condemnors argued that the Anti-Injunction Act barred an original federal action with respect to the earlier initiated proceeding.[76] The prohibition on lower-federal court review of state court judgments also surfaced as an argument.

The Supreme Court repeatedly held that the proceedings before the eminent domain commissioners were in the nature of an inquest for value and not a court proceeding.[77] The regular judicial phase began when a party contested the initial valuation.[78] The upshot of the cases was:

> [T]he states may not prescribe any mode of taking property for public purposes and of ascertaining the compensation therefore, which would exclude from the jurisdiction of a Circuit Court of the United States a condemnation proceeding which in its essential features is a suit involving a controversy between citizens of different states.[79]

Occasionally, the condemnors argued that the whole proceeding, including the appeal, were part of one administrative proceeding that the federal courts could not hear.[80] The Court again reasoned that the proceedings took the form of a controversy when it came up for consideration in the regular courts.[81]

Recognizing a distinct judicial phase also characterized challenges in railroad commission cases where states sometimes argued that the commission's decisions

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[75] *See* Pac. R.R. Removal Cases, 115 U.S. 1, 18–19 (1885) (rejecting an argument that removal was too late because of an initial proceeding tried before the mayor by jury, and an appeal taken before the petition was filed).

[76] *See Madisonville Traction Co.*,196 U.S. at 243 . Removal was an exception to the Anti-Injunction Act. *Id.* at 245; *see* Rev. Stat. 720 (1874), current version at 28 U.S.C. 2283; *see also* Pub. Serv. Co. v. Corboy, 250 U.S. 153, 161–62 (1919) (state court involvement in drainage district designation and work authorization would not necessarily make the proceedings judicial under the Anti-Injunction Act).

[77] *Boom Co.*, 98 U.S. at 406.

[78] *See id.* ("If it takes the form of proceeding before the courts between parties, there is a controversy, which is subject to the ordinary incidents of a civil suit."); *Pac. R.R. Removal Cases*, 115 U.S. at 18–19; *see also* Del. Cnty. Comm'rs v. Diebold Safe & Lock Co., 133 U.S. 473, 486–87 (1890) (rejecting argument that an initial decision by the county board of commissions on a contract claim was a judicial proceeding such that removal was too late); *cf.* Searl v. Sch. Dist., 124 U.S. 197, 199 (1888) (holding that this particular proceeding which provided the filing of a petition and the service on defendant, at which point a party could elect a commission or a jury, could be immediately removed); Kohl v. United States, 91 U.S. 367, 376 (1876) (holding that the United States could remove the proceedings that provided for an immediate determination by a commission or a jury).

[79] *See Madisonville*, 196 U.S. at 252.

[80] *Pac. R.R. Removal Cases*, 115 U.S. at 18–19.

[81] *Id.* at 19–23.

should be treated as adjudicative.[82] For example in *Milwaukee Road*, the Court recognized a requirement of judicial review of rate reasonableness; the Court responded not only to the argument that the commission should be treated as a legislative entity (which the Court rejected) but also to the argument that it should be treated as a court whose determinations were entitled to judicial finality such that review in the regular court system was not required.[83] Given the rudimentary process the commission employed, the Supreme Court had little trouble concluding that the commission "cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."[84]

Enhanced procedures in the commissions might have improved the prospects for a judicial characterization of agency proceedings. The Court, however, maintained a distinction—as it did with respect to eminent domain—between agency proceedings and regular court proceedings.[85] The distinction helped the Court maintain lower federal court equity jurisdiction for review of rate reasonableness and other state regulatory orders.[86] And as was true in the eminent domain cases, the Court repeatedly said that the states could not design their institutions to preclude out-of-staters and those alleging federal issues from accessing the federal courts.[87] The Court, moreover, treated this aspect of judicial federalism as having a constitutional dimension.[88] While Congress had power to limit federal jurisdiction, the states did not.[89]

Prentis v. Atlantic Coast Line Railway presented an unusual case of the Court's adjusting to state procedures to preserve lower federal court jurisdiction.[90] A state commission provided hearings for rate setting, and the Virginia Supreme Court on review could substitute its own rate-making orders for those of the commission.[91] Upon completion of agency procedures, the railroad filed a federal equity action challenging the rates.[92] The State argued that the commission was a court whose

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[82] Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 457–58 (1890).

[83] *Id.* at 456–57.

[84] *Id.* at 457.

[85] Woolhandler & Collins, *supra* note 14, at 628–29.

[86] *See* Prentis v. Atl. Coast Line Co., 211 U.S. 210, 226 (1908) (rejecting an Anti-Injunction Act and res judicata argument).

[87] Woolhandler & Collins, *supra* note 14, at 634–35.

[88] *See, e.g.*, Pub. Serv. Co. v. Corboy, 250 U.S. 153, 161–62 (1919); *see also* Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362, 391–92 (1894) (indicating that the state's limiting review to courts of a particular county would not affect federal review); *id.* at 391 ("A State cannot tie up a citizen of another State, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts."); Smyth v. Ames, 169 U.S. 466, 517 (1898) (quoting this language); *see* Woolhandler, *supra* note 15, at 91, 130.

[89] *Reagan*, 154 U.S. at 391–92.

[90] *See generally* Prentis v. Atl. Coast Line Co., 211 U.S. 210 (1908).

[91] *Id.* at 211.

[92] *Id.*

determinations were entitled to preclusive effect and which could not be subject to a federal court injunction.[93] Alternatively, the State argued that the state supreme court's review role was part of the state's legislative process in which the federal courts could not interfere.[94]

The U.S. Supreme Court rejected the argument that the commission's rate determinations were court decisions.[95] It agreed, however, that the state supreme court played a legislative role through its ability to enter its own rate schedule.[96] But rather than derailing access to a federal forum, the Court's legislative characterization of the state supreme court's role meant that the railroad could bring an original equity proceeding in the lower federal court after the state supreme court had ruled.[97] The Court viewed *Prentis* as standing for the proposition:

> [A]lthough a State may have power to confer upon its courts such authority as may be deemed appropriate, it cannot by the exertion of such right draw into the judicial sphere powers which are intrinsically legislative and executive or both, and thus bring the exercise of such powers within the scope of the prohibition of the statute [Anti-Injunction Act], with the result of depriving the courts of the United States to that extent of their omnipresent authority to enforce the Constitution.[98]

States' attempts to defeat federal court jurisdiction also arose as to aspects of state rate-making schemes less linked to the separation of powers. For example, states legislation provided that customers could sue railroads for large fines for every violation of a state or commission-prescribed rate,[99] and attempted by this and

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[93] *Id.* at 223.

[94] *Cf.* Keller v. Potomac Elec., 261 U.S. 428 (1923) (holding that the U.S. Supreme Court could not review a Supreme Court of the District of Columbia decision where the lower court could change rates), *discussed in* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 993 (2011).

[95] *Prentis*, 211 U.S. at 226. Justice Holmes suggested, without deciding, that other adjudicative proceedings of the agency might be treated as more judicial, and as engaging the Anti-Injunction Act, 211 U.S. at 225–26, but the Court did not take up this suggestion. The Court's decision suggested that direct review of the Virginia Supreme Court's decision would not be available.

[96] *Id.*

[97] *Id.* at 229–30; *cf.* Bacon v. Rutland R.R., 232 U.S. 134, 137–38 (1914) (determining that the railroad was free to bring a federal equity action after the commission proceedings because the state court had only judicial power); Detroit & Mackinac Ry. Co. v. Mich. R.R. Comm'n, 235 U.S. 402, 405 (1914) (prior state review where state court presumptively lacked legislative powers was res judicata).

[98] Pub. Serv. Co. v. Corboy, 250 U.S. 153, 162 (1919).

[99] *See* John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 991–92 (2008).

other means to limit railroads' challenges to defenses in state-court actions.[100] The Supreme Court, however, repeatedly allowed shareholders to bring diversity or federal question actions, stating that states could not limit redress to their own courts.[101] And in *Ex parte Young*, as John Harrison has recounted, the Court determined that the burdens to court access violated (procedural) due process, quite apart from the underlying merits of whether the challenged rates were reasonable.[102]

One area in which the Court did allow informal procedures to count as judicial was in exclusions from the state bar. During the nineteenth century, the Court occasionally reviewed exclusions from the bars of lower federal courts, and required those courts to provide adequate procedures.[103] Bar applicants in the mid-twentieth century sometimes sought direct review from decisions of state supreme courts denying admissions based on speech or association.[104] For example, in *In re Summers*, a lawyer challenged the denial of his admission based on his refusal to swear to defend the state because of his conscientious objection to war.[105]

In the U.S. Supreme Court, the state parties argued that certiorari was unavailable given that the proceedings were informal and administrative.[106] The U.S. Supreme Court stated in *Summers*, "[s]ince the proceedings were not treated as judicial by the Supreme Court of Illinois, the record is not in the customary form."[107]

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[100] *See* Reagan v. Farmers' Loan & Tr. Co., 154 U.S. 362, 393–94 (discussing the railroad's arguments, "that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property"); Smyth v. Ames, 169 U.S. 466, 518 (1898) (indicating the carrier was made liable to large fines for each offense, and that the remedies would be inadequate in that a court of law could only deal with each separate transaction); Siler v. Louisville & N. R. Co., 213 U.S. 175, 190 (1909) (noting the railroad's arguments as to ruinous penalties, but deciding on the ground that the Kentucky legislature had not given the commission general rate-making authority).

[101] *Reagan*, 154 U.S. at 391 ("A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.").

[102] Harrison, *supra* note 99, at 993; *see also* Smyth v. Ames, 169 U.S. 466, 517–18 (1898) (discussing that the multiplicity of actions for fines would justify equity jurisdiction). *See generally Ex parte* Young, 209 U.S. 123 (1908).

[103] *See, e.g.*, *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 512 (1873) (awarding mandamus, stating, "Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence"); *Ex parte* Bradley, 74 U.S. (7 Wall.) 364, 375, 379 (1869) (awarding mandamus because the court below had no power to punish the attorney without notice and opportunity for explanation), *discussed in* Ann Woolhandler, *Procedural Due Process Liberty Interests*, 43 HASTINGS CONST. L.Q. 811 (2016).

[104] *In re* Summers, 325 U.S. 561, 562 (1945).

[105] *Id.* at 563, 572–73. On the merits, the Court upheld the exclusion as not violative of the First and Fourteenth Amendments.

[106] *Id.* at 564–65.

[107] *Id.* at 563.

The U.S. Supreme Court took the state supreme court's characterization of the proceedings as nonjudicial to be conclusive as to state law.[108] It nevertheless stated that "[a] claim of a present right to admission to the bar of a state and a denial of that right is a controversy."[109] It noted the importance of the case, although it found on the merits against the attorney.[110]

In several subsequent cases in similar procedural postures, the Court granted relief to applicants from state supreme court determinations denying bar admission based on past communist affiliations.[111] The judicial characterization of the bar exclusion cases allowed immediate review in disputes implicating speech and associational interests.[112]

The Court later reiterated its judicial characterization of bar exclusion proceedings in *D.C. Court of Appeals v. Feldman*,[113] a case not involving speech rights. Feldman argued that the D.C. Court of Appeals—a local court in the District of Columbia operating analogously to a state supreme court—should have granted him a waiver of the requirement of attendance at an American Bar Association–approved law school.[114] After the D.C. Court of Appeals denied his application, Feldman sought relief in a federal district court.[115] Both the federal district court and the federal circuit court acknowledged that they could not sit in review of state court proceedings,[116] but determined that the proceedings were nonjudicial.[117] The Supreme Court, however, held that the prior proceedings of the D.C. Court of Appeals counted as judicial such that direct review would have been the proper route.[118] While seemingly a setback for lower federal court jurisdiction, the decision followed from earlier bar exclusion cases where the Court used direct review to advance the immediate review of the federal associational rights at issue.[119]

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[108] *Id.* at 565.

[109] *Id.* at 568.

[110] *Id.* at 573.

[111] *See* Konigsberg v. State Bar of Cal., 353 U.S. 252, 273 (1957) (holding on direct review that membership in the Communist Party in the past provided no evidence of bad moral character); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 246 (1957) (on review of the state supreme court after it reviewed a hearing, finding that there was nothing to suggest bad character from the past use of aliases and membership in the community party).

[112] D.C. Court of Appeals v. Feldman, 460 U.S. 462, 473 (1983).

[113] *Id.* at 462.

[114] *Id.* at 463–64.

[115] *Id.* at 468.

[116] *See, e.g.*, Rooker v. Fiduciary Tr. Co., 263 U.S. 413, 414 (1923) (involving a prior state judicial decision as to a trust, which the Court on writ of error had said did not disclose a question that would be the basis for review).

[117] *Feldman*, 460 U.S. at 474–75.

[118] *Id.* at 479.

[119] The Court also indicated that a challenge to bar rules, including if they did not admit a waiver, might possibly be brought in a lower federal court. *Id.* at 485–87.

The cases involving judicial characterizations underline the principle that despite states' leeway to design their institutions in ways that do not conform to federal separation of powers, they cannot design their institutions in ways that limit the role of the federal courts in determining both diversity and federal question controversies. The Court's decisions, moreover, may have reduced state incentives to limit the role of their own generalist courts in reviewing agency action, given that less standard arrangements would not generally provide an escape from federal review.

IV. EXECUTIVE CHARACTERIZATIONS

Historically many executive officers had been subject to common law and equity actions—actions that were often de novo and thus gave no deference to the officer's determinations. A state official's claim to be acting as an executive officer thus would not seem to provide a good argument for avoiding judicial review—unlike arguments that officers were acting as legislative or judicial officials.[120]

Nevertheless, arguments surfaced that an executive official could act within nonreviewable discretion, akin to arguments about exercising judicial discretion.[121] For example, certain local licensing or permitting decisions with respect to "privileges" or "franchises" for tavern-keeping traditionally evoked little review.[122]

Yick Wo v. Hopkins involved such a claim of unreviewable executive discretion,[123] but the Court determined that ordinances delegating such discretion should not be given effect. The San Francisco Board of Supervisors' ordinances prohibited laundries in wooden buildings except upon permission of the Supervisors.[124] The Supervisors granted permission to virtually all non-Chinese-owned laundries while denying permission to all those owned by persons of Chinese origin.[125] The California Supreme Court denied habeas relief to Yick Wo who had been imprisoned for violating the ordinance.[126] The California Supreme Court:

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[120] Their principal arguments for avoiding review were often based on sovereign immunity, which this Article does not focus on.

[121] The executive characterization, as distinguished from a judicial characterization, would not have entailed the complications of timeliness of removal and the Anti-Injunction Act noted above. *See supra* text accompanying notes 75–76.

[122] *See* Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886) (distinguishing determinations of whether a person was suitable for a liquor license).

[123] *Id.* at 356–57. *See generally* Evelyn Atkinson, *Frankenstein's Baby: The Forgotten History of Corporations, Race, and Equal Protection*, 108 VA. L. REV. 581, 585 (2022) (discussing lawyers using similar equal protections arguments for protections of racial minorities and corporations); Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About* Yick Wo, 2008 U. ILL. L. REV. 1359, 1362 (2008) (arguing that the decision was based more on the invasion of property rights than on discriminatory prosecution).

[124] *Yick Wo*, 118 U.S. at 357.

[125] *Id.* at 359.

[126] *Id.* at 360. In the companion case of *Wo Lee v. Hopkins*, the federal court denied habeas relief based on deference to the state supreme court opinion. *Id.* at 363.

> considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire.[127]

The U.S. Supreme Court, however, said:

> We are not able to concur in that interpretation of the power conferred upon the supervisors . . . . [The ordinances] seem intended to confer, and actually do confer, not a discretion to be exercised upon consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons.[128]

The Court quoted at length from a Maryland case refusing to enforce a condition in a permit to operate a steam engine, which provided that the engine was "to be removed after six months' notice to that effect from the mayor."[129] The mayor's invocation of the condition led the Maryland court to conclude, as quoted by the U.S. Supreme Court, that:

> there may be cases in which an ordinance, passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and setting it aside as a plain abuse of authority.[130]

The presumption of nondelegation of powers uncontrolled by standards and evidence also appeared in the rate-making setting, as discussed above. Referring to the ICC, for example, the Court stated:

> It is not to be supposed that [C]ongress would ever authorize an administrative body to establish rates without inquiry and examination; to evolve, as it were, out of its own consciousness, the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country.[131]

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[127] *Id.* at 366 (as described by the U.S. Supreme Court).
[128] *Id.*
[129] *Id.* at 372.
[130] *Id.*
[131] ICC v. Cincinnati, N.O. & T.P.R. Co., 167 U.S. 479, 509 (1897) (interpreting the 1887

The Court used similar analysis with respect to state agencies, where such reasoning would help to narrow interpretations of statutes[132] or to reach a determination that a law violated the Constitution.[133]

An interesting aspect of *Yick Wo* was that the Supervisors had engaged in a reprobated delegation to themselves.[134] While local governments could pass legislation or ordinances providing for permitting of certain uses of buildings and conducting occupations, the Supervisors could not delegate to themselves an arbitrary power to deny permits.[135] In *Yick Wo*, the Supervisors' evident discriminatory application aided in the Court's result.[136]

V. PRIVATE EXERCISES OF GOVERNMENT POWER

The theme of standardless delegation also played out with respect to delegations to private parties, upon whom a legislative body sometimes conferred a regulating

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Interstate Commerce Act as not giving general rate-making power to the ICC, and reasoning inter alia that the lack of procedures provided in the act indicated that the power had not been delegated); *see also* ICC v. Ill. Cent. R.R. Co., 215 U.S. 452, 470 (1910) (indicating that a manifestly unreasonable decision would be beyond delegated power).

[132] Siler v. Louisville & Nashville R.R. Co. 213 U.S. 175, 190–91, 197 (1909) (in a case from a lower federal court, reasoning that the commission had not been delegated power to make general rates); Wichita R.R. & Lt. Co. v. Pub. Utils. Comm'n of Kan., 260 U.S. 48, 56–57 (1922) (in a case from a lower federal court, holding that state law should be interpreted to require a finding of unreasonableness before displacing a rate provided in a contract); *cf.* Smyth v. Ames, 169 U.S. 466, 526–27 (1898) (in a case originating in a lower federal court, stating with respect to a legislatively fixed rate: "[I]t may be observed that the grant to the legislature in the constitution of Nebraska of the power to establish maximum rates for the transportation of passengers and freight on railroads in that State has reference to 'reasonable' maximum rates. These words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness.").

[133] Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 456–57 (1890) (the state supreme court had held that commission acts were final stating, "[t]his being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company"); S. Ry. v. Virginia, 209 U.S. 190, 195, 197 (1933) (holding that the statute providing for orders to remove grade crossings without hearing, evidence, or review was a delegation of "purely arbitrary and unconstitutional power").

[134] *Yick Wo*, 118 U.S. at 373–74.

[135] *Id.* at 362.

[136] *Id.* at 373–74. *But cf.* Bridge Co. v. United States, 105 U.S. 470, 480–81 (1882) (holding that Congress could reserve for itself the judgment as to whether to impose more stringent requirements for a private company's building a bridge over navigable waters); *discussed in* Nelson, *supra* note 54, at 570; Union Bridge Co. v. United States, 204 U.S. 364, 385–86, 388 (1904) (holding that Congress had not made a forbidden delegation of legislative or judicial power in giving to the Secretary of War the decision of whether a bridge needed to be modified because it presented an unreasonable obstruction to navigation), *discussed in* Nelson, *supra* note 54, at 596.

or permitting role. For example, in *Eubank v. Richmond*, the Court held violative of the Fourteenth Amendment a local ordinance allowing the owners of nearby property to establish a setback or building line.[137] The ordinance required the city's street committee to treat the private determination as binding.[138] The Court held that the ordinance allowed for a standardless and capricious exercise of power over property, thus violating due process.[139] Similarly, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, the Court held violative of due process a requirement of consent of a percentage of neighboring property owners for certain building modifications.[140] The Court said, "[t]hey are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the [landowner] to their will or caprice."[141]

The Court reiterated its distaste for delegations to private parties in *Carter v. Carter Coal*, involving a congressional delegation under the Bituminous Coal Conservation Act of 1935.[142] The Act delegated to producers of two-thirds of the coal and a majority of the miners the power to set the minimum wages and maximum hours in the industry.[143] "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[144] *Carter Coal* may be mostly known for holding that the regulation of coal mining was outside of Congress's Commerce power.[145] *Schecter Poultry v. United States*, however, also adverted to the problems of delegation to private industry groups to confect codes of fair competition under the National Industrial Recovery Act, and moreover, the lack of guidance for the President in approving such codes.[146]

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[137] 226 U.S. 137, 143–44 (1912). The only limitation was that the building line be anywhere between five and thirty feet from the road. *Id.*

[138] *Id.*

[139] *Id.* ("The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the proper rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously.").

[140] 278 U.S. 116, 122–23 (1928).

[141] *Id.* at 122 (citing *Yick Wo*, 118 U.S. at 366, 368); *see also* Browning v. Hooper, 269 U.S. 396, 405–06 (1926) (holding that allowing property owners basically to determine the scope of an improvement district was not a legislative or municipal determination and that a right to be heard to determine benefits before a state official was necessary for due process).

[142] 298 U.S. 238, 242–43 (1936), *discussed in* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 1888–1986, at 219–20, 223–25 (1994).

[143] *Carter Coal*, 298 U.S. at 310–11.

[144] *Id.* at 311.

[145] *Id.* at 297.

[146] 295 U.S. 495, 533–37 (1935); *cf.* Nat'l Horsemen's Benevolent and Protective Ass'n

There are a good many private delegations that courts have approved, however, particularly in areas of standard setting and profession licensing.[147] But those delegations generally are qualified by checks by governmental officials.[148] The courts, moreover, still consider delegations to private parties to warrant greater concern than delegations to governmental officers.[149] In addition, the Court has disallowed delegations of certain functions to ostensibly private parties as a way to avoid constitutional strictures such as equal protection.[150] For example in *Terry v. Adams*, the Court rejected the county Democrats' use of an ostensibly separate entity to hold elections that excluded Black voters.[151]

Cases such as *Yick Wo*, involving a legislative delegation of certain permitting decisions, and the land use cases involving delegation of permitting narrow slices of regulation to private parties, demonstrate the Court's use of nondelegation as part of its decisions based on equal protection and due process.[152] In *Yick Wo*, *Eubank*, and *Roberge*, reasoning from delegation led the Court to determine that the ordinances in question were inoperative.[153] Whether one adds these cases to those in which nondelegation led the Court to treat statutes as inoperative is up to the reader—given that other constitutional rights were at issue. In all events the cases reiterate the themes from the cases involving delegation of legislative power. The legislature, despite having some powers to act unreasoningly, cannot necessarily extend this power to others. Nor may a legislative body give to itself the power to make certain particularized decisions without standards or evidence.

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v. Black, 53 F.4th 869, 887–90 (5th Cir. 2022) (holding that Horseracing Integrity and Safety Act, 15 U.S.C. §§ 3051–60, improperly delegated lawmaking authority to a private entity with insufficient power in the Federal Trade Commission over the entity's rulemaking).

147 *See* Seth Davis, *Standing Doctrine's State Action Problem*, 91 NOTRE DAME L. REV. 585, 610 (2016); Seifter, *supra* note 66, at 1786–87 (citing Joseph Postell, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 281 (2022)) (indicating that the courts routinely uphold professional licensing schemes).

148 Seifter, *supra* note 66, at 1787.

149 Postell, *supra* note 147, at 282 ("[M]any states have imposed heightened scrutiny against delegations of power to private [parties].").

150 Davis, *supra* note 147, at 610–11.

151 345 U.S. 461, 461–70 (1953); *cf.* Griffin v. State Bd. of Educ., 296 F. Supp. 1178, 1181 (E.D. Va. 1969) (invalidating Virginia tuition grant legislation as providing segregated education forbidden by the Constitution); *cf.* Griffin v. Cnty. Sch. Bd., 363 F.2d. 206, 212 (4th Cir. 1966) (en banc) (in later proceedings, finding the Prince Edward County Board of Supervisors and its members in contempt for disbursing funds for private segregated schools while the right to do so was under consideration in the appellate court).

152 From a modern perspective, the due process problem might be partly substantive (unreasonable impairments of property interests) and partly procedural (the lack of reasonableness as inherent in decision makers who could act by caprice).

153 Yick Wo v. Hopkins, 118 U.S. 356, 373–74; Eubank v. City of Richmond, 226 U.S. 137, 143–44; Washington *ex rel* Seattle Title Tr. Co. v. Roberge 278 U.S. 116, 122–23.

VI. POSSIBLE LIGHT ON MODERN DEBATES

Through the lens of the Court's discussion of state separation of powers, one sees the nondelegation doctrine playing a helpful rule in the development of substantive norms such as non-confiscation, equal protection, and rights of speech and association. One also sees delegation as bolstering requirements of procedural due process in the agencies, as well as providing an impetus to standards that appear in the APA. The above discussion also may shed some light on current debates about states' use of private parties as law enforcers, and about the Independent State Legislature Doctrine.

A. Private Enforcement

The Court's wariness of delegations to private parties has some relevance for evaluating state laws providing for private enforcement of public rights. The best-known example of this phenomenon is Texas Senate Bill 8's (S.B. 8) exclusive private enforcement scheme for its substantive prohibition on abortions once a fetal heartbeat is detectable.[154] Plaintiffs suing to enforce the bill do not need to show an individualized injury and they can collect a minimum recovery of $10,000 per abortion performed or abetted, plus attorneys' fees.[155]

While the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* indicates that Texas's substantive prohibition on post-detectable-heartbeat abortions is generally constitutional, constitutional concerns with the private enforcement regime remain.[156] One concern is whether the private delegation of public power violates due process. A related problem is whether the scheme blocks access to federal court in violation of federal constitutional and statutory grants of jurisdiction.

Because the private S.B. 8 enforcers have no private injury, the enforcement scheme would violate federal standing requirements were the suits initiated in federal courts.[157] State courts, however, are not bound by Article III standing requirements.[158] But a federal court may still determine if the proposed enforcers are

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[154] Tex. Health & Safety Code Ann. §§ 171.207(a), 171.208(a)(2), 171.005, *discussed in* Richard D. Rosen, *Deterring Pre-Viability Abortions in Texas through Private Lawsuits*, 54 TEX. TECH L. REV. 115, 121 (2021).

[155] Tex. Health & Safety Code Ann. § 171.208(a)–(b). Plaintiffs cannot be liable for attorneys' fees and costs for any such suits. *Id.* at § 171.208(i).

[156] *See* Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187, 212 (2022) (discussing imitator laws); Cal. AB 1594 (July 11, 2022) (allowing certain public and private suits against gun manufacturers).

[157] *See* Diamond v. Charles, 476 U.S. 54, 56, 65–66 (1986) (holding that a doctor who opposed abortion had no injury from an anti-abortion law's being held unconstitutional).

[158] *See* ASARCO v. Kadish, 490 U.S. 605, 616–17 (1989). Qui tam suits can be limited

effectively acting as state officials,[159] and if so, whether that role violates procedural due process.

As several commentators have noted, S.B. 8 effectively deputizes private parties to act as state officials.[160] They exercise the governmental power to enforce statutes—"to see that the law is obeyed"—rather than pursuing suits to vindicate their own private rights.[161] The lack of private injury,[162] the penal nature of the law,[163] and the limits on multiple plaintiffs' recovery for one abortion[164] all indicate that S.B. 8 plaintiffs act on behalf of the state government.

As the Supreme Court noted with respect to delegations of public power to private parties, "They are not bound by any official duty," but may act "for selfish reasons or arbitrarily" or by "will or caprice."[165] As Professor Nelson and I observed, "[i]n explaining America's movement away from private prosecutions, courts emphasized the dangers of putting public power in the hands of private individuals who were neither selected by nor responsible to the people at large."[166] Professors Tara Grove and Seth Davis point out that the lack of public purpose limitations on private as opposed to government prosecutors entails greater risks of arbitrariness.[167] The

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by their historical pedigree and an assignment theory. *See* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 725–31 (2004).

[159] *Cf.* Davis, *supra* note 147, at 594 ("There are two types of state action problems. One is addressed by state action doctrine and concerns whether the Constitution should apply to a defendant who claims to be a private actor. The other concerns an individual or institution who claims to wield state power where it is not clear they have valid authority to do so.").

[160] Anthony J. Colangelo, *Suing Texas State Senate Bill 8 Plaintiffs under Federal Law for Violations of Constitutional Rights*, 74 SMU L. REV. FORUM 136, 138 (2021).

[161] *See* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 796 (2009) (discussing private prosecution generally); Colangelo, *supra* note 160, at 137 (stating that plaintiffs under S.B. 8 are governmental actors); *cf.* Howard W. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029, 1082 (2022) (apparently seeing S.B. 8 as a public enforcement scheme).

[162] Wasserman & Rhodes, *supra* note 161, at 1082; Colangelo, *supra* note 160, at 137.

[163] Colangelo, *supra* note 160, at 138.

[164] Tex. Health & Safety Cod Ann. § 171.208(c), cited in Wasserman & Rhodes, *supra* note 161, at 1082 n.339; *cf.* Davis, *supra* note 147, at 644 (indicating that a private-party suit for the government may have preclusive effects on the government).

[165] Washington *ex rel*. Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 122 (1928).

[166] *See* Woolhandler & Nelson, *supra* note 158, at 699; *id.* at 701–02 (providing reasons for disallowing private suits for public nuisances without special injury); *id.* at 712 ("Central concerns were that the control of public rights should remain in the hands of public officials and that individuals should be free from arbitrary enforcement at the hands of private actors.").

[167] Grove, *supra* note 161, at 783 (private parties "are not subject to constitutional requirements or to the other legal and political checks that, to some degree, curtail executive enforcement discretion"). Professor Grove points out that if there is a risk of abuse with public prosecutorial discretion, that risk is enhanced by private party pursuit of actions which they are allowed to pursue for political or other personal ends. *Id.* at 834. While Grove

risks increase because of the limitless pool of potential enforcers.[168] And one cannot expect all volunteer enforcers to exercise discretion to rein in the inevitable overbreadth of laws[169]—such as in cases of aiding or abetting liability.[170] Both Professors Grove and Davis emphasize the risks of "arbitrarily burdening the property and liberty rights of private defendants."[171] Ultimately they see such delegations as potentially violating procedural due process.[172]

S.B. 8, moreover, employs its defect of limitless potential enforcers as a way to avoid anticipatory relief and timely judicial scrutiny.[173] Using a multiplicity of fines and court actions to discourage challenges to laws and court access can itself violate due process—as the Court held in *Ex parte Young*.[174] The Court, moreover, has frequently condemned states' attempts to structure their causes of action to avoid lower federal court jurisdiction as contrary to federal constitutional and statutory

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primarily addresses federal standing, her analysis can encompass state standing as well. *Id.* at 834; Davis, *supra* note 147, at 607 (citing Kimberley N. Brown, *"We the People," Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1350 (2013)) (arguing that the Constitution requires that government power including standing be exercised by persons accountable to the people).

[168] *See* Grove, *supra* note 161, at 808–10 (describing how even cases allowing broad standing limit the class of potential plaintiffs).

[169] *See* William N. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 38 (1975).

[170] To be sure state schemes for private enforcement of consumer and other laws continue to exist. California has a number of such statutes. The track record of standingless suits manifests the potential for arbitrary enforcement. *See* Nike v. Kasky, 539 U.S. 654, 656 (2003) (involving allegations of false advertising with respect to claims as to working conditions under which Nike products were manufactured). Californians later required a private injury under the particular statute at issue in *Nike*. *See* Trevor Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 593, 638–39 (2005). Other statutes still raise issues of arbitrariness and the absence of considered discretion. *See* Cal. Chamber of Comm. v. Council for Educ. & Rsch. on Toxins, 29 F.4th 468, 472 (9th Cir. 2022) (with respect to acrylamide, upholding the grant of a preliminary injunction against both public and private enforcement of California's statute requiring certain labels as to carcinogens).

[171] Davis, *supra* note 147, at 614 (citing Grove, *supra* note 161, at 820 (indicating that limitations on private standing are justified by the need to prevent the arbitrary exercise of power)).

[172] Davis, *supra* note 147, at 589; *id.* at 591–92 ("Restrictions on who may stand for the government are rooted in protecting the due process rights of opposing parties and third parties from the arbitrary exercise of government power."); *id.* at 593 (finding that the need for government control is greatest as to "administrative" interests, that is, interests in enforcement); *id.* at 622 (seeing due process as the primary limit on states' ability to delegate); Woolhandler & Nelson, *supra* note 158, at 733 (alluding to due process concerns). Cases where the plaintiff has a private injury are distinguishable, but too expansive a view of private injury undermines the distinction.

[173] *In re* Whole Woman's Health, 595 U.S. ___, 142 S. Ct. 701 (2022) (Sotomayor, J., dissenting from denial of writ of mandamus).

[174] Harrison, *supra* note 99, at 993 (noting that Justice Peckham held that the burden to court access was a due process violation, quite apart from the sufficiency of the rates).

provisions for federal court jurisdiction.[175] In short, the provision for private enforcement and the attempt to evade court challenges violate due process and constitutional and statutory provisions for federal jurisdiction.

There remains the question of the federal cause of action that might be used to challenge the statute. The defenders of S.B. 8 argue that raising federal defenses in state court enforcement actions suffices.[176] The Supreme Court in *Whole Woman's Health v. Jackson* held that the private defendant that the abortion providers named was not a proper defendant because he disclaimed an intent to bring an action against plaintiffs.[177] The Court held that the case should not be dismissed as against state licensing officials who apparently had some duties in implementing the law.[178] On remand and certification to the Texas Supreme Court, however, the state court held that those officials had no enforcement role.[179]

If, however, the private enforcement scheme, including its attempt to circumvent federal court jurisdiction, is unconstitutional, perhaps the Court should treat the provisions as inoperative in determining against whom an anticipatory action can be brought.[180] The Attorney General could then be treated as the default enforcer of state law.[181] True, the Court in *Whole Woman's Health* did not allow a suit against the Attorney General because he lacked an enforcement role[182] and because it said

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[175] *See* text accompanying notes 73–102; *cf.* Wasserman & Rhodes, *supra* note 161, at 1081 (observing that the exclusivity distinguishes S.B. 8 "from its nearest analogue, California's pre-2004 consumer protection law").

[176] *Cf.* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 537–38 (2021) (discussing possible state court anticipatory actions and defenses to private suits); *id.* ("This Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court."); Jonathan M. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 1002 (2018).

[177] 142 S. Ct. at 537.

[178] *Id.* at 536.

[179] Whole Woman's Health v. Jackson, 642 S.W.3d 569, 572 (Tex. 2022).

[180] The federal courts in the past have proceeded to entertain causes of action in the teeth of state provisions purporting to limit the actions to certain parties and certain courts. *See* Cowles v. Mercer Cnty., 74 U.S. (7 Wall.) 118, 118–21 (1869) (rejecting the claim that the county could only be sued in the circuit court of the county; state legislation could not limit the "constitutional right" of the diversity plaintiff to sue in federal court); Dodge v. Woolsey, 59 U.S. (18 How.) 331, 356 (1855) (allowing out-of-state shareholders to sue to contest imposition of tax); Smyth v. Ames, 169 U.S. 466, 474, 516–17 (1898) (not requiring the railroad to be named as a plaintiff nor the state to be named as a defendant); *see also* White v. Greenhow, 114 U.S. 307, 308 (1885) (entertaining a trespass action despite the state's attempt to repeal the remedy). *See generally* Woolhandler, *supra* note 15, at 99–112 (discussing federal courts' divergence from state causes of action in diversity cases).

[181] *Cf.* Wasserman & Rhodes, *supra* note 161, at 1060 (indicating that the Court in *Ex parte Young* treated the Attorney General as the default enforcer of state law, although distinguishing the private enforcement scheme of S.B. 8).

[182] 142 S. Ct. at 534. While the Court in *Whole Woman's* argued that private parties would not be bound by a suit against the officials, that is not clear if the private parties are effectively government actors. If the private enforcers are in effect acting for the state, they could

that private parties would not be bound by an injunction against the AG.[183] But that reasoning may have assumed the viability of private enforcement.

Another possibility is to allow a suit against the state.[184] John Harrison has argued that the antisuit injunction is really a defensive action such that a suit against the state should be allowed under the reasoning of *Cohens v. Virginia*.[185] This argument could be bolstered by the Court's repeatedly treating the state as a proper party to defend the constitutionality of its laws, even if its officials are not involved in enforcement of the law.[186]

B. Elections and Electors Clauses

The 2020 election raised questions as to the meaning of the Elections and the Electors Clauses.[187] The Elections Clause provides: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations. . . ."[188] The Electors Clause provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . ."[189]

Trump supporters used the Independent State Legislature Doctrine (ISLD) during the 2020 election to attempt to undo results of states' popular election schemes for

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be bound by a decree against the AG or the state. In any event, they lack life, liberty or property interests in an action to enforce rights belonging to the public. In addition, were the AG to lose his suit, a persistent private enforcer might be subject to an injunction against enforcement based on bad faith. *See* Wasserman & Rhodes, *supra* note 161, at 1088–90 (although suggesting that suits against the private enforcement actions may be subject to abstention under *Younger v. Harris*, 401 U.S. 37 (1971), also suggesting that the bad faith exception to *Younger* could apply).

[183] *Whole Woman's Health*, 142 S. Ct. at 535.

[184] The Supreme Court dismissed certiorari as improvidently granted in a suit by the United States against Texas and various other parties. United States v. Texas, 142 S. Ct. 522 (2021).

[185] Harrison, *supra* note 99, at 996, 1000 (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)); *cf. id.* at 1004 (treating the statute as a nullity would not threaten sovereign immunity).

[186] Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 854, 857–68 (2016) (discussing numerous instances where states were seen as having an interest in the continued enforceability of their laws); *see also* Berger v. N.C. State Conf. of the NAACP, 142 S. Ct, 2191, 2206 (2022) (holding that state legislators could intervene of right in a challenge to voter picture identification requirements that the Attorney General was defending); *id.* at 2198 (noting a North Carolina statute authorizing such intervention). Needless to say, state legislators lack enforcement duties.

[187] There were some concerns expressed with respect to the 2000 election that the Florida Supreme Court had deviated too much from the legislature's wishes. *See* Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y 135, 148–49 (2023); Jason Marisam, *The Dangerous Independent Legislature Theory*, 2022 MICH. ST. L. REV. 571, 580 n.78 (2023) (discussing Bush v. Gore, 531 U.S. 98 (2000)).

[188] U.S. CONST. art. I, § 4, cl. 1.

[189] U.S. CONST. art II, § 1, cl. 2.

electors.[190] The Court recently heard argument in a case raising an ISLD challenge to a state court's revisions of the state legislature's redistricting scheme.[191] The doctrine relies heavily on the references to "the Legislature" in the Election and Electors Clauses.[192] Although there are variations on the doctrine, its central tenet is that the two clauses give state legislatures considerable independence from state constitutions and state judicial review in fashioning rules for federal elections.[193] In response, a large body of scholarship argues that the Elections and Electors Clauses' references to "the Legislature" refer to the states' ordinary processes for legislation, including state constitutional constraints and judicial review.[194]

While the ISLD proponents have provided historical evidence for their view,[195] the opponents have presented substantial historical support for theirs.[196] For example, Michael Weingartner has stated that the text could support either ISLD or the ordinary legislation view,[197] and that "neither the legislative history nor purpose resolve this indeterminacy."[198] But "the practice of states—via state legislatures and their citizens" and the "practice of state courts reviewing state election laws under those provisions" have liquidated the clauses' meaning as ordinary legislation.[199]

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[190] Weingartner, *supra* note 187, at 137 n.8 (noting attempts to have legislators choose new electors post-election).

[191] Moore v. Harper, 142 S. Ct. 2901 (Mem.) (2022). The Court heard argument on December 7, 2022.

[192] Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 22 (2020) (arguing for a plain meaning interpretation of "Legislature").

[193] Justin Levitt, *Failed Elections and the Legislative Selection of Presidential Electors*, 96 N.Y.U. L. REV. 1052, 1056–58 (2021) (describing stronger and weaker versions of ISLD); Morley, *supra* note 3, at 557 (same).

[194] *See* authorities cited *infra* notes 196–205; *see also* Morley, *supra* note 192, at 11–12 (collecting scholarship criticizing ISLD); Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 808 (2015) ("[R]edistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto.").

[195] Morley, *supra* note 192, at 27–32, 37–45, 45–61 (discussing historical support for the doctrine).

[196] *See generally* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445 (2022) (supplementing his prior ISLD article).

[197] Weingartner, *supra* note 187, at 164–67 (indicating the text is indeterminate).

[198] *Id.* at 35 n.271; *see also* Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 999 (2021) ("[S]uspicion of . . . legislators suffuses the purpose and history of the [Elections] Clause.").

[199] Weingartner, *supra* note 187, at 180; *id.* at 180–87 (discussing state constitutions' regulation of federal elections, including by constitutional amendments promulgated by ballot initiatives); *id.* at 188–91 nn.325–47 (discussing state judicial review); *id.* at 192–98 nn.350–89 (discussing state legislatures' accepting constitutional constraints); *see also*

Congressional and popular acceptance also support the ordinary legislation reading.[200] The ISLD reading, he concludes, "conflicts with over two hundred years of historical practice."[201]

This Article's discussion of federal courts' use of state separation of powers reasoning may cast only oblique light on the debate. ISLD proponents can point to explicit textual bases for their argument, missing from the examples discussed above where the Court used state separation of powers arguments in support of other constitutional determinations. What is more, scholars on both sides of this debate have explored the text, precedent, and historical practice with respect to these specific clauses and state regulation of federal elections.[202]

Still a few observations may be warranted. The ordinary legislation theory would mean that state election legislation should be treated similarly to federal courts' regular treatment of state separation of powers. As described above, the Court deviated from the states' own purported allocations of their governmental powers when other constitutional rights (or the right to a federal forum under constitutional and statutory grants) were threatened by the state schemes. Allocating powers among state officials simpliciter was not the role of the federal courts.[203] As Professors Vikram and Akhil Amar have stated, the federal courts in respect to elections should "stay focused on enforcing *federal* rights and *federal* policies," such as the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments.[204]

Rather than supporting other rights, moreover, ISLD would seem to undermine them. For example, the ISLD proponents in the 2020 election sought to discount

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Carolyn Shapiro, *The Independent State Legislature Claim, Textualism, and State Law*, 90 U. CHI. L. REV. (forthcoming 2023) (manuscript at 4–5) (on file with Social Science Research Network) (presenting multiple arguments against maximalist ISL theory); Mark S. Krass, *Debunking the Non-Delegation Doctrine for State Regulation of Federal Elections*, 108 VA. L. REV. 1091, 1135 (2022) (finding that early state legislatures often left time, place and manner of regulation of federal elections to local officials).

[200] Weingartner, *supra* note 187, at 199–215 nn.390–486 (discussing congressional acceptance of state constitutional constraints); *id.* at 215–18 nn.487–510 (discussing popular acceptance).

[201] *Id.* at 138.

[202] *Compare* Morley, *supra* note 3, *with* Weingartner, *supra* note 187.

[203] In cases originating in the federal courts, the federal courts did evaluate state separation of powers with a little less regard to state views, but, in such cases, there generally were not definitive state supreme court decisions. *See, e.g.*, Siler v. Louisville & N. R. Co., 213 U.S. 175, 194 (1909) ("[W]e are without the benefit of a construction of the statute by the highest state court of Kentucky.").

[204] Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush-*League Arguments Root and Branch: The Article II Independent State Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 44 (2022); *id.* ("[T]here is in this domain no general federal interest in implementing any particular intra-state separation-of-powers regime or any specific textual interpretive methodology.") (emphasis removed).

votes from minorities and more urban districts—thus raising equal protection and other constitutional concerns.[205]

Besides generally supporting the regular legislation theory, the historical record suggests that legislatures may be limited in allocating arbitrary power to delegees or even to itself.[206] On the one hand, many commentators assume that state legislatures, at least if acting by ordinary legislation and prior to an election,[207] could dispense with the popular vote for choosing electors and provide that the legislature alone could choose electors.[208] Such an allocation would allow for unreasoning power in the legislature,[209] but may be allowed given early practices in a few states.

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[205] *Cf.* Levitt, *supra* note 193, at 1071 (stating that the Due Process Clause would be implicated in a legislative attempt to change the choosing of electors after the election had begun); Morley, *supra* note 3, at 16–17 (indicating that the Elections Clause contains implicit limitations: "It does not empower states to adopt laws that 'dictate electoral outcomes . . . favor or disfavor a class of candidates, or . . . evade constitutional constraints'" (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833–34 (1995))); Bob Bauer & Jack Goldsmith, *Correcting Misconceptions About the Electoral Count Reform Act*, LAWFARE (Jul. 24, 2022) (quoting Bush v. Gore, 531 U.S. 98, 104–05 (2000) ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental. . . . Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.")); *id.* (referring to First and Fourteenth Amendment rights); Marisam, *supra* note 187, at 572 ("If the U.S. Supreme Court adopted this theory, it would effectively remove states constitutions as a safeguard for voting rights.").

Of course, structural rights promote a variety of other constitutional values, such as legitimacy by following the designated frameworks, accountability, the rule of law, and preventing the arbitrary exercise of power. ISLD, however, does not seem to enhance these values. *See* Seifter, *supra* note 66, at 1795 (responding to argument that ISLD promotes democracy because the legislatures are the bodies closest to the people, stating that "wresting a decided election away from the voters is shockingly undemocratic"); *id.* (indicating that the countermajoritarian nature of some state legislatures reinforces the point); Shapiro, *supra* note 199 (manuscript at 5) (arguing that ISLD undermines political accountability and predictability).

[206] Krass, *supra* note 199, at 1129–30.

[207] Most commentators conclude that state legislatures cannot change their voting rules post-election. *See* Amar & Amar, *supra* note 204, at 50; Morley, *supra* note 3, at 559 (indicating that legislatures must comply with preexisting legislation even under his ISLD views); *see* Electoral Reform Act of 2022, S. 4573, 117th Cong. § 1 (as reported by the S. Comm. on Rules & Admin. on Oct. 18, 2022) ("The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day.").

[208] *See* Bush v. Gore, 531 U.S. 98, 104 (2000); Morley, *supra* note 3, at 559 n.472; Levitt, *supra* note 193, at 1066–67, 1071; *id.* at 1067–68 (noting some early state provisions for a larger state legislative role in choosing electors); *id.* at 1066–67 (indicating that a legislature through the regular lawmaking process could reclaim for itself the ability to select presidential electors); Nathaniel F. Rubin, *The Electors Clause and the Governor's Veto*, 106 CORNELL L. REV. ONLINE 57, 57 (2021) (suggesting that governors should veto legislation in which a legislature sought directly to choose electors).

[209] *Cf.* U.S. CONST. amend. XII (providing the means for the House to determine the

But a legislature's overtly dispensing with the popular vote would likely prove unpopular.[210] All states currently make the popular vote the determinant for federal elections including the choice of electors.[211]

A legislature, however, might attempt to use less transparent means to derail a popular vote for its disfavored candidate. For example, the legislature—by pre-election legislation—might provide that any disputes as to the popular vote could effectively be determined arbitrarily; it might purport to give final power to determine election disputes to favored officials. But the popular vote, absent extreme circumstances, is a question for determination by standards and facts. The legislature's designation of a purportedly final decision maker as to election results should not be treated as authorization to make a decision in disregard of election results.[212]

President and Vice President when no candidate receives a majority of the Electoral vote). Some provisions that might seem to give free rein to preferences, however, arguably imply constraints. *Cf.* U.S. CONST. art. I, § 5 cl. 1 (each chamber can determine the qualifications of its members); Weingartner, *supra* note 187, at 207 n.433 ("When Congress resolves a disputed election, it does not sit as a court, nor is it constrained by law or precedent"); *id.* at 208–09 n.435 (observing that Congress nevertheless has deferred to state constitutions when determining election disputes under this provision); *see also* 3 U.S.C. § 2 ("Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."); Levitt, *supra* note 193, at 1071, 1079, 1083 (indicating that this provision refers to regular preexisting legislation); Weingartner, *supra* note 187, at 202 n.404 (same); Amar & Amar, *supra* note 204, at 47 n.118 ("A *failed* election, within the meaning of this statute, is certainly not the same thing as a merely *close and hotly contested* election."); *see* Ned Foley et al., *Why Congress Should Swiftly Enact the Senate's Bipartisan ECA Reform Bill*, ELECTION L. BLOG (July 20, 2022, 11:38 AM) (citing proposed S. 4573 (deleting the reference to a failed election)), https://electionlawblog.org/?p=130870 [https://perma.cc/N2E8-KAHB]; *see also* 3 U.S.C. § 15 (setting out how the House and Senate should resolve certain disputes as to state's electoral slate); S. 4573 § 109 (amending these provisions).

[210] *See* Levitt, *supra* note 193, at 1071 n.76 (referring to a proposed but unadopted Arizona bill that the legislature could ignore the popular vote and choose electors by a simple majority); Morley, *supra* note 3, at 559 ("A strong normative case for direct legislative appointment of electors exists only when a major disaster, such as Hurricane Katrina, makes it impracticable or impossible to conduct, complete, or determine the results of a popular presidential election."); Richard L. Hasen, *Identifying and Minimizing the Risks of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 301 n.175 (2022) (discussing the failure of the Arizona legislation).

[211] Voters themselves are entitled to act unreasoningly. *Cf.* Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 806 (2015) (discussing different functions that state legislatures may have, including an "electoral" function that they exercised in choosing Senators prior to Seventeenth Amendment).

[212] The Electoral Count Reform Act of 2022 seeks to provide various safeguards against a rogue governor's certification. The act states that "the executive of each State shall issue a certificate of ascertainment of appointment of electors, under and in pursuance of the laws of such State providing for such appointment and ascertainment enacted prior to election

The federal requirement that the electors be chosen on Election Day reinforces this conclusion.[213]

The inability of a legislature to delegate unreasoning power to others also suggests that the legislature cannot delegate such power to itself.[214] For example, if a legislature purports to maintain a popular vote scheme, but then implicitly authorizes itself to determine the results of election disputes without reference to the popular vote and evidence thereof, it is attempting to give itself a power to act arbitrarily and to discount votes in violation of equal protection principles.[215]

While the delegation cases discussed above generally concerned disallowing the exercise of unreasoning power in governmental actors subordinate to the legislature, those restrictions eventually could turn into restrictions on the legislature. If a commission could not finally determine rates were reasonable, then neither could

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day." S. 4573 § 104(a)(1). The act also says that "the certificate of ascertainment of appointment of electors issued pursuant to subsection (a)(1) shall be treated as conclusive in Congress with respect to the determination of electors appointed by the State." S. 4573 § 104(c)(1)(A). The provisions, however, are meant to bind the executive to follow previously enacted state law, and the governor's decision is subject to judicial review. *See* S. 4573 § 104(c)(1)(B) ("[A]ny certificate of ascertainment of appointment of electors required to be issued or revised by any State or Federal judicial relief granted prior to the date of the meeting of electors shall replace and supersede any other certificates submitted pursuant to this section."); S. 4573 § 104(c)(2) ("The determination of Federal courts on questions arising under the Constitution or laws of the United States with respect to a certificate of ascertainment of appointment of electors shall be conclusive in Congress."). For an explanation of the provisions, see Bauer & Goldsmith, *supra* note 205. *But cf.* Laurence H. Tribe, Erwin Chemerinsky & Dennis Aftergut, *The Electoral Count Act Reform Doesn't Go Far Enough*, WASH. POST, Aug. 2, 2022, at A17 (arguing that there is the "potential for chaos when [the act] states that a governor's certification is 'conclusive,' and then, in seeming contradiction, provides for judicial review and congressional objections. A governor's certification helps, but to deal with the danger of rogue governors, such certification should be clearly subject to challenge if it undermines the people's vote.").

[213] *See* 3 U.S.C. § 1 ("The electors of President and Vice President shall be appointed in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."); *see also* S. 4573, 117th Cong. § 102(a)(1) ("The electors of President and Vice President shall be appointed, in each State, on election day, in accordance with the laws of the State enacted prior to election day."); U.S. CONST. art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.").

[214] *See supra* text accompanying notes 34, 134.

[215] *See* Hasen, *supra* note 210, at n.160 ("States should change laws to eliminate any discretion in the certification process; if there is a bona fide dispute about fraud or about who actually won an election, states should have procedures for judicial or administrative review by those empowered to examine facts and evidence and make a determination about election outcomes."); Amar & Amar, *supra* note 204, at 47 n.118 (suggesting that a state constitution might prevent a state legislature from making itself the judge of a contested presidential primary).

the legislature. A subordinate official could not determine a tax assessment without reference to standards and facts, and eventually the legislature was limited in its ability to do so as well. And a local government in its legislative capacity could not give itself an executive power to withhold permits unreasoningly. The legislature should not be able to self-delegate a power to act unreasoningly with respect to a determination governed by standards and facts.

CONCLUSION

The federal courts' treatment of state separation of powers confirms that such issues were largely a matter for state constitutions and statutes. The Court did, however, use its own characterizations of state institutions to prevent state legislatures from delegating the power to act without reference to standards and evidence—whether the delegation was to commissions, the executive, private parties, or even in some cases to the legislature itself. The lesser deference that the Court gave delegated power aided the Court in crystallizing standards for substantive due process, procedural due process, equal protection, and the First Amendment. The Court, moreover, used its own characterizations of state governmental institutions to prevent states from attempting to foreclose a role for the federal courts in deciding diversity and federal question cases.

This Article's look at state separation of powers in the federal courts may bear on current debates as to private party enforcement and as to the Independent State Legislature Doctrine. It suggests that private enforcement under statutes such as S.B. 8 may violate procedural due process and also federal statutory and constitutional provisions for federal court access. It also suggests that state legislatures may lack the power to provide for an arbitrary decision by themselves or their delegees of the result of the popular vote.