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## **If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication"**

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# IF WE BUILD IT, WILL THEY LEGISLATE? EMPIRICALLY TESTING THE POTENTIAL OF THE NONDELEGATION DOCTRINE TO CURB CONGRESSIONAL “ABDICATION”

*Daniel E. Walters*<sup>†</sup> & *Elliott Ash*<sup>‡</sup>

*A widely held view for why the Supreme Court would be right to revive the nondelegation doctrine is that Congress has perverse incentives to abdicate its legislative role and evade accountability through the use of delegations (either expressly delineated or implied through statutory imprecision), and that enforcement of the nondelegation doctrine would correct for those incentives. We call this the Field of Dreams Theory—if we build the nondelegation doctrine, Congress will legislate. Unlike originalist arguments for the revival of the nondelegation doctrine, this theory has widespread appeal and is instrumental to the Court’s project of gaining popular acceptance of a greater judicial role in policing congressional decisions regarding delegation. But is it true?*

*In this Article, we comprehensively test the theory at the state level, using two original datasets: one comprising all laws passed by state legislatures and the other comprising all nondelegation decisions in the state supreme courts. Using a variety of measures and methods, and in contrast with the one existing study on the subject, we do observe at least some statistically measurable decrease in delegation, if only by cer-*

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tain measures. However, when put in context, these findings are underwhelming compared to the predictions of the Field of Dreams Theory. For instance, we observe that, even where it exists, this effect is substantively small and on par with a number of other factors that influence delegation—our best estimate is that nondelegation cases explain about 1.5% of the variation in delegation. Moreover, we also find some evidence that is directly contrary to the Field of Dreams Theory—that is, we find evidence that enforcement of the nondelegation doctrine actually leads to more implied delegation in the form of vague and precatory statutory language.

These findings have direct relevance to contemporary debate and cases entertaining a revitalization of the nondelegation doctrine in the federal courts. First, the findings that enforcement of the doctrine can prospectively decrease legislative delegation suggest that there may be something to the Field of Dreams Theory, although that in turn raises the stakes of debates over whether less delegation would actually be good for public welfare. Second, even though there is an effect, the weakness of that effect, both in an absolute sense and relative to other factors, undermines the overblown claims that the nondelegation doctrine could fundamentally transform how government works. And finally, our finding that judicial decisions enforcing the nondelegation doctrine can sometimes lead to more implied delegation through imprecise statutory language suggests that there may be unintended consequences from giving the nondelegation doctrine a new lease on life.

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INTRODUCTION

At the heart of contemporary debates over administrative, regulatory, and constitutional law lies an alluring theory of a lost political economy: one where Congress takes on responsibility for the development of law and public policy, taking back some of the turf yielded to administrative agencies within an increasingly powerful executive branch.<sup>1</sup> As now-Supreme Court Justice Amy Coney Barrett noted before her ascension to the bench, “[m]odern lawmaking increasingly proceeds in unorthodox fashion rather than along the straightforward route depicted in the classic *Schoolhouse Rock!* cartoon.”<sup>2</sup> Congress now operates largely by broadly delegating the power to make legislative rules to administrative agencies, who write the de-

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<sup>1</sup> See, e.g., C. Boyden Gray, *Congressional Abdication: Delegation Without Detail and Without Waiver*, 36 HARV. J.L. & PUB. POL’Y 41, 42 (2013) (“Too often, Congress over-delegates and provides no detail and no accountability, or an agency asserts delegation with no accountability.”); Gene Healy, *Congressional Abdication and the Cult of the Presidency*, 10 WHITE HOUSE STUD. 89, 94 (2010) (“[T]he Court eventually made its peace with statutes that allow the executive branch to both make and enforce the law. Its post-1937 refusal to strike down broad delegations of legislative authority helped give us what Theodore Lowi has called the ‘Second Republic’ of the United States, in which Congress routinely passes statutes with ambitious, noble—and underspecified—goals, leaving it to the relevant executive branch agencies to issue and enforce the regulations governing individual behavior.”); Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 974 (2020) (arguing that the combination of a lax nondelegation doctrine and *Chevron* deference gives Congress “every incentive to delegate” since they need not make unpopular regulatory choices themselves). These criticisms of congressional abdication are a central part of a larger tendency to lament the administrative state’s supposed departure from longstanding norms of governance. See Daniel A. Farber & Anne Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1146 (2014); EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 61–63 (2005).

<sup>2</sup> Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2197 (2017).

tailed regulations that flesh out statutory programs.<sup>3</sup> Gone are the days when Congress could be described as regularly laying down primary rules of conduct to govern the nation, if those days ever really existed.<sup>4</sup> And while many have no quarrel with this modernization of the lawmaking process,<sup>5</sup> many still lament the alleged loss of congressional responsibility and yearn for a restoration of the Constitution's democratic promise.<sup>6</sup>

Consider the recent battles over the eviction moratorium implemented by the Centers for Disease Control and Prevention (CDC) in response to the COVID-19 pandemic. A case challenging this moratorium first came to the Supreme Court in June of 2021, and the Court denied the challengers the relief they sought, but not without making it clear that the ball was in Congress's court.<sup>7</sup> Justice Kavanaugh, after expressing disagreement with the CDC's assertion that the relevant statute delegating authority to the agency could be construed to allow the CDC to implement an eviction moratorium, nevertheless allowed the moratorium to continue to be enforced for a few weeks until the current version of the policy was set to expire automatically.<sup>8</sup> But Justice Kavanaugh could not help exhorting Congress to do its job, noting that "clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31."<sup>9</sup>

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<sup>3</sup> THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 106 (40th anniversary ed. 2009) ("Obviously modern law has become a series of instructions to administrators rather than a series of commands to citizens."); Martin H. Redish, *Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 *LOY. U. CHI. L.J.* 363, 367 (2019) ("Today, Congress is losing power as a political force and the executive is growing stronger. While Congress enacts roughly fifty laws each year, some of which merely transfer federal land to states or rename post offices, executive agencies promulgate approximately 4,000 substantive rules per year. In the few laws it does enact, Congress often transfers broad swaths of power to the executive through vague directives." (footnotes omitted)).

<sup>4</sup> Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 *COLUM. L. REV.* 1789, 1794 (2015) ("And so it seems that the *Schoolhouse Rock!* cartoon version of the conventional legislative process is dead. It may never have accurately described the lawmaking process in the first place." (footnote omitted)).

<sup>5</sup> See, e.g., RUBIN, *supra* note 1; Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *HARV. L. REV.* 1, 7 (2017) (accepting the fact that "delegations are necessary given the economic, social, scientific, and technological realities of our day").

<sup>6</sup> See, e.g., DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 1 *passim* (1993).

<sup>7</sup> *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2320, 2320–21 (2021) (Kavanaugh, J., concurring).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2321.

The opinion set off a mad dash to pass authorizing legislation, but in the end there was no deal to be had.<sup>10</sup> Congressional leaders disclaimed any need to pass new legislation (despite Kavanaugh's prior statements), and instead implored the White House to solve the problem by extending the moratorium under existing statutes.<sup>11</sup> Ultimately, the Biden Administration extended the moratorium and the case returned to the Supreme Court. Predictably, the Court struck the new eviction moratorium, opining again that "[i]t is up to Congress, not the CDC, to decide whether the public interest merits further action here."<sup>12</sup> In the aftermath of the Court's decision, some congressional leaders have continued to work on a potential legislative fix, but to no avail.<sup>13</sup>

By most accounts, the eviction moratorium saga was deeply dysfunctional,<sup>14</sup> but for some, it is just one manifestation of a much larger and more systemic democratic dysfunction in American politics.<sup>15</sup> On this account, Congress's ability to pass lawmaking responsibility to agencies through delegation fundamentally undermines the logic of accountability that tethers the law to democracy. Congress has no incentive to do the hard work of legislating when it has delegation as an option and when agencies acting pursuant to that delegation can be either blamed or praised depending on what is expedient for election-minded members of Congress. It is as if there is an error in the constitutional code that can be blamed for a parade of horrors in the policymaking process, many of which are opposites of each other: over-regulation<sup>16</sup> versus under-regula-

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<sup>10</sup> Glenn Thrush, Matthew Goldstein & Conor Dougherty, *Eviction Freeze Set to Lapse as Biden Housing Effort Lags*, N.Y. TIMES (July 31, 2021), <https://www.nytimes.com/2021/07/31/us/politics/eviction-moratorium-biden-housing-aid.html> [<https://perma.cc/8MQR-YDQV>].

<sup>11</sup> *Id.*

<sup>12</sup> Ala. Ass'n. of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (per curiam).

<sup>13</sup> Michael Casey, *Lawmakers Attempt to Revive Nationwide Eviction Moratorium*, PBS NEWSHOUR (Sept. 21, 2021), <https://www.pbs.org/newshour/politics/lawmakers-attempt-to-revive-nationwide-eviction-moratorium> [<https://perma.cc/4BDR-VMRD>].

<sup>14</sup> *E.g.*, David Von Drehle, *The Eviction Moratorium Mess Exposes the Decay in American Politics*, WASH. POST (Aug. 6, 2021), <https://www.washingtonpost.com/opinions/2021/08/06/eviction-moratorium-mess-biden-cdc/> [<https://perma.cc/VLC5-89HZ>].

<sup>15</sup> See *infra* Part I.

<sup>16</sup> See, *e.g.*, Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 127 (2016) ("The efforts at regulatory restraint, while not entirely without consequence, largely failed. They were not so much defeated on the merits as overwhelmed by the dynamics of government growth through legislative delegation and managerial lawmaking."); Richard A. Epstein, *How Bad*

tion<sup>17</sup>; interest group capture<sup>18</sup> versus a lack of responsiveness and accountability<sup>19</sup>; and undue empowerment of members of Congress<sup>20</sup> versus abdication to the executive.<sup>21</sup>

According to some, including a possible majority of sitting Supreme Court Justices, we know what the error in the code is: it is the federal courts' unwillingness to enforce the nondelegation doctrine. That doctrine bars Congress from permitting other actors, such as administrative agencies or private actors, to exercise too much of Congress's legislative power by making rules with the force of law.<sup>22</sup> When Congress delegates legisla-

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*Constitutional Law Leads to Bad Economic Regulations*, ATLANTIC (Oct. 20, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/how-bad-constitutional-law-leads-bad-regulations/600280/> [<https://perma.cc/8U9V-M2S8>].

<sup>17</sup> See, e.g., DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE* 161 (2005) ("If the legislators themselves made the laws, they would be personally responsible for the health hazards to which the public remained exposed *and* the burdens imposed on the public."); LOWI, *supra* note 3, at 300–01.

<sup>18</sup> Reeve T. Bull, *Combatting External and Internal Regulatory Capture*, REGUL. REV. (June 20, 2016), <https://www.theregreview.org/2016/06/20/bull-combatting-external-internal-regulatory-capture/> [<https://perma.cc/2XEP-LYXP>] (linking excessive delegation to the risk of capture); David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. & PUB. POLY 31, 34 (2013) (noting that if agencies are strongly captured, that would perhaps indicate benefits of reviving the nondelegation doctrine).

<sup>19</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 134 (1980) ("The problem seems more basic, and may lie not in a propensity to make politically controversial decisions without telling us why, but rather in a propensity not to make politically controversial decisions—to leave them instead to others, most often others who are not elected or effectively controlled by those who are. If we can just get our legislators to legislate we'll be able to understand their goals well enough. I'm not saying we may not still end up with a fair number of clowns as representatives, but at least then it will be because clowns are what we deserve.").

<sup>20</sup> Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1476 (2015); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1415 (2017).

<sup>21</sup> BENJAMIN GINSBERG, *PRESIDENTIAL GOVERNMENT* 1 *passim* (2016); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 6 (2014) ("The administrative regime consolidates in one branch of government the powers that the Constitution allocates to different branches. Although existing scholarship recognizes aspects of this problem, it does so mostly in terms of the separation of powers. The threat to the separation of powers, however, is merely one element of a broader consolidation of power, which results from the exercise of power outside and above the law.").

<sup>22</sup> Proponents of the nondelegation doctrine typically point to the vesting clauses of Articles I, II, and III of the Constitution as implying limits on any action that would subvert that allocation of powers violates the constitution. See, e.g., Hon. Douglas Ginsburg, *Legislative Powers: Not Yours to Give Away*, HERITAGE FOUND. (Jan. 6, 2011), <https://www.heritage.org/the-constitution/report/legislative-powers-not-yours-give-away> [<https://perma.cc/Q2VG-TZQL>] ("The executive necessarily has a range of discretion in the manner of effectuating a law. But some decisions are legislative by nature; otherwise, the distinction among legisla-

tive power, the theory goes, it does so out of a desire to escape responsibility for tough political choices.<sup>23</sup> Commentators have therefore often thought of the Court's duty as forcing Congress to internalize the political costs of legislating, thereby reinforcing democracy.<sup>24</sup> As Justice Gorsuch put it in a recent case, "The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials," since "lawmakers may be tempted to delegate power to agencies to 'reduc[e] the degree to which they will be held accountable for unpopular actions.'"<sup>25</sup>

For Justices singing this tune, it is no doubt frustrating that, ever since the Supreme Court first addressed the nondelegation doctrine in 1825 in *Wayman v. Southard*,<sup>26</sup> the Court has struggled to identify any justiciable formulation of the doctrine. As Cass Sunstein famously observed, the nondelegation doctrine has had "One Good Year" and more than two hundred bad ones.<sup>27</sup> After briefly invoking the nondelegation doctrine to block some of the New Deal programs

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tive, executive, and judicial powers that is fundamental to the Constitution's structure would be meaningless."); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002) ("The Constitution clearly—and one must even say obviously—contemplates some such lines among the legislative, executive, and judicial powers. The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense otherwise." (footnote omitted)). These structural arguments are far from airtight. Indeed, there are some who dispute whether there is such a doctrine at all. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 280 (2021). This important debate is not directly relevant to this Article, which focuses on the impact of the nondelegation doctrine as it is enforced in state courts rather than on the originalist case for the doctrine.

<sup>23</sup> MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 67 (1977); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 57–59 (1982); ELY, *supra* note 19, at 134.

<sup>24</sup> SCHOENBROD, *supra* note 6, at 166–70; LOWI, *supra* note 3, at 300; ELY, *supra* note 19, at 134. For a recent compilation of this nostalgic and mythical line of thinking, which the author labels "Americana Administrative Law," see Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. (forthcoming 2023) (on file with authors).

<sup>25</sup> Nat'l Fed'n Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (alteration in original) (quoting Ronald Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 154 (2017)).

<sup>26</sup> 23 U.S. 1, 42 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.").

<sup>27</sup> Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 330 (1999).

that pushed the nation into a new regulatory era, the Supreme Court ultimately retreated.<sup>28</sup> Over the last eighty years, the Court has repeatedly applied the “intelligible principle” standard to uphold wholesale delegations of authority to make rules in the “public interest” or to pursue other similarly open-ended goals.<sup>29</sup>

Recent events have upended any assumption that the nondelegation doctrine will continue to go unenforced in the federal courts. First, a dissent in an otherwise unsuccessful nondelegation challenge to a federal statute signaled renewed interest among at least four justices in using the nondelegation doctrine to rein in the administrative state.<sup>30</sup> Even though it did not carry the day, Justice Gorsuch’s dissent in the *Gundy* case made waves, and scholars and commentators have since scrambled to unpack the implications of the vision Gorsuch offered for the Court’s role in policing delegation.<sup>31</sup> The Court has since added to the confusion over where the law stands in a series of cases applying and clarifying the nascent “major questions doctrine,” which may come quite close to revitalizing the spirit behind the nondelegation doctrine. For instance, in *National Federation of Independent Business v. Department of Labor*, the Court invoked the major questions doctrine in holding that the Occupational Safety and Health Administration (OSHA) lacked statutory authority to issue an emergency temporary regulation requiring vaccinations for employees at certain places of work.<sup>32</sup> According to the Court, because the

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<sup>28</sup> *Id.* at 332.

<sup>29</sup> *See, e.g.*, *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 230 (1943) (finding that a statute requiring the Federal Communications Commission’s regulations to be consistent with “public convenience, interest, or necessity” did not violate the nondelegation doctrine); *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 605 (1944) (finding that a statute requiring that the Federal Power Commission set “just and reasonable” rates did not violate the nondelegation doctrine); *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472–73 (2001) (finding that a statute requiring the Environmental Protection Agency to issue rules “requisite to protect the public health” with “an adequate margin of safety” did not violate the nondelegation doctrine).

<sup>30</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

<sup>31</sup> *See, e.g.*, Ian Millhiser, *The Supreme Court’s Coming War with Joe Biden, Explained*, VOX (Mar. 27, 2021), <https://www.vox.com/22276279/supreme-court-war-joe-biden-agency-regulation-administrative-neil-gorsuch-epa-nondelegation> [<https://perma.cc/QU3P-3KT5>]; Julian Davis Mortenson & Nicholas Bagley, *There’s No Historical Justification for One of the Most Dangerous Ideas in American Law*, ATLANTIC (May 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-orliginalism/612013/> [<https://perma.cc/GN5K-AYBJ>].

<sup>32</sup> 142 S. Ct. 661 (2022).

regulation requiring vaccines for such workers was a major question, Congress needed to “speak clearly” before an agency could exercise that kind of authority.<sup>33</sup> With a cursory look at the statute, the Court concluded that there was no plain statement in the statute authorizing the action.<sup>34</sup> In *West Virginia v. EPA*,<sup>35</sup> the Court made it even clearer that the major questions doctrine is now a clear-statement rule requiring Congress to legislate with specificity if it intends to allow agencies to take any action on major questions.<sup>36</sup> Effectively, “[e]ven broadly worded, otherwise unambiguous statutes do not appear good enough when it comes to policies the Court deems ‘major.’”<sup>37</sup> Justice Gorsuch again authored a separate opinion, this time a concurrence, observing that the formulation of the major questions doctrine endorsed by the Court advanced nondelegation values,<sup>38</sup> and commentators have noted that the formulation of the major questions doctrine endorsed by the Court in *West Virginia* has the potential to be a de facto resurrection of the nondelegation doctrine.<sup>39</sup> Select lower courts have taken the

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<sup>33</sup> *Id.* at 665.

<sup>34</sup> *Id.* at 665–66.

<sup>35</sup> 142 S. Ct. 2587 (2022).

<sup>36</sup> See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 4–5), <https://ssrn.com/abstract=4165724> [<https://perma.cc/P6R9-9CMR>] (noting that *West Virginia* was “the first time the Court actually used the phrase ‘major questions doctrine,’ and it represents the full emergence of the doctrine as a clear-statement rule”); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263–64 (2022) (noting that the “quartet” of major questions doctrine cases from the October 2021 Term “unhitched the major questions exception from *Chevron*” and completed a “transition to a new order of operations for evaluating the legality of major regulatory action” that turns on whether Congress has supplied a “clear statement that the action is authorized”). As a clear statement rule performing in service of nondelegation values, the major questions doctrine is a textbook example of what Jane Schacter called “metademocratic” statutory interpretation—that is, a theory of statutory interpretation where the “court assigns meaning to a contested statutory term by using interpretive rules that are self-consciously designed to produce ‘democratizing’ effects.” Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 595 (1995).

<sup>37</sup> Deacon & Litman, *supra* note 36 (manuscript at 4).

<sup>38</sup> *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring).

<sup>39</sup> Sohoni, *supra* note 36, at 265–66 (noting that a “sufficiently robust major questions doctrine greatly reduces the need to formally revive the nondelegation doctrine,” since the “most important work that the nondelegation doctrine would perform can be accomplished on an ad hoc, agency-by-agency, rule-by-rule basis through the mechanism of the quartet’s new clear statement rule”). *But see* Deacon & Litman, *supra* note 36 (manuscript at 28–30) (arguing that “despite some Justices’ efforts at equating the major-question-doctrine-as-clear-statement rule with values underlying the nondelegation doctrine, the clear statement rule . . . operates differently than the nondelegation doctrine”). In fact, the differences that do exist between the nondelegation doctrine and the major questions doctrine *qua* nondelegation doctrine may make the latter worse than the former,

Court's cue and begun to apply the major questions doctrine in a fashion tantamount to enforcing the nondelegation doctrine.<sup>40</sup> These monumental changes in the law in just a few short years are a testament to the persistent drumbeat of dissatisfaction with Congress's willingness to delegate policymaking authority to agencies.

The implicit theory purportedly justifying this return to the nondelegation doctrine and related doctrines like the major questions doctrine appears to be that if the courts build real limits on Congress's ability to delegate policymaking discretion to agencies, Congress will step up and legislate—call it the “Field of Dreams Theory.”<sup>41</sup> That is, the nondelegation doctrine, were it actually enforced, would create sufficient incentives for Congress to do its work differently (and presumably better). On this account, Congress's failure to legislate with specificity is primarily induced by the complete absence of judicially enforced limits on delegation, not based on other institutional incentives (or pathologies) that would continue to exist even were the courts to police excessive delegation. Simply correcting one variable—the Court's own abdication—would cause a virtuous alignment of incentives that would restore functionality to law and politics.<sup>42</sup> Congress would make its

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in the sense that the major questions doctrine stubbornly resists being pinned down and imposes an “*in terrorem*” effect on agency activities. Sohoni, *supra* note 36, at 266. This difference could, of course, change the empirical analysis this Article conducts, but we simply cannot know, since the major questions doctrine, unlike the nondelegation doctrine, has not been a mainstay of litigation in the state courts.

<sup>40</sup> See *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1164 (M.D. Fla. 2022) (applying the major questions doctrine and concluding that existing statutes were not clear enough in granting regulatory authority to the Centers for Disease Control and Prevention to support the federal government's travel mask mandate); *Louisiana v. Biden*, 585 F. Supp. 3d 840, 863–65 (W.D. La. 2022) (applying the major questions doctrine to vacate an executive order on the social cost of carbon). In at least some instances, the lower courts have even gone so far as to enforce the nondelegation doctrine itself. See *Jarkesy v. SEC*, 34 F.4th 446, 462–63 (5th Cir. 2022) (finding that the delegation of discretion to the Securities and Exchange Commission to choose between administrative adjudication and Article III adjudication of fraud claims violated the nondelegation doctrine).

<sup>41</sup> FIELD OF DREAMS (Universal Pictures 1989) (“If you build it, he will come.”). The Court's choice (so far) to couch its project as articulation of a major questions doctrine rather than the explicit revival of the nondelegation doctrine might provide additional evidence of the relative importance of this theory to what the Court is doing. After all, the major questions doctrine leaves open the possibility that Congress could delegate major authority—it just needs to do it clearly. To the extent that formalist separation of powers theory was the impetus for the Court's doctrinal development here, it would have been more logical to bar even this possibility of delegation.

<sup>42</sup> Mark Strand & Timothy Lang, *Can the Courts Make Congress Do Its Job?*, NAT'L AFFS. (Summer 2021), <https://www.nationalaffairs.com/publications/de->

statutory work product clear enough that voters could actually discern what it did and reward or punish it for its decisions. Critically, Congress would not necessarily simply cease legislating,<sup>43</sup> but would in fact promulgate by itself the kinds of regulatory schemes that the public demands<sup>44</sup> and that agencies currently produce pursuant to delegations,<sup>45</sup> but with the added imprimatur of democratic accountability.<sup>46</sup> The

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tail/can-the-courts-make-congress-do-its-job [https://perma.cc/8R8Y-DFUX] (“If the Court does change how it decides non-delegation cases, Congress will need to change how it drafts legislation. As a general matter, lawmakers will have to write legislation more carefully, more completely, and more clearly. Doing so will allow it to keep a tighter rein on the executive branch and lessen the likelihood that courts will find fault with its work.”).

<sup>43</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting) (“Nor would enforcing the Constitution’s demands spell doom for what some call the ‘administrative state.’ The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. . . . What is more, Congress is hardly bereft of options to accomplish all it might wish to achieve. It may always authorize executive branch officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers.”). Occasionally proponents of the nondelegation doctrine in fact argue that part of the goal would be to make legislation harder and therefore reduce the size and power of government. See John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 191, 202–04 (2007). Despite the quotation above, Justice Gorsuch seemed to pine for a smaller administrative state in other portions of his dissent, noting that “the framers went to great lengths to make lawmaking difficult” and erected “detailed and arduous processes for new legislation” to serve as “bulwarks of liberty.” *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting). The reality is that both pro-regulatory and anti-regulatory sentiment can easily be harmonized with the Field of Dreams Theory; much would depend on how easy in practice Congress would find it to generate consensus over specific regulatory statutory text.

<sup>44</sup> Polls routinely reveal great appetite for public protections on certain issues, see, e.g., Megan Brennan, *Views of Big Tech Worsen; Public Wants More Regulation*, GALLUP (Feb. 18, 2021), <https://news.gallup.com/poll/329666/views-big-tech-worsen-public-wants-regulation.aspx> [https://perma.cc/ZZN3-J7Q5]; Alec Tyson & Brian Kennedy, *Two-Thirds of Americans Think Government Should Do More on Climate*, PEW RSCH. CTR. (June 23, 2020), <https://www.pewresearch.org/science/2020/06/23/two-thirds-of-americans-think-government-should-do-more-on-climate/> [https://perma.cc/D9ZM-VD2K], even if the public is more deeply divided about regulation as a general matter, see Art Swift, *Americans’ Views on Government Regulation Remain Steady*, GALLUP (Oct. 11, 2017), <https://news.gallup.com/poll/220400/americans-views-government-regulation-remain-steady.aspx> [https://perma.cc/N9VE-6SEJ].

<sup>45</sup> Pamela J. Clouser McCann & Charles R. Shipan, *How Many Major US Laws Delegate to Federal Agencies? (Almost) All of Them*, 10 POL. SCI. RSCH. & METHODS 438, 438 (2021) (finding that 99% of U.S. laws from 1947 to 2016 contained a delegation).

<sup>46</sup> SCHOENBROD, *supra* note 6, at 135–154 (arguing that Congress could, if forced, find the time and resources to legislate as effectively as agencies currently regulate); LOWI, *supra* note 3, at 300–01 (“Just as there is no reason to fear the decline of Congress under the Schechter rule, there is also no reason to fear contraction of modern government toward some nineteenth-century ideal. . . .

nondelegation doctrine would not debilitate government and return us to Lochnerian laissez-faire constitutionalism,<sup>47</sup> and it would not effectively empower courts, instead of executive agencies, to fill in gaps in underspecified statutes as they see fit.<sup>48</sup> With Congress taking on the responsibility for making important decisions about the content of the law, it would be possible for voters to evaluate Congress's performance and, if the public does not like the choices Congress made, vote the bums out.<sup>49</sup>

While the Field of Dreams Theory might seem facially plausible,<sup>50</sup> and although its promised result may seem desirable at

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Rule of law, especially statute law, is the essence of positive government. The bureaucracy in the service of the strong and clear statute is more effective than ever.”).

<sup>47</sup> On the whole, the Court's opinions show little appetite for resurrecting the “liberty of contract” approach of the *Lochner* Court. Metzger, *supra* note 5, at 29. But see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1457 (2015) (arguing that the Court is using the Free Exercise Clause of the First Amendment to accomplish essentially the same protection of economic liberty). Some see the Supreme Court (and other officials) as flirting with Lochnerian ideas more broadly. See K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1692 (2018) (reviewing JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017)); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195, 211–12 (2014); Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, 107 GEO. L.J. 1323, 1348 (2019). While this element may become more prominent due to personnel changes on the Supreme Court, it is still unlikely to be popular, and any explicitly anti-regulatory program would receive serious pushback in the court of public opinion.

<sup>48</sup> Perceptive comparative institutional analyses raise concerns that a bar on delegation to agencies would substitute one unaccountable delegatee for another. See, e.g., David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 131 (2000) (“Not only would a nondelegation rule sacrifice the informational benefits of delegation, but it would also shift policy choices to actors who are just as capable of deviation from the publicly preferred alternative as agencies—namely, Congress or the courts.”); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 408 (2008) (“[T]o the extent that lawmaking by agencies triggers constitutional anxieties about the proper allocation of power among the three branches, so too should delegated lawmaking by courts.” (footnote omitted)); Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U. ENV'T L.J. 379 (2021) (“How can we ensure that judicial oversight of Congress's delegations of power does not simply substitute one failure of accountability for another, less correctable one?”).

<sup>49</sup> Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989, 993–94 (2018) (discussing and critiquing the idea of retrospective voting and its relationship with notions of congressional accountability).

<sup>50</sup> As a matter of incentives, one might assume that anything that raises the costs of delegation would have some kind of effect on Congress's propensity to delegate. However, this is only certain in a vacuum where there are no other pressures or incentives that might shape congressional behavior, and that is a

first glance,<sup>51</sup> it ultimately suffers from a lack of evidence. Simply put, proponents of the theory have offered nothing to show that if the courts really build a nondelegation doctrine with teeth (or aggressively pursue nondelegation values through enforcement of the major questions doctrine), Congress will respond by legislating with greater specificity and diligence. That is, we lack an estimate of how strongly judicial decisions might deter congressional abdication.<sup>52</sup> In fact, what limited evidence has emerged suggests that there would be no measurable effect at all.<sup>53</sup> Given the importance of the theory to justifying contemporary efforts to enforce the nondelegation doctrine and the major questions doctrine, more proof should be expected before we embark on a journey to recalibrate the separation of powers. The stakes are high: it is not as if a failure to change Congress's behavior would be a costless experiment. The nondelegation doctrine and the major questions doctrine have the potential to be unsettling,<sup>54</sup> and many believe that they would ultimately lead to confusion and disruption,<sup>55</sup>

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decidedly unrealistic scenario. See *infra* Part III for a discussion of other factors that shape delegation behavior.

<sup>51</sup> After all, who could object to Congress doing more work for itself? In reality, there are some serious downsides—delegation may well lead to better policy than having Congress make decisions itself. See *infra* subpart III.B.

<sup>52</sup> In other words, presuming that enforcement of the nondelegation doctrine would significantly increase the seriousness with which Congress approaches the task of legislating is a form of the “sign fallacy”—identifying the likely direction of incentives resulting from institutional or legal factors and assuming that the magnitude of such an effect will be large. As others have noted, the sign fallacy is pervasive in administrative law. See Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 299–300 (2017) (defining the sign fallacy as a “pervasive error within the economic analysis of law, which is to identify the likely *sign* of an effect and then to declare victory, without examining its *magnitude*—without asking whether it is realistic to think that the effect will be significant”); Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 312–13 (2017) (applying the sign fallacy concept to the ordinary remand rule in administrative law and likening it to another effect—the focusing illusion—that leads analysts to “focus disproportionately on a salient aspect of a large and complex problem”).

<sup>53</sup> Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J.L. ECON. & ORG. 27, 46–47 (2018).

<sup>54</sup> See Daniel E. Walters, *Decoding Nondelegation After Gundy: What the Experience in State Courts Tells Us About What to Expect When We’re Expecting*, 71 EMORY L.J. 417, 422 (2022) (arguing that the test being floated by Justice Gorsuch for the nondelegation doctrine has proven to be impossible to administer in state courts and would likely be no easier to administer in the federal courts); see also *infra* subpart III.C (discussing possible unintended consequences of enforcing the doctrine).

<sup>55</sup> See, e.g., Johnathan Hall, Note, *The Gorsuch Test: Gundy v. United States, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 178 (2020) (estimating that a revival of the nondelegation doctrine may jeopardize about 300,000 statutes currently on the books); Dan Farber, *The*

if not also an actual diminution in accountability, responsiveness, and social welfare.<sup>56</sup> Given all of this, it is imperative that the Supreme Court ground its decisions in data that could meaningfully assess what a change of doctrine would do on the ground.

In this Article, we provide such data. We combine two unique and comprehensive datasets from the laboratory of the states, where the nondelegation doctrine has had much more vitality than at the federal level, to enable observation of a counterfactual world that we simply cannot observe at the federal level.<sup>57</sup> Would the nondelegation doctrine, had it ever been meaningfully enforced in federal courts, have changed Congress's propensity to delegate? Would a change now induce Congress to change course? We cannot know because a world in which the federal courts enforce the nondelegation doctrine has almost never existed. But we can know it at the state level, where state courts routinely strike legislation passed by state assemblies as having exceeded the boundaries of the nondelegation principle. Using advanced computational linguistics methods to identify the frequency of delegating and underspecified language in statutory text in a dataset encompassing all state session laws in each state, we are able to observe changes in the volume and character of legislative delegations over time.<sup>58</sup> We then match those data with another unique dataset of state supreme court applications of the nondelegation doctrine.<sup>59</sup> Combined, the datasets allow us to test whether more aggressive limits on nondelegation have any relationship with changes in legislative behavior, all while controlling for the variable circumstances of each state, including the degree to which legislators might find delegation advantageous and the degree to which they have capacity to oversee the agencies they might delegate to.

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*Nondelegation Doctrine and Its Threat to Environmental Law*, LEGAL PLANET (Mar. 22, 2021), <https://legal-planet.org/2021/03/22/the-nondelegation-doctrine-and-its-threat-to-environmental-law/> [https://perma.cc/US2V-EGTH] ("Potentially, the result could be to wipe out large areas of federal regulation including securities, labor, and environmental law."); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324 (1987) ("[R]equiring Congress to write detailed commands in statutes could well produce unsound and less responsible government.").

<sup>56</sup> JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 148-57 (1997) (articulating the affirmative case for broad delegations of authority to executive agencies).

<sup>57</sup> See *infra* subpart II.A.

<sup>58</sup> See *infra* section II.A.2.

<sup>59</sup> See *infra* section II.A.1.

The evidence we uncover suggests that there may be a kernel of truth in the idea that more stringent enforcement of the doctrine could change congressional behavior, but that the revival of the nondelegation doctrine would not likely do nearly as much as proponents of the Field of Dreams Theory have suggested and may even backfire in certain ways. To summarize, we find some evidence—albeit not entirely consistent evidence—that enforcement of the nondelegation doctrine in the states changed state legislative behavior and curbed delegation, at least by some measures.<sup>60</sup> Moreover, we find that the volume of legislation did not decrease substantially in the wake of enforcement of the doctrine; if anything, the volume of legislation may have slightly increased—all consistent with the theory that Congress might respond to nondelegation decisions by picking up the slack to some degree.<sup>61</sup> However, the effects we observe, while statistically significant in some cases, are not of the magnitude needed to meaningfully change the character of modern government. Our best estimate is that, at a maximum, enforcement of the nondelegation doctrine could be expected to reduce the propensity to delegate by about 1.5%.<sup>62</sup> No doubt a central reason for this extremely limited impact is the fact that there are other institutional, structural, and demographic variables that predict decreased delegation just as meaningfully as enforcement of the doctrine.<sup>63</sup> Beyond this, we find that the effect of nondelegation decisions on legislative drafting may sometimes be precisely opposite of what the Field of Dreams Theory would hope for.<sup>64</sup> The takeaway is clear: the nondelegation doctrine may matter on the margins, but it is no cure-all for democratic disease, and indeed it may be worse than the disease itself.

The Article proceeds as follows: Part I unpacks the building blocks of the core hypothesis that we seek to test—that Congress has perverse incentives to delegate legislative power to agencies and that real enforcement of the nondelegation doctrine by the federal courts would be sufficient to overcome those incentives and cause Congress itself to legislate with greater diligence; Part II, our central contribution, tests the

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<sup>60</sup> See *infra* subpart II.B.

<sup>61</sup> The fact that nondelegation decisions can induce a change in legislative behavior does not itself resolve the normative debate about whether delegation is good or bad for public welfare, but it does raise the stakes of getting that account wrong. See *infra* subpart III.B.

<sup>62</sup> See *infra* subpart III.B.

<sup>63</sup> See *infra* subpart III.A.

<sup>64</sup> See *infra* subpart III.C.

hypothesis using our novel datasets and state-of-the-art techniques of text analysis and econometric analysis; finally, Part III steps back and asks what to make of our findings in Part II and what can be done about congressional abdication if the nondelegation doctrine alone cannot do the work that some have assumed it could do.

## I

## THE ALLEGED DYSFUNCTION AND THE NONDELEGATION PANACEA

Delegation is a fact of modern government.<sup>65</sup> When Congress writes laws, it only sometimes provides what might be termed “primary rules of conduct.”<sup>66</sup> As Jerry Mashaw put it, “Statutes empower, direct, and constrain; but they often fail to decide critical issues of public policy.”<sup>67</sup> This has been true ever since the earliest years of the Republic, when Congress passed laws that delegated policymaking discretion to regional federal officials to determine the appropriate level of taxes, for instance.<sup>68</sup> Arguably it is even more true today—indeed, for many, it is unthinkable that it could be any other way in a society of dazzling complexity. From a once-in-a-century pandemic<sup>69</sup> to innovative technologies that move faster than al-

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<sup>65</sup> See McCann & Shipan, *supra* note 45.

<sup>66</sup> A “primary rule of conduct” is a central part of H.L.A. Hart’s theory of law. On his account, “[p]rimary rules are rules of conduct; they tell you what your [sic] are legally obligated to do (or refrain from) and what consequences attach to obedience or disobedience.” Lawrence B. Solum, *Primary and Secondary Rules*, LEGAL THEORY LEXICON, [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/06/legal\\_theory\\_le\\_2.html#:~:text=Hart's%20basic%20idea%20is%20quite,attach%20to%20obedience%20or%20disobedience](https://lsolum.typepad.com/legal_theory_lexicon/2004/06/legal_theory_le_2.html#:~:text=Hart's%20basic%20idea%20is%20quite,attach%20to%20obedience%20or%20disobedience) [https://perma.cc/4PSE-VCF3] (last updated Nov. 7, 2021). Secondary rules, by contrast, tell lawmaking institutions how they are to make primary rules of conduct. *Id.* Under the Hartian framework, many existing delegations of legislative authority would be more appropriately classified as secondary rules.

<sup>67</sup> MASHAW, *supra* note 56, at 131.

<sup>68</sup> Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1313 (2021); see also Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 136–47 (2020) (pointing to early patent legislation that delegated).

<sup>69</sup> Legislatures might have been able to anticipate that there would be a pandemic of some kind at some point, but they are not reincarnations of Nostradamus—they could not possibly have anticipated the specific issues presented by the spread of COVID-19, let alone what responsive rules and responses should look like given the unique characteristics of the virus. One possible approach would have been for legislatures to await the exigency and then act after the fact, but most legislatures understandably preferred to instead enact general emergency authorizations of regulatory authority, delegating authority to agencies to respond with greater nimbleness when a crisis arose. See generally ANNA PRICE &

most anybody can keep up with,<sup>70</sup> among many other possible examples from recent times, it is readily apparent that the nimbleness made possible by delegation is indispensable.<sup>71</sup> No wonder, then, that Justice Kagan believes that if delegation is not permissible, then almost all modern government is impermissible.<sup>72</sup>

But what looks to some like an entirely pragmatic institutional allocation of power looks to others to be politically and democratically dysfunctional. This Part attempts to synthesize persistent strains of skepticism about Congress's decisions to delegate legislative powers to administrative agencies. Understanding the logic of this influential critique, its animating assumptions, and the evidence amassed to support it to date helps to set the stage for the empirical analysis in Part II. At the outset, we stress that we do not personally adhere to these strains of skepticism, and in subpart III.B we critique them. Nevertheless, we aim here to lay out as sympathetic a case as possible for these influential lines of thought.

### A. Perverse Incentives to Delegate

It is not easy to be a member of Congress. Members spend much of their time fundraising<sup>73</sup> and fretting about how each

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LOUIS MYERS, LAW LIBR. CONG., UNITED STATES: FEDERAL, STATE, AND LOCAL GOVERNMENT RESPONSES TO COVID-19 (2020). The former approach seems almost irresponsible, while the latter approach in fact allowed governments to respond with swift action to curb spread of the virus and pave the way for development of effective vaccines.

<sup>70</sup> See, for instance, questions about how to regulate so-called non-fungible tokens (NFTs). As these assets have proliferated, attorneys have begun to acknowledge that regulatory gaps will start to sow chaos. See Gary DeWaal, *NFTs Are Hot, but Patchwork of Laws, Rules Needs Watching*, BLOOMBERG L. (Apr. 6, 2021), [https://www.bloomberglaw.com/bloomberglawnews/banking-law/X13JOPP000000?bna\\_news\\_filter=banking-law#jcite](https://www.bloomberglaw.com/bloomberglawnews/banking-law/X13JOPP000000?bna_news_filter=banking-law#jcite) [<https://perma.cc/D3LT-XMP7>]. It begs belief to think that Congress could ever be made to lay out primary rules of conduct to govern this burgeoning industry.

<sup>71</sup> Nicholas Bagley, *A Warning from Michigan*, ATLANTIC (Oct. 7, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/america-will-be-michigan-soon/616635/> [<https://perma.cc/HF43-3BKU>].

<sup>72</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (“Indeed, if SORNA’s delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.”).

<sup>73</sup> Lee Drutman, *Yet Another Retiring Member of Congress Complains About the Misery of Fundraising*, VOX (Jan. 8, 2016), <https://www.vox.com/polyarchy/2016/1/8/10736402/congress-fundraising-miserable> [<https://perma.cc/8QFF-R2JT>]; SCHOENBROD, *supra* note 6, at 85–86 (“Legislators devote most of their own time, and that of their staff, to tasks of more benefit to themselves than the public: fundraising, burnishing their images, pressing the flesh of their constituents, doing casework likely to lead to electoral support or cash contributions, making

decision or public statement they make might detract from their next reelection campaign,<sup>74</sup> which in many cases (especially in the House of Representatives) is never too far away. Even in an era of scientifically optimized gerrymandering<sup>75</sup> and a high proportion of “safe seats”<sup>76</sup> that alleviate the stress of inter-party competition, intra-party competition and the threat of being “primaried” often substitute as stressors.<sup>77</sup> Members of Congress may feel strong pressure to cater to one set of interests, knowing full well that they will pay the price with another set of interests, who will perhaps mobilize to defeat them in the next election; even worse, they may not even be able to anticipate when their actions will lead to this kind of backlash, making the policymaking process look like a minefield. While elections are the lifeblood of Congress and a source of public accountability,<sup>78</sup> it is also easy to see why members would sometimes seek to avoid the harsh light of public scrutiny.

One possible answer to this conundrum for beleaguered, reelection-minded members of Congress is to confine their decisions to those that are unassailable simply because they do not decide anything. According to an influential line of critique grounded in public choice theory,<sup>79</sup> this is precisely what members do. The theory takes numerous forms but can be distilled to a core hypothesis that members can reap rewards for superficially addressing demands for new policy while leaving critical details to an agency tasked with implementing the statute in

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floor speeches or inserting documents into the *Congressional Record* to impress the home audience rather than to persuade colleagues.” (quotation marks and citation omitted)).

<sup>74</sup> ELAINE C. KAMARCK & JAMES WALLNER, BROOKINGS, ANTICIPATING TROUBLE: CONGRESSIONAL PRIMARIES AND INCUMBENT BEHAVIOR 2 (Oct. 2018), <https://www.brookings.edu/research/anticipating-trouble-congressional-primaries-and-incumbent-behavior/> [<https://perma.cc/L3NX-UZA4>]

<sup>75</sup> Daniel Oberhaus, *Algorithms Supercharged Gerrymandering. We Should Use Them to Fix It*, VICE (Oct. 3, 2017), <https://www.vice.com/en/article/7xkmag/gerrymandering-algorithms> [<https://perma.cc/X574-2T5E>].

<sup>76</sup> David Cottrell, *Using Computer Simulations to Measure the Effect of Gerrymandering on Electoral Competition in the U.S. Congress*, 44 LEGIS. STUD. Q. 487 (2019).

<sup>77</sup> ROBERT G. BOATRIGHT, GETTING PRIMARIED: THE CHANGING POLITICS OF CONGRESSIONAL PRIMARY CHALLENGES 1–4 (2013); Nick Troiano, *Party Primaries Must Go*, ATLANTIC (Mar. 30, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/party-primaries-must-go/618428/> [<https://perma.cc/3N79-2X2D>].

<sup>78</sup> Stephanopoulos, *supra* note 49, at 994.

<sup>79</sup> For general background on public choice theory, see DANIEL A. FARBER & ANNE JOSEPH O’CONNELL, RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW (2010); MASHAW, *supra* note 56.

further rounds of policymaking.<sup>80</sup> If, as is customary, we assume that members of Congress are single-minded seekers of reelection,<sup>81</sup> it follows *a fortiori* that they will “base their votes to a significant extent on looking good to the public rather than on doing good for the public.”<sup>82</sup> Delegating the actual policy decision to an agency looks good enough to the various interest groups comprising the public, so members of Congress see delegation as advantageous to their ultimate goal of reelection.

Legislators can accomplish this in legislation either by specifically delegating discretion to an agent<sup>83</sup> or by implicitly delegating through vagueness or ambiguity in statutory drafting,<sup>84</sup> or perhaps through both at the same time. What such delegations allegedly do is create a “public-policy ‘lottery,’ which a majority of legislators and their interest-group clients may prefer to any individual public-policy certainty.”<sup>85</sup> While this would be a difficult tightrope to walk—after all, err on the side of too much vagueness and the statute will no longer convince anyone that it is an improvement on the status quo—there are plenty of concrete examples that seem at least potentially consistent with this pattern. For instance, David Schoenbrod argues that the Clean Air Act satisfied constituencies who favored policies that would clean up the air, but, by leaving fundamental questions about the prescribed balance of environmental protection and economic costs of regulation to the EPA, Congress actually punted on all of the important decisions.<sup>86</sup>

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<sup>80</sup> See MASHAW, *supra* note 56, at 136-40 (summarizing the thesis and dubbing it the “Lowi-Ely-Rehnquist critique”).

<sup>81</sup> DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 17 (2004).

<sup>82</sup> SCHOENBROD, *supra* note 6, at 85.

<sup>83</sup> Peter M. Shane & Christopher J. Walker, *Chevron at 30: Looking Back and Looking Forward*, 83 *FORDHAM L. REV.* 475, 477 (2014) (citing *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

<sup>84</sup> *Id.*

<sup>85</sup> Aranson, Gellhorn & Robinson, *supra* note 23, at 7. At their best, critiques in this vein acknowledge that not all statutory vagueness or ambiguity is attributable to strategic abdication. See, e.g., LOWI, *supra* note 3, at 125 (“Admittedly the complexity of modern life forces Congress into vagueness and generality in drafting its statutes.”). Rather than providing a definitive answer to the riddle of the optimal specificity of statutes, see Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 *YALE L.J.* 65, 71-72 (1983), these accounts fall back on a naked assertion that vagueness is often abused. See, e.g., LOWI, *supra* note 3, at 302 (“Schechter rules and presidential vetoes, even when forcefully applied in good faith, could never eliminate all the vagueness in legislative enactments and could never eliminate the need for delegation of power to administrative agencies. Ignorance of changing social conditions is important, although it is much overused as an alibi for malfeasance in legislative drafting.”).

<sup>86</sup> SCHOENBROD, *supra* note 6, at 73 (“Congress made only one law in the 1970 [Clean Air Act]—the one limiting emissions of three pollutants from new cars by 90 percent. Otherwise, it decided that EPA and the states should make the laws.

Members of Congress could then take credit for the good—passing the Clean Air Act—while obscuring the bad—the possible imposition of regulatory compliance costs on industry.<sup>87</sup> From more recent times, consider the Affordable Care Act's essential health benefits mandate to private insurance companies.<sup>88</sup> The essential health benefits mandate comes tantalizingly close to looking like a definitive list of promises to the public about extended health care coverage, but in fact leaves room for agency discretion to determine what actually needs to be covered.<sup>89</sup> Looking only at this statutory provision, neither beneficiaries nor private insurance obligatees have any concrete reason to doubt that they have gotten the better half of the bargain. It will ultimately depend on what the agencies do with the delegation.

The critique runs even deeper than this—Morris Fiorina identified further advantages to members of Congress in this strategy in the form of blame shifting.<sup>90</sup> At the stage of agency implementation, when important decisions are actually made that will affect public beneficiaries and regulatory obligatees, members of Congress could pin the implementing agency with the blame for any adverse consequences of agency rules to various constituencies, perhaps even simultaneously criticizing the agency for regulating too stringently and too laxly.<sup>91</sup> Again, Schoenbrod points to the Clean Air Act, which passed

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In its lengthy instructions on how they should do so, Congress sidestepped the two hardest and most fundamental choices: how clean to make the air, and who should bear the cleanup burden. Moreover, legislators artfully exploited the ambiguity in the act to convey quite different impressions to different constituencies.”); see also David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 748 (1983) (“The Act conferred on everyone an absolute right to healthy air in the 1970s, but it gave the corresponding duty only to EPA, which had just been born with legal duties far in excess of its political power and administrative resources.”).

<sup>87</sup> SCHOENBROD, *supra* note 6, at 92 (noting that the “Clean Air Act was designed to concretize the benefits—the attainment of national ambient air quality standards by a specific date—while obscuring the most politically problematic costs of achieving that benefit—the expense to industry of reducing emissions from existing stationary sources and the inconvenience to motorists of changing their behavior”).

<sup>88</sup> 42 U.S.C. § 18022.

<sup>89</sup> See Amy B. Monahan, *The Regulatory Failure to Define Essential Health Benefits*, 44 AM. J.L. & MED. 529, 531–32 (2018).

<sup>90</sup> FIORINA, *supra* note 23.

<sup>91</sup> Kenneth R. Mayer, *The Limits of Delegation: The Rise and Fall of BRAC*, 22 REGULATION 32, 34 (1999) (“Delegation has a third practical effect, at least for legislators: it allows them to shift the blame for unpopular decisions to a bureaucracy or other entity, thereby diverting criticism away from themselves. Members of Congress gain politically from lashing out at the Internal Revenue Service, the Environmental Protection Agency, and the Occupational Safety and Health Ad-

through Congress almost unanimously but encountered withering criticism—sometimes from the biggest former supporters in Congress—when EPA’s implementation affected constituents more concretely.<sup>92</sup> Delegation is the gift that keeps on giving.

As we will discuss in subpart III.B, there are plenty of good reasons to doubt that any of this theory of perverse incentives is valid. Nevertheless, there are four reasons (somewhat related to one another) that this dynamic, if it describes any substantial portion of Congress’s activity in legislating, could potentially be worrisome.

First, and most obviously, such delegation might be viewed as disrupting lines of democratic accountability between voters and their representatives in Congress by making it difficult for voters to observe what their representatives have done and reward or punish them accordingly.<sup>93</sup> Voters might be misled to support members’ reelection by promises that sound good on paper but will never be implemented, perhaps by design. They might also misattribute bad policy outcomes to an agency, failing to connect the dots to the members of Congress who made that possible by leaving matters undecided. All of this might be thought to make rational retrospective voting impossible.<sup>94</sup> More subtly, things may turn out just fine in the agency’s hands, but the public is nevertheless robbed of the chance to express democratic approval or disapproval of the action, since agency personnel “are neither elected nor re-elected, and are controlled only spasmodically by officials who are.”<sup>95</sup> As Justice Gorsuch put it in *Gundy*, delegation’s creation of “opportunities for finger-pointing might prove temptingly advantageous for the politicians involved, but they would also threaten to ‘disguise . . . responsibility for . . . the decisions.’”<sup>96</sup>

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ministration, even though IRS, EPA, and OSHA are executing tax, environmental, and workplace-safety laws passed by Congress itself.”).

<sup>92</sup> SCHOENBROD, *supra* note 6, at 92.

<sup>93</sup> As Jerry Mashaw put it, the “Lowi-Ely-Rehnquist critique dramatizes an apparently serious flaw in American government—a legislature fleeing from choice on critical issues, not by postponing action, but by adopting vague statutes conferring policymaking power on administrators who will themselves be deeply compromised by their lack of clear statutory authority.” MASHAW, *supra* note 56, at 138.

<sup>94</sup> Stephanopoulos, *supra* note 49, at 993–94.

<sup>95</sup> ELY, *supra* note 19, at 131.

<sup>96</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (alterations in original and citation omitted).

Second, delegation of this sort might be viewed by capture theorists to be a critical avenue for Congress to facilitate the provision of private goods to powerful interests that do not wield as much power in the halls of Congress as they do in the halls of the agency tasked with implementing a vague statute.<sup>97</sup> Notice that this may be in some descriptive tension with the idea that delegation is a policy lottery<sup>98</sup>—on the capture account, members of Congress have reason to believe that the agency delegee will take a particular action that benefits a powerful interest group at another constituency's loss, and so there is no lottery at all.<sup>99</sup> For instance, building on “iron triangle” theories that posit a tight relationship between agencies, interest groups, and congressional committees, Neomi Rao argues that such delegation amounts to “administrative collusion” that “diminishes the collective . . . Congress” to benefit policy subsystems that deliver private goods at public expense.<sup>100</sup> In other words, what might not fly in public debate in Congress might fly in agency backchannels. By delegating to an ally agency, Congress ensures that policy rents are awarded to certain interests, but Congress retains the shield of plausible deniability when voters question the arrangement—after all, the agency technically had the discretion to choose a different policy and can therefore be shouldered with the blame. Perhaps this concern about capture can be merged with the accountability critique above by noting, as Schoenbrod does, that attention to regulatory policy may be systematically skewed such that recipients of rents will be able to reward the members of Congress who facilitated the deal while members of the more diffuse general public will have no idea what role their members of Congress played in the scheme.<sup>101</sup>

Third, some have raised concerns about what delegation does to the rule of law. Theodore Lowi, in particular, linked delegation to a broader drift away from a commitment to what he called the “juridical principle,” which is defined as the opposite of “interest-group liberalism”—i.e., a preference for informal bargaining and open-ended political processes over

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<sup>97</sup> Aranson, Gellhorn & Robinson, *supra* note 23, at 10.

<sup>98</sup> See *supra* note 85 and accompanying text.

<sup>99</sup> *Id.*

<sup>100</sup> Rao, *supra* note 20, at 1490.

<sup>101</sup> SCHOENBROD, *supra* note 6, at 90 (“Delegation often does not shift credit and blame equally. For example, a statute that delegates power to an agency to set prices to the advantage of an industry may succeed in shifting almost all the blame for the costs to the agency, because consumers do not understand the legislature’s role in authorizing the price-fixing; yet a sophisticated industry will still credit legislators for a substantial share of its benefit.”).

concrete legal norms and obligations.<sup>102</sup> According to Lowi, the “legal expression of the new liberal ideology can be summed up in a single, conventional legal term: *delegation of power*.”<sup>103</sup> Further, the “decline of Congress, the decline of independence among regulatory agencies, the general decline of law as an instrument of control are all due far more than anything else to changes in the philosophy of law and the prevailing attitude toward laws.”<sup>104</sup> We can see similar claims throughout contemporary discourse on delegation. For instance, in *Gundy*, Justice Gorsuch drew on an argument that delegation undermines notice by leaving law indeterminate and subject to political bargaining and discretion.<sup>105</sup> Recently administrative law scholars have begun to posit that delegation may have undesirable intertemporal impacts insofar as broad delegations remain on the books long after the circumstances prompting the delegation change.<sup>106</sup> Agencies may attempt to draw on broad statutory delegations to take actions that were neither anticipated by the enacting Congress nor popular enough with the current Congress to support new authorizing legislation. For instance, some argue that this is what has happened with the Clean Air Act, which was enacted well before climate change was a problem on most people’s radar screen, but which is now being repurposed to address the greatest environmental challenge of our time.<sup>107</sup> In fact, even if they want to address an issue like climate change, members of Congress may lack appropriate incentives to do the hard work of reauthorizing the statute with explicit authorities for addressing climate change, since they can continue to punt on the issue, confident that EPA and other agencies will attempt to work with the statutory authorization they have. Again, if EPA fails on that front, it is not the fault of a current member of Congress.

Fourth, some argue that delegation subverts the only serious check on the President’s growing power. Concerns about

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<sup>102</sup> LOWI, *supra* note 3, at 92, 298. For helpful discussion of Lowi’s core thesis, see MASHAW, *supra* note 56, at 136–37.

<sup>103</sup> LOWI, *supra* note 3, at 92.

<sup>104</sup> *Id.* at 125.

<sup>105</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

<sup>106</sup> Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1993 (2020); see also David Schoenbrod, *Statutory Junk*, 66 EMORY L.J. ONLINE 2023, 2023 (2017) (describing outdated mandates as “statutory junk”).

<sup>107</sup> Adler & Walker, *supra* note 106, at 1957; Schoenbrod, *supra* note 106, at 2024.

the accumulation of executive power have a long lineage,<sup>108</sup> but have picked up steam in recent years as Presidents of both parties have stepped up their efforts to control the output of administrative agencies.<sup>109</sup> The emergence of populism and extremism in presidential politics over the last half decade has brought concerns about presidential power to a rolling boil.<sup>110</sup> Some believe that delegation plays a key role in enabling this state of affairs by failing to delineate the legitimate scope of agency discretion, creating the space for Presidents to intervene in increasingly aggressive fashion to shape agency action.<sup>111</sup> For instance, Saikrishna Bangalore Prakash argues that delegation unduly expands the scope of the President's power to execute, or implement, the law, transforming the unitary executive theory<sup>112</sup> allegedly anticipated by the founders into a dangerous, and potentially fascistic instrumentality.<sup>113</sup> In other words, it is not the idea of the unitary executive theory

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<sup>108</sup> See, e.g., ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 1 *passim* (1973); PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS DEMOCRACY* 1 *passim* (2009). Of course, not all commentators believe that empowerment of the executive is problematic. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 1 *passim* (2010).

<sup>109</sup> For general accounts of the rise of "presidential administration," see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2248–50 (2001); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 685–87 (2016). For more recent applications of the presidential administration framework to the Trump presidency, see Daniel A. Farber, *Presidential Administration Under Trump* 1–2 (U.C. Berkeley Pub. L. Rsch. Paper, Aug. 8, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015591](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591) [<https://perma.cc/5JF3-6AMN>]; Jud Mathews, *Trump as Administrator in Chief: A Retrospective*, 46 DPCE ONLINE 1035, 1036 (2021).

<sup>110</sup> See, e.g., WILLIAM G. HOWELL & TERRY M. MOE, *PRESIDENTS, POPULISM, AND THE CRISIS OF DEMOCRACY* (2020).

<sup>111</sup> The President's authority to take executive action within the scope of Article II of the Constitution depends in large part on whether Congress has specified in a statute a different course of action than the President would like to take. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). When Congress leaves a course of action unspecified, the President may retain inherent Article II power to take an action. *Id.* at 636–37. Often, conflicts of this sort arise when the President directs an agency to take an action that may or may not be in conflict with the statute the agency administers. *Id.* at 637–38. To the extent that delegation makes these conflicts less likely to occur, it arguably expands the potential domain of executive power.

<sup>112</sup> For background on the unitary executive theory, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 4 (2008) (arguing for the unitary executive theory); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 228 (2021) (arguing against the unitary executive theory on historical grounds).

<sup>113</sup> SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER EXPANDING POWERS* 1–3 (2020). There are echoes of this thinking in Justice Gorsuch's *Gundy* dissent, where he argued that "if a single executive branch official can write laws restricting the liberty [of sex offenders],

that is to blame for presidential imperialism, but Congress's willingness to leave so much to be decided at the execution stage. Indeed, this argument connects with the rest of the theories, which focus more on Congress's incentives in that Congress stands to benefit even more from abdication because it knows that a more expert, energetic branch will step in to pick up the slack.<sup>114</sup>

Taking a step back, the basic claim being made throughout this literature is that we end up with a democratic accountability deficit because of the perverse incentives to delegate. There is no electoral discipline being imposed on policymaking by Congress because the lack of specificity always allows Congress to shift blame to other actors, such as administrative agencies. On this thinking, "we blunder our way into an administrative state that has traded its democratic values for little or no increase in effective governance."<sup>115</sup> A better system, claim the critics, would involve legislators doing much of the work that agencies currently do: that is, passing statutes with a high degree of specificity and containing mostly primary rules of conduct that grapple with the "hard choices" posed by policy and thereby facilitating up-or-down referenda by the voters.

## B. The Nondelegation Panacea

While theoretically dubious,<sup>116</sup> the idea that Congress has perverse incentives to delegate policymaking authority to agencies through vague statutory language in order to escape accountability or deliver rents, if accepted at face value, does have fairly straightforward implications. On this account, almost the entirety of the modern administrative state, with its pervasive delegation of policymaking authority to agencies, is potentially a perversion of our democracy.<sup>117</sup> This extreme conclusion has often led its proponents to an extreme prescrip-

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what does that mean for the next [group]?" 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

<sup>114</sup> Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1608–09 (2016) (arguing that the executive branch possesses far more expertise and capacity than the other branches).

<sup>115</sup> MASHAW, *supra* note 56, at 138.

<sup>116</sup> See *infra* subpart III.B (critiquing the account we have presented in subpart I.A).

<sup>117</sup> The proponents of this basic argument often, but not always, argue that it facilitates over-regulation. It is not clear why this would be the case, though, and some, like David Schoenbrod, make exactly the opposite argument—that delegation allows Congress to defuse popular demand for regulatory protections while not actually accomplishing much. See SCHOENBROD, *supra* note 6, at 16–19.

tion—namely, a proposed invigoration of the nondelegation doctrine in the courts.<sup>118</sup>

This conclusion follows naturally from the theory of perverse incentives above. Because the entire problem allegedly stems from Congress duping the voters, the voters cannot be relied on to change course and demand less delegation.<sup>119</sup> Nor can Congress be expected to desist from a strategy that benefits members so directly.<sup>120</sup> It is similarly naïve to think that the President would ever veto legislation agglomerating executive power and discretion, or refrain from exercising discretionary authorities already on the books.<sup>121</sup> Thus, it allegedly falls to the courts, who are the only actors who have the independence and incentives to do the job and who are therefore duty-bound to say when Congress has gone so far as to undermine the constitutional and democratic equilibrium.<sup>122</sup>

Proponents of these theories of congressional abdication do not stop at the conclusion that courts are, practically speaking, the only institution that can curb delegation. They also make an arrestingly sanguine claim about the capacity of courts to correct the dysfunction through enforcement of the nondelegation doctrine. The nondelegation doctrine, as every student of administrative law learns, is a doctrine more in theory than in practice, at least for now,<sup>123</sup> but at root it stands for the proposition that Congress may not delegate its legislative authority to another actor, such as an administrative agency.<sup>124</sup> Clearly the doctrine is observed only in the breach.<sup>125</sup> Only twice has the doctrine been used by the U.S. Supreme Court to invalidate

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<sup>118</sup> ELY, *supra* note 19, at 133 (“There can be little point in worrying about the distribution of the franchise and other personal political rights unless the important policy choices are being made by elected officials. Courts thus should ensure not only that administrators follow those legislative policy directions that do exist—on that proposition there is little disagreement—but also that such directions are given.”); LOWI, *supra* note 3, at 300–01; SCHOENBROD, *supra* note 6, at 165–79.

<sup>119</sup> SCHOENBROD, *supra* note 6, at 170.

<sup>120</sup> *Id.* at 168, 171.

<sup>121</sup> PRAKASH, *supra* note 113, at 209–11.

<sup>122</sup> SCHOENBROD, *supra* note 6, at 166.

<sup>123</sup> See Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1746 (2021) (describing the doctrine’s “famed dormancy” and noting that it is nevertheless “poised for a comeback”).

<sup>124</sup> See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (stating a rule “[t]hat congress cannot delegate legislative power to the President,” but finding that such a delegation did not occur in the case).

<sup>125</sup> Sunstein, *supra* note 27, at 330 (noting that the federal nondelegation doctrine has had “One Good Year [and more than] Two Hundred and Two Bad [ones]”).

statutes delegating power to executive agencies.<sup>126</sup> Given this history, it is unbearably tempting to assume that simply enforcing the doctrine would resolve all or most of the dysfunction that critics see in delegation.<sup>127</sup> After all, it is seemingly the only thing that has not been seriously tried.

Following this temptation, many proponents of reviving the nondelegation advance what we call the “Field of Dreams Theory”: if the courts build a nondelegation doctrine with teeth, Congress will no longer behave in a way that undermines democracy. What is so appealing about this theory is that it provides something for people of every ideological persuasion.<sup>128</sup> For progressive supporters of greater regulatory action, the Field of Dreams Theory offers a vision of a much more proactive and energetic Congress that would step up to the plate to pass meaningful, specific statutory language that locks in regulation supported by a majority of the population.<sup>129</sup> There would be no more open-ended delegations that run a risk of being lost in implementation.<sup>130</sup> Moreover, Congress would

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<sup>126</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388, 406, 433 (1935) (striking down § 9(c) of the National Industrial Recovery Act as a violation of the nondelegation doctrine); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (striking down § 3 of the National Industrial Recovery Act as a violation of the nondelegation doctrine).

<sup>127</sup> See *supra* subpart I.A.

<sup>128</sup> We are of course aware that many progressives are skeptical of the nondelegation doctrine, viewing it as a subaltern method of “kneecapping” progressive policy. See Matt Ford, *The Plot to Level the Administrative State*, NEW REPUBLIC (Jan. 14, 2020), <https://newrepublic.com/article/156207/plot-level-administrative-state> [<https://perma.cc/R99F-EWTM>]; Millhiser, *supra* note 31. Nevertheless, some notable progressives have a more agnostic view that would depend on the empirical validity of the Field of Dreams Theory. See Seifter, *supra* note 123, at 1746–47 (linking John Hart Ely and Justice William J. Brennan to the idea that the nondelegation doctrine could promote democracy); William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, 2019 AM. CONST. SOC’Y SUP. CT. REV. 211, 213 (arguing that the nondelegation doctrine could “redound to the benefit of progressive constitutionalism” and that there is in fact a “history of progressive interest in non-delegation principles,” with liberal giants like Justices Douglas, Brennan, and Black all endorsing some form of the doctrine).

<sup>129</sup> Araiza, *supra* note 128, at 214 (noting the desirability of “statutory requirements that agencies at least consider particular factors or regulatory options,” and arguing that Congress must “change how it legislates” with an assist from the courts).

<sup>130</sup> *Id.* at 213 (“Today, a broad grant of discretionary power to an administrative agency is just as likely to lead to regulatory inaction as to aggressive and appropriate regulation.”); see also Craig N. Oren, *Detail and Delegation: A Study in Statutory Specificity*, 15 COLUM. J. ENV’T L. 143, 145–46 (1990) (discussing the “perceived failures of the classic New Deal regulatory agency, which typically had been granted broad discretion,” and outlining how statutory detail can “ensure not only that agencies do not act arbitrarily in carrying out their authority, but also that the specifics of the complex legislative scheme are followed”). For empiri-

no longer have incentives to sit back and wait for ally agencies to use old, vague language to promulgate important public policies, since such policies would be perpetually at risk of being nixed by the courts. For conservative opponents of regulation, the dream is a Congress that effectively stops regulating altogether.<sup>131</sup> Without the ability to delegate, Congress would bear responsibility for the costs of regulation and would rarely, if ever, find the votes necessary to impose those costs.<sup>132</sup> As Justice Gorsuch argued in *Gundy*, legislation is supposed to be hard—it is delegation that artificially removes barriers that protect rights.<sup>133</sup> And when Congress does manage to impose regulatory requirements through specific statutory language, we can be very confident that it represents a democratic consensus. The Field of Dreams Theory offers the hope that democracy will once again rule the day, whatever policy it eventually yields.

Ultimately, though, it is an empirical question how effective the Court could be in changing congressional behavior through use of the nondelegation doctrine, and one for which we have little data to draw on in providing an answer.<sup>134</sup> In his dissent in *Gundy*, Justice Gorsuch invoked anecdotal evidence that after the invalidation of a pair of New Deal statutes, “Congress responded by writing a second wave of New Deal legislation more ‘[c]arefully crafted’ to avoid the kind of problems that sank these early statutes.”<sup>135</sup> For Justice Gorsuch, the nondelegation doctrine was working as long as the Court enforced it: simply stopping the Court’s own abdication of its duty had the effect of stopping Congress’s abdication. But beyond such anecdotes, there is essentially no data at the federal level that informs whether the doctrine could meaningfully change

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cal validation of this concern that agencies with discretion might not follow through on statutory mandates for regulation, see Jason Webb Yackee & Susan Webb Yackee, *From Legislation to Regulation: An Empirical Examination of Agency Responsiveness to Congressional Delegations of Regulatory Authority*, 68 ADMIN. L. REV. 395, 437 (2016) (finding that many delegations are never acted on by agencies).

<sup>131</sup> Douglas H. Ginsburg, *Delegation Running Riot*, 18 REGULATION 83, 86 (1995) (reviewing SCHOENBROD, *supra* note 6).

<sup>132</sup> Aranson, Gellhorn & Robinson, *supra* note 23, at 33.

<sup>133</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

<sup>134</sup> One existing study looks at the question systematically and returns null results. See *infra* notes 147–149 and accompanying text.

<sup>135</sup> *Gundy*, 139 S. Ct. at 2138 (Gorsuch, J., dissenting) (alteration in original) (quoting MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937 424 (2002)).

legislative drafting practices.<sup>136</sup> The critics of delegation have not asserted some isolated glitch in our democratic system—they have asserted systemically distorted incentives that require systemic corrections. Could the nondelegation doctrine really do the work that Justice Gorsuch and other critics of delegation believe it could?

One could entertain real doubts about whether deeply rooted, institutionally situated practices like Congress's propensity to delegate could be so easily deprogrammed.<sup>137</sup> If the risk of invalidation under the nondelegation doctrine was only a marginal factor in Congress's actual drafting decisions, then enforcing the nondelegation doctrine might fail to yield any improvement on the status quo. For these reasons, even if the relationship exists, it is a mistake to assume without any real evidence that the signal would be large enough or strong enough to register amidst the noisy inputs that surely influence legislative decisions.<sup>138</sup> The risk of invalidation could be quite high and Congress quite attentive to it, but if other factors pushing in favor of delegation are strong enough to overwhelm it, then putting hope in the nondelegation doctrine would be a fool's errand.

This open question matters. While there are other reasons, both doctrinal and crassly political, that the nondelegation doctrine has reappeared on the Supreme Court's agenda, it would be a mistake to underestimate the rhetorical importance

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<sup>136</sup> Nor could there be, since even a change of doctrine like the one identified by Gorsuch that applies to the entire legal system would lack a counterfactual comparison group. As discussed in Part II, *infra*, it is possible to get around this problem at the state level, where states can be compared based on whether they were "treated" with nondelegation decisions or not, and it is there that we focus our empirical analysis.

<sup>137</sup> See Strand & Lang, *supra* note 42 ("Of course, crafting better, more detailed legislation is easier said than done. The process of enacting high-quality legislation is arduous, requiring policy expertise, working relationships with other members and party leaders, and an understanding of both the written and unwritten rules that dictate how Congress operates. None of these competencies are easy to come by, and much of the contemporary congressional culture works against each to some degree or another. Excessive control of the legislative process by congressional leaders, impoverished personal relationships between members, weakened committees, limited policy expertise, and other challenges all plague today's Congress, making it less capable of crafting and passing good law.").

<sup>138</sup> See Bagley, *supra* note 52 (drawing on Sunstein's and Vermeule's "sign fallacy" concept in the context of remedies in administrative law); *cf.* Sunstein & Vermeule, *supra* note 52 (noting the "pervasive error within the economic analysis of law" of identifying the "likely sign of an effect and then to declare victory, without examining its magnitude—without asking whether it is realistic to think that the effect will be significant").

of the claim that enforcement of the nondelegation doctrine could correct congressional abdication. Unlike arguments based on the text, structure, or history of Article I's vesting clause,<sup>139</sup> and unlike a simple partisan preference for less regulation, the argument based on the perverse incentives logic has broad appeal. If it is true that delegation undermines accountability or facilitates capture or empowers a potentially imperial President, that is just as much of a concern for the political left as it is for the political right.<sup>140</sup> For those who are not committed to formalist or originalist constitutional interpretation, the perverse incentives version of the argument is the only reasoning that could justify the revival of the nondelegation doctrine—or, at least, it is the only argument that would likely lead someone to prefer that the Court, rather than the voters or the President, take on the responsibility for remedying what is ultimately a political dysfunction in Congress.<sup>141</sup> But all of this works as a justification only if judicial enforcement of the nondelegation doctrine could actually be expected to change congressional behavior. In the next Part, we test this expectation.

## II

### EMPIRICALLY TESTING THE THEORY

Given the centrality of the Field of Dreams Theory to contemporary criticism of the Supreme Court's permissive approach to delegation,<sup>142</sup> and given the Supreme Court's willingness to consider a possible change of approach to nondelegation cases,<sup>143</sup> it is more critical than ever to assess whether, if the Court builds a nondelegation doctrine, Congress will rely less on delegation in its legislative work. If a robust relationship could be demonstrated empirically, there would be powerful reasons to accept some greater role for courts in policing delegation. If a robust relationship did not appear in data, then, setting aside other reasons that might be urged to justify a more stringent nondelegation doctrine (which are beyond the scope of this Article to evaluate),<sup>144</sup> the ac-

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<sup>139</sup> See Mortenson & Bagley, *supra* note 22, at 293; Ilan Wurman, *Nondelegation at the Founding*, 130 *Yale L.J.* 1490, 1525 (2021); Parrillo, *supra* note 68, at 1311; Chabot, *supra* note 68, at 120.

<sup>140</sup> See Araiza, *supra* note 128.

<sup>141</sup> Spence & Cross, *supra* note 48, at 141.

<sup>142</sup> See *supra* Part I.

<sup>143</sup> See *supra* notes 38–39 and accompanying text.

<sup>144</sup> See *supra* note 22 and accompanying text.

countability-based logic that is often leveraged to support the doctrine would lose its force.

Our aim in the next two Parts is to answer this question—one that has almost “entirely escaped empirical scrutiny”<sup>145</sup>—using the best available data, which happens to be at the state rather than federal level, and a sophisticated multivariate analysis that can control for most of the factors that might mediate the impact of the nondelegation doctrine. States present a particularly advantageous laboratory to study the question because, unlike at the federal level, there are routine and frequent instances of state supreme court invalidations of statutes under the nondelegation doctrine, as well as significant variation across states.<sup>146</sup>

It bears mentioning at the outset that we do not write on an entirely blank slate, although only one study to date attempts to do what we do, and on a much less comprehensive source of data. In his prior study, Jed Stiglitz examined state legislative data drawn from 1990 to 2010 to determine whether the nondelegation doctrine changed state legislatures’ propensity to delegate.<sup>147</sup> Stiglitz examines two “treatments” that the Field of Dreams Theory would suggest would lead to changed legislative behavior: first, he uses a state’s overall characterization as a “strict” or “weak” nondelegation state, following classifications from two prior doctrinal surveys of state approaches to the nondelegation doctrine; second, he uses observed invalidations of statutes as a measure of “doctrinal ‘tightening’” which should update the legislature’s understanding of the likelihood of an invalidation for failure to meet the requirements of the nondelegation doctrine.<sup>148</sup> Under both approaches, Stiglitz found that “the nondelegation doctrine does not appear to much matter for legislative drafting practices.”<sup>149</sup>

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<sup>145</sup> Stiglitz, *supra* note 53, at 28.

<sup>146</sup> Of course, the states are different enough from the federal level that there are some concerns about external validity of the results. See Walters, *supra* note 54, at 467 (discussing and addressing concerns about external validity when generalizing from the states to the federal level). Nevertheless, states provide the best available data, and there are good reasons to believe that the comparison is apt. See *infra* note 230. Moreover, if anything, a more robust relationship might be expected at the state level, where the veto gates to legislation are not as imposing and party control of government is often unified (unlike at the federal level). In light of the fact that the effect we observe is quite weak, see *infra* subpart III.B, the inference would be that the effect would be even smaller at the federal level.

<sup>147</sup> Stiglitz, *supra* note 53, at 34.

<sup>148</sup> *Id.* at 31, 43.

<sup>149</sup> *Id.* at 46–47.

As we will explain, our approach is similar to that of Stiglitz. We use both doctrinal classifications of states' doctrinal approaches and observed invalidations of state statutes to model the impact of nondelegation doctrines on state legislative behavior. However, our analysis goes beyond the Stiglitz analysis in a number of important respects. First, leveraging two original datasets, we greatly increase the scope of the analysis beyond the twenty-year period examined by Stiglitz.<sup>150</sup> This expansion of the scope of the study addresses the possibility that the twenty-year period observed by Stiglitz is abnormal in some critical respect. Second, we draw on more measures of delegation and more methods of statistical analysis to isolate the potential effect of enforcement of the doctrine.<sup>151</sup> Third, we are able to decompose our models to draw more nuanced insights into how the results might differ across the subject matter area of legislation, and to bring in other institutional variables to allow a comparison of the *relative* effect of enforcement of the nondelegation doctrine.<sup>152</sup>

To broadly summarize what follows, our findings provide a slightly more nuanced picture than the emphatically null results of the Stiglitz study, albeit still basically in agreement with that study that "the nondelegation doctrine does a poor job of shaping the behavior [of] legislative drafters."<sup>153</sup> In contrast with the Stiglitz study, we find some limited evidence of a relationship between enforcement of the nondelegation doctrine and subsequent congressional behavior, and that the behavioral shift is sometimes in accordance with theoretical expectations. While this is a significant finding, and one that tends to underscore the Field of Dreams Theory, it is subject to important caveats. While statistically detectable, the magnitude of the effects that we observe, while not trivial, would be difficult to detect in the real world, where delegations are almost innumerable, and at any rate the finding is only intermittently present in our data. Moreover, in some instances the effect is exactly contrary to theory. It stands to reason that, if the states are any guide, the nondelegation doctrine could be expected to only slightly slow the flow of delegation, and in some cases, it might have the opposite effect. We discuss broad implications of these findings in the next Part.<sup>154</sup>

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150 See *infra* subpart II.A.

151 See *infra* section II.A.2.

152 See *infra* subpart II.B.

153 Stiglitz, *supra* note 53, at 50.

154 See *infra* Part III.

### A. Data

Testing the Field of Dreams Theory has been hampered by data limitations. Although many observe that Congress has relied on increasingly capacious delegations of regulatory authority in its statutory work product,<sup>155</sup> and although there are data on these delegations that do vary enough in their own right to allow empirical testing of the drivers of delegation,<sup>156</sup> there is not enough variation in the nondelegation cases at the federal level to permit analysis of the relationship between cases and legislative behavior. As discussed above, the Supreme Court has only twice struck statutes on nondelegation grounds, and both were in the same year.<sup>157</sup> Given how quickly the Court reverted to deferential application of the intelligible principle standard, even inferences from the immediate aftermath of this “quasi-experiment” have to be taken with a grain of salt. Broader analyses are a non-starter: without variation on the outcomes of nondelegation cases, there is no variable that can serve as a “treatment.”

At the same time, while it has long been known that states have their own nondelegation doctrines and that these nondelegation doctrines are far less toothless than they are at the federal level<sup>158</sup>—solving the lack of a potential treatment variable—the problem at the state level has been the lack of usable data on delegations coming from the legislature. Existing studies of state-level delegation, until very recently, focused on specific states where data were available.<sup>159</sup> There were no truly comprehensive data on state-level legislative delegation, either temporally or across all states.

We solved the data dilemma by combining two original and unique datasets: one focused on state-level supreme court de-

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<sup>155</sup> See Ginsburg, *supra* note 131, at 86.

<sup>156</sup> See generally John D. Huber & Charles R. Shipan, *Politics, Delegation, and Bureaucracy*, in THE OXFORD HANDBOOK OF POLITICAL SCIENCE 849 (Robert E. Goodin ed., 2011) (discussing the theoretical and empirical literature on delegation in political science).

<sup>157</sup> See *supra* notes 26–31 and accompanying text.

<sup>158</sup> See, e.g., Jim Rossi, *Institutional Design and the Lingering Legacy of Anti-federalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1171–72 (1999) (noting that “many state courts approach separation of powers jurisprudence,” including the nondelegation doctrine, “differently,” and in many states, “impose substantive limits on delegation”); Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. 567, 580 (1994) (explaining that some states have strict delegation standards).

<sup>159</sup> JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* (2002) (testing theories of delegation at the state level, but focusing on states or particular substantive areas of law where statutory texts were available).

cision making on the nondelegation doctrine and another one focused on comprehensive measures of delegating activity in state legislatures. Given the novelty of these data, we first describe in some detail what these datasets include and what measures they yield.

1. *State Supreme Court Decisions on the Nondelegation Doctrine*

For this dataset, we collected state supreme court cases concerning a challenge brought under the nondelegation doctrine. The data were constructed by using the Westlaw key system to identify an inclusive list of all state supreme court decisions coded with the headnotes for nondelegation.<sup>160</sup> The 4,001 cases returned by this search spanned from 1830 to 2019. Next, legally trained research assistants reviewed each case to determine whether it was a true nondelegation dispute. This step was necessary because not every case containing a nondelegation headnote actually involved a nondelegation challenge—the Westlaw search was bound to be overinclusive. Two coders reviewed each case independently and recorded their evaluation on whether the case should be included in the data. Coders were given instruction on how to identify cases of interest. For instance, coders were instructed to include cases that presented statutory interpretation questions that would have raised nondelegation concerns but were resolved by the court to avoid reaching the constitutional question, as through application of a nondelegation canon or a narrow construction of the text of the statute. They were likewise instructed to exclude cases that simply cited nondelegation decisions for background or that did not involve delegations of authority to executive or independent agencies in the state government.

After the coders had both reviewed the cases, there were three possible ways to cull the dataset to ensure that the data reflected only cases of interest. First, the broadest (but potentially still overinclusive) dataset involves cases coded by either research assistant as included. Second, a narrower dataset (one which is likely not overinclusive) involves cases coded by both research assistants as included. Finally, both coders rated the difficulty of coding each case on a Likert scale, allowing omission of cases that were difficult enough that they may have undermined the validity of the coding. In what follows, we present data and analysis using only the second ver-

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<sup>160</sup> We focused on the following set of keys: “XX. Separation of Powers. (B) Legislative Powers and Functions. 4. Delegation of Powers, k2400–2449.”

sion of the data, i.e., those where both coders agreed a case was relevant. Including only these cases reduces the count of cases to 1,668.<sup>161</sup>

Assuming that a state supreme court decision was included in the data for analysis, the most important coding decision coders made was to determine whether the state supreme court invalidated the statute in question (or narrowly interpreted the statute to avoid a purported constitutional issue). Coders were instructed to code the case on this variable even if they believed the decision should not be included, using their best guess as to what the court intended to do with the statutory provision had it been the kind of nondelegation case of interest. On this coding decision about the outcome of the case, agreement between coders was perfect. As reported in another paper using these data, the outcomes of nondelegation cases average out to an 81.3% validation rate, which is substantially lower than the federal court validation rate.<sup>162</sup>

Our state supreme court data are roughly in line with existing efforts to collect and categorize nondelegation cases at the state level. Keith Whittington and Jason Iuliano conducted a similar data collection exercise in their two articles on the nondelegation doctrine in the states.<sup>163</sup> While Whittington and Iuliano did attempt to collect the complete population of qualifying cases from the period running from 1789 to 1940,<sup>164</sup> they did not attempt to do so for the period running from 1940 to 2015.<sup>165</sup> Instead, they sampled at five-year intervals for the latter period.<sup>166</sup> Altogether, Whittington and Iuliano estimated that there were over 2,100 cases in the first period,<sup>167</sup> and 919 in the latter,<sup>168</sup> though a mathematical extrapolation would suggest there were on the order of 5,000 cases in the latter

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<sup>161</sup> Keeping cases where at least one coder would have excluded it would expand the dataset to 2,333 cases.

<sup>162</sup> Walters, *supra* note 54, at 453.

<sup>163</sup> Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 383 (2017) [hereinafter Whittington & Iuliano, *Myth of the Nondelegation Doctrine*]; Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 620 (2017) [hereinafter Iuliano & Whittington, *Nondelegation Doctrine: Alive and Well*].

<sup>164</sup> Whittington & Iuliano, *Myth of the Nondelegation Doctrine*, *supra* note 163, at 418.

<sup>165</sup> Iuliano & Whittington, *Nondelegation Doctrine: Alive and Well*, *supra* note 163, at 635–36.

<sup>166</sup> *Id.*

<sup>167</sup> Whittington & Iuliano, *Myth of the Nondelegation Doctrine*, *supra* note 163, at 418.

<sup>168</sup> Iuliano & Whittington, *Nondelegation Doctrine: Alive and Well*, *supra* note 163, at 636.

period.<sup>169</sup> Our dataset is, broadly speaking, comparable. It is not as large, but this may be because of a later start date or because of relatively exclusive criteria. A number of recent doctrinal surveys note that the nondelegation doctrine at the state level includes categories of cases that are not the kind of cases we typically think of when we think of the nondelegation doctrine—for instance, cases involving delegations to courts and local government units.<sup>170</sup> As discussed above, coders for our dataset were instructed not to include such cases and to focus on cases involving delegations to executive branches or independent agencies (i.e., the kinds of cases of most concern in the federal context). Overall, we are confident that our dataset represents an accurate collection of the state supreme court nondelegation doctrine decisions that will best inform analogies to the federal level.

Figure 1 summarizes the dataset by plotting cumulative invalidations, validations, and the difference between the two. Clearly there is substantial variation in the data, both in terms of the absolute volume of cases—states like Illinois and Florida have had substantially more nondelegation cases than comparable states, like New York—and in terms of the relative balance of invalidations and validations, with some states showing very high rates of validations and others, like Wyoming and Louisiana, showing more balanced outcomes. The data also reveal temporal variation: the rate of growth in the volume of cases and outcomes is higher and more irregular in some states than others, indicating that some states go through “hot streaks” where invalidation is more likely than it is over the whole sweep of the data. Overall, this variation on multiple dimensions allows for more powerful testing of the effect of nondelegation decisions. Various measures of these decisions—e.g., the cumulative share of validations and the raw count of validations and invalidations—serve as our primary treatment variables in the analysis that follows in subpart II.B and subpart III.A.

## 2. *State Session Law Dataset*

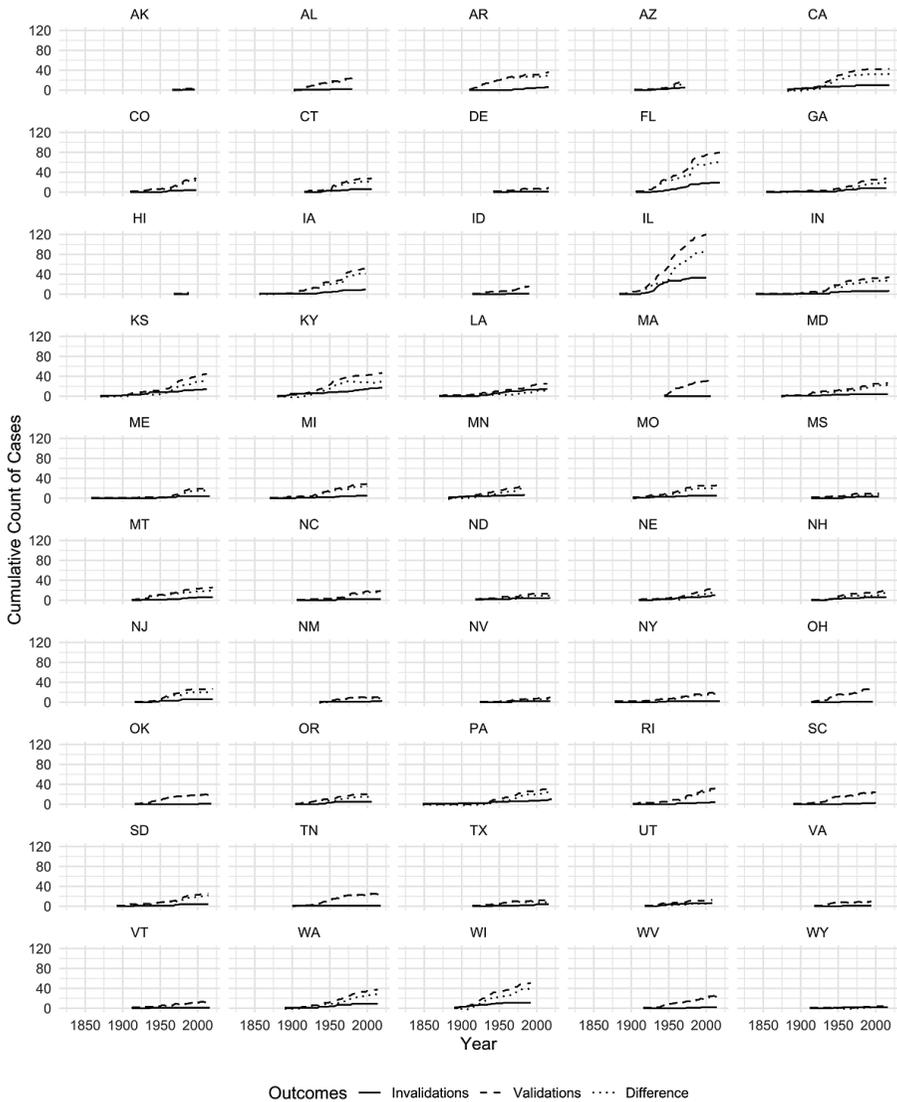
Our second dataset comprises the plain text of U.S. state session laws, which we obtained in their entirety from Hein

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<sup>169</sup> Walters, *supra* note 54, at 443.

<sup>170</sup> Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1234–35, 1249–58 (2022); Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 278–285 (2022).

FIGURE 1: CUMULATIVE COUNTS OF CASES AND OUTCOMES IN THE STATE SUPREME COURT NONDELEGATION DATASET



Online.<sup>171</sup> Session laws are the bills that were passed into statutory law. They give us a comprehensive look at legislative outputs across states and across time—we have data on all 50 states from 1700 to 2012. We created a corpus of these session law texts, which in turn allows us to develop quantitative measures of this legislative output, including measures of delega-

<sup>171</sup> For another paper using and describing these data, see Matia Vannoni, Elliott Ash & Massimo Morelli, *Measuring Discretion and Delegation in Legislative Texts: Methods and Applications to US States*, 29 POL. ANALYSIS 43 (2021).

tion, raw volume of statutory text, and more syntactical or lexical measures of the texts. These measures, in turn, serve as our primary outcome, or dependent, variables in the analysis that follows in subpart II.B.

As a first cut, we counted sentences in state session laws that contain a delegation from the judicial power to the executive. This is done in three steps. First, we processed the statute texts following the method from Stiglitz.<sup>172</sup> Second, the statutes for a biennium-year are segmented into sentences.<sup>173</sup> Each sentence is processed using a syntactic dependency parser to extract subjects, verbs, and objects. Third, we apply regular expression pattern matching to detect delegations. We assign a delegation to a sentence when it contains an agency as subject and a language of authority. These words, listed in Table A.1 in Panel A, are based on the words used by Stiglitz to construct a similar delegation measure on his more limited dataset.<sup>174</sup> For our analysis, we then take the sum of the delegations by state and biennium, which we have plotted below in Figure 2.

The baseline count of delegations serves as a foundation for a number of other useful outcome variables. For instance, Figure 3 plots the share of delegations over time. The share of delegations measures the percent of all statutes that were tagged as delegations. This measure in effect accounts for the fact that delegations may rise in a state as the overall volume of legislation goes up. The share of delegations may therefore be a more precise measure of the propensity to delegate relative to the overall workload that state legislatures have. As Figure 3 demonstrates, many states vary significantly from biennium to biennium and over long ranges of time on this propensity to delegate. While Figure 2 shows more-or-less steady increases in overall delegation in most states, some states have significantly curtailed their propensity to delegate in the last half century once the overall volume of legislation is accounted for. Also notable is that 99% of the observations fall below 45.6% delegations for the entirety of the period of observation. The

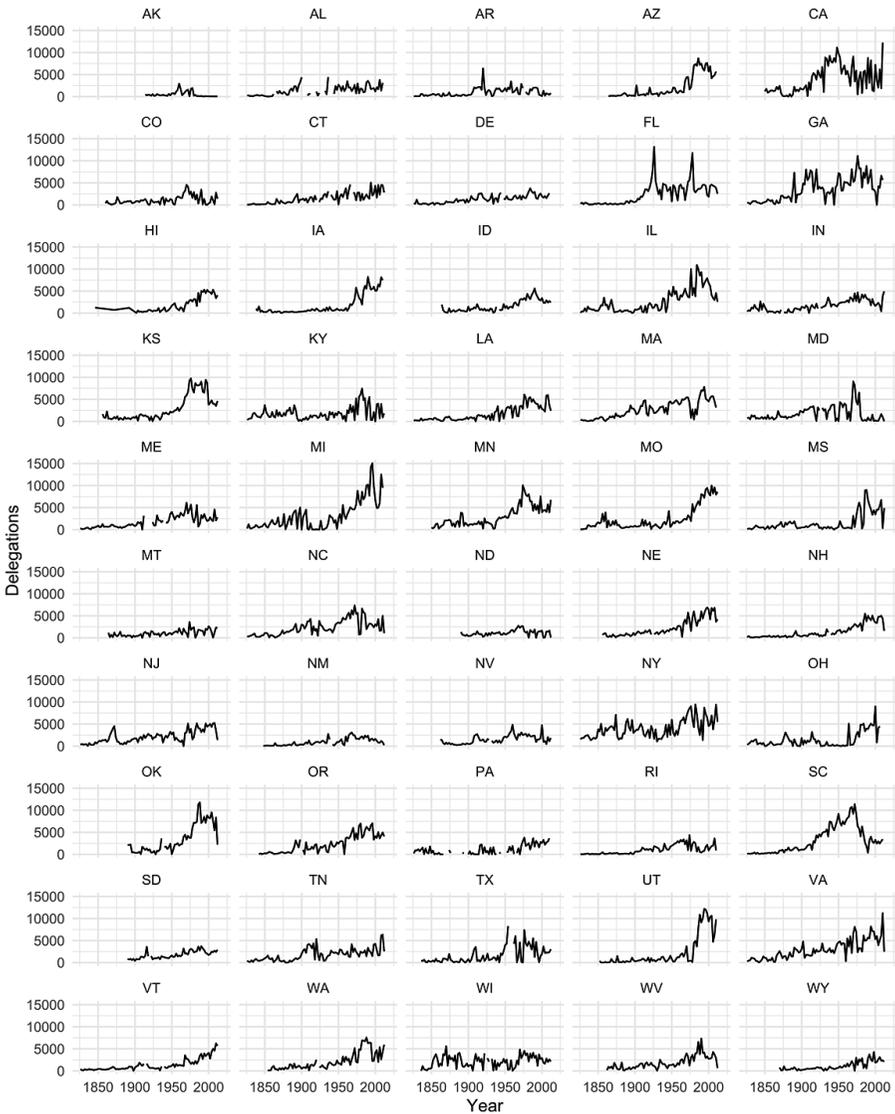
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<sup>172</sup> Stiglitz, *supra* note 53 (Online Appendix). It bears mentioning that Stiglitz carefully validates the measure of delegations (as well as several other measures, such as the density of precatory language, the density of definitions, and the length of statutes) using New Deal statutes as a baseline reference point for paradigmatically open-ended laws. *Id.* at 37–40.

<sup>173</sup> Biennia are a more convenient format than years for recording the temporal aspects of the data, given that many legislatures operate on a biennial basis.

<sup>174</sup> Stiglitz, *supra* note 53, at 34 & n.17.

FIGURE 2: YEARLY COUNT OF DELEGATIONS BY STATE AND BIENNIUM<sup>175</sup>

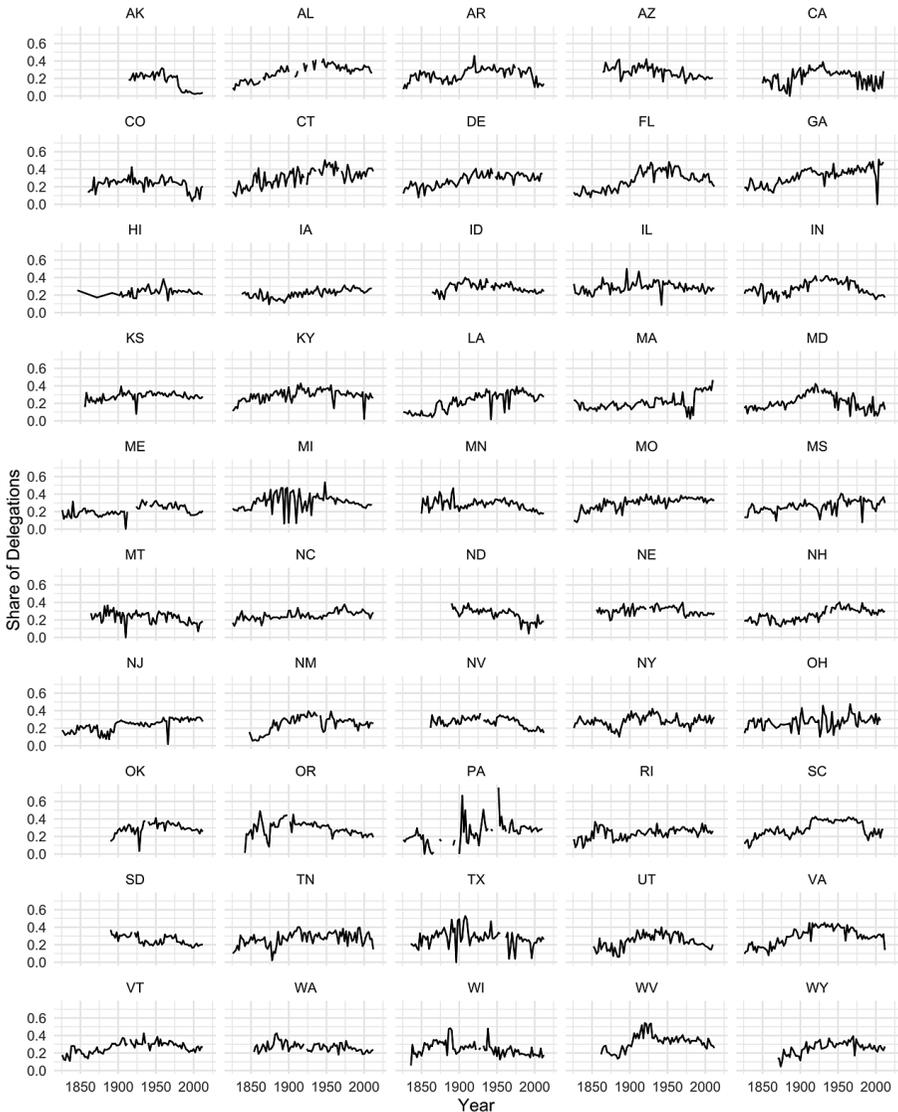


average is 24.7% for the whole period and 27.5% for the period after 1950.

While counting delegating sentences is a very direct way of capturing delegation, it is ultimately imprecise standing alone. After all, it could be that Congress delegates (e.g., agency shall . . . ) but leaves little discretion for the agency. Through

<sup>175</sup> We see that some data are missing in the middle years. This is for two reasons. First, in Mississippi, there was a period when the legislature only met once every three years. So, some biennia did not have any legislation passed. Second, the data source is missing session laws for some years.

FIGURE 3: SHARE OF DELEGATIONS BY STATE AND BIENNIUM



the use of specific or restrictive language, Congress could make a formal delegation into something that would easily pass even a restrictive nondelegation test.<sup>176</sup> Likewise, in some instances ambiguity or vagueness outside of a formal delegating sentence could effectively function as an implied delegation.<sup>177</sup>

<sup>176</sup> See Clay Phillips, Note, *Slaying “Leviathan” (or Not): The Practical Impact (or Lack Thereof) of a Return to a “Traditional” Nondelegation Doctrine*, 107 VA. L. REV. 919, 957–58 (2021) (arguing that many delegating laws could survive the Gorsuch test from *Gundy*).

<sup>177</sup> Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2015–24 (2011) (reviewing the history running from

For these reasons, we also developed several other measures that focus on lexical features of statutory text, whether in delegating sentences or in all statutes. First, we develop a measure of what we call *polysemy*—the existence of other possible meanings of the words used—by adding together the average number of *hyponyms* and *hypernyms* associated with words used in statutes.<sup>178</sup> In essence, this measure tells us whether the agency has declined to be as specific as it could be. We rely on the WordNet database,<sup>179</sup> which contains a lexical hierarchy of the English language, to identify the number of hyponyms and hypernyms associated with each term used in a statute, and we then average these out for each sentence before adding the averages together for each statute. Next, we compute the share of *precatory* terms.<sup>180</sup> We also compute the share of words in a closely related dictionary of *laxity* terms.<sup>181</sup> To capture the extent to which statutes might be irreducibly unclear, we compute the share of paradigmatically *vague* legal terms.<sup>182</sup>

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*Chevron*, which recognized the existence of “implied delegations” and linked deference to them, to later cases, like *Mead*, that undermined the presumption of deference on implied delegation grounds).

<sup>178</sup> For a prior study implementing hyponym- and hypernym-based measures of statutory specificity, see Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference’s Effects on Agency Rules*, 119 COLUM. L. REV. 85, 126–28 (2019). Hyponyms are an intuitively attractive measure of forgone specificity: these are words that fall beneath a word in a hierarchical model of the English language. For instance, if one starts with the term *animal*, then *dogs* and *cats* are both hyponyms of *animal* since they are both encompassed within the category of *animal*. Hypernyms are the opposite of hyponyms: they are words that fall above other words in the hierarchical model. For instance, an *organism* is a hypernym of *animal*, since it encompasses both *animals* and *plants*. Hypernyms may be a proxy for relative specificity, since a large number of associated hypernyms means that the speaker chose hyponyms when they could have used more general terms. However, hypernyms may also cut in the other direction, since they may leave delegee agencies with the task of disambiguating which of several hypernyms best illuminates the hyponym that was actually used. For instance, use of the term *orange* has at least two hypernyms: *fruit* and *color*. In which sense was *orange* used? It will depend on context, which may or may not help in a particular case, leaving an ambiguity. For this reason, we add the hyponym rate to the hypernym rate to generate our main measure, *polysemy*. We also report the results of each measure separately.

<sup>179</sup> WORDNET, <https://wordnet.princeton.edu/> [https://perma.cc/5SQ8-DULN] (last visited Dec. 14, 2022).

<sup>180</sup> Here we closely follow Jed Stiglitz’s approach, see Stiglitz, *supra* note 53, at 36 & n.24, using a dictionary of terms including the terms *reasonable*, *fair*, *public*, *may* (but not *may not*), *feasible*, *practicable*, and *appropriate* that tend to indicate Congress expressed an open-ended request for agency action.

<sup>181</sup> Here we draw on the list of “permissive” terms used by Walters, *supra* note 178, at 123 n.192, which includes the terms *could*, *might*, *can*, *probably*, *may* (but not *may not*), and *should*.

<sup>182</sup> The dictionary is related to, but more expansive than, the list of precatory terms. We draw on the list used *id.* at 122 n.188, which includes the terms

All three of these measures were validated in prior research.<sup>183</sup> Since definitions might indicate specificity, we measure the share of sentences that contain definitions.<sup>184</sup> Finally, and most basically, we calculate several measures of the length of statutes at the word and sentence level.<sup>185</sup> We combine some of these measures into the Coleman-Liau readability index.<sup>186</sup>

In addition to calculating these measures at the aggregate level, we attempted to generate a measure of the statutory topic so that we can decompose the aggregate results to the topic level, allowing observations about particular substantive areas of the law. To do this, we relied on topic coding done for the State Supreme Court Nondelegation Dataset above. We analyzed those classifications to determine the most frequent categories, and then we developed a dictionary of words associated with those topics that we could use to search through the State Session Law dataset to tag statutes as about one topic or another. The dictionary, which we report in Table A.1, Panel G, also includes stems associated with each word to ensure that all variants of the same word (e.g., singular and plural form) are included. We made sure to exclude sentences where those words do not share the same context (e.g., the word *security* could be used in the context of national security or financial securities; the word *nature* could mean either “the environ-

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*reason\**, *optimal*, *appropriate*, *feasible*, *acceptable*, *unreasonable*, *careful*, *proper*, *undue*, *unavailable*, *impossible*, *infeasible*, *unacceptable*, and *caution*.

<sup>183</sup> See *id.* at 121 & n.179 (describing a validation exercise using these measures that took samples of sentences that scored high on these metrics and asked law students to rate the sentences as clear or unclear).

<sup>184</sup> See Stiglitz, *supra* note 53, at 37.

<sup>185</sup> Much of the existing literature on delegation uses such length-based measures as a proxy for specificity. See, e.g., HUBER & SHIPAN, *supra* note 159. We acknowledge that these measures may be somewhat crude, which is why we have supplemented them with more granular measures described above.

<sup>186</sup> The Coleman-Liau Index is one of many closely related readability measures that use word, sentence, and syllable length to capture the difficulty of reading a given text. The formula for Coleman-Liau is  $5.88 * (\text{number of letters} / \text{number of words}) - 29.6 * (\text{number of sentences} / \text{number of words}) - 15.8$ . Higher numbers indicate more difficulty. The measure has been relied on as a measure of obfuscation in Supreme Court decisions, see Ryan J. Owens, Justin Wedeking & Patrick C. Wohlfarth, *How the Supreme Court Alters Opinion Language to Evade Congressional Review*, 1 J.L. & CTS. 35, 41 (2013), and we similarly view it as a measure of obfuscation in statutory text—obfuscation that would make it difficult for people to discern what was meant. Of course, highly technical and specific text might score high on the Coleman-Liau Index, so this measure might not be perfect as a measure of lexical or syntactic ambiguity. However, it is likely to be a valid measure of a lay person’s ability to read the text and discern what it means, and that kind of lack of clarity is central to the Field of Dreams Theory’s hope that the nondelegation doctrine would lead to better democratic accountability for statutory decisions.

ment” or “essence,” as in “the nature of the offense”). Finally, we assign topics to sentences for each topic word identified in the given sentence.

Some may be critical of individual measures listed above, which is why we have employed a battery of measures.<sup>187</sup> Any fault in individual measures will not carry over to other measures, which do slightly different things. To those with more general skepticism about even the possibility of objectively and quantitatively measuring features of statutes, we would only note that the alternative is to accept at face value a non-falsifiable thesis. Since proponents of the nondelegation doctrine and the Field of Dreams Theory intend to make an if-then prediction of what would happen upon enforcement of the nondelegation, we ultimately need measures to evaluate that prediction. If proponents of the theory do not believe that their idea of what “better” legislation is could be quantified using our method or any other method imaginable, then the theory ought to be rejected as inconsistent with basic epistemology.

### 3. Control Data

Although our primary results in subpart II.B rely on fixed effects to “control” for factors that vary across states and over time, we do examine additional controls in certain model specifications. First, we ran a specification of our models that included state-specific time trends as a control.<sup>188</sup> The inclusion of these trends accounts for a potential confounding trend that might be correlated with the timing of changes in the treatment variable.<sup>189</sup> Second, we ran a specification of our models that included the lagged dependent variable as a control.<sup>190</sup> In long-time series the lagged dependent variable can improve model performance, as it controls for time-varying differences by state in the past legislative behavior.<sup>191</sup> Finally, we ran a specification of our models that included a battery of controls identified as potentially important by a Random Forest

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<sup>187</sup> In addition, many of these measures have been validated and used in prior studies. See Walters, *supra* note 178, at 120; RYAN C. BLACK, RYAN J. OWENS, JUSTIN WEDEKING & PATRICK C. WOHLFARTH, U.S. SUPREME COURT OPINIONS AND THEIR AUDIENCES 53–59 (2016).

<sup>188</sup> See *infra* Figures A.3 & A.6.

<sup>189</sup> Marianne Bertrand, Esther Duflo & Sendhil Mullainathan, *How Much Should We Trust Differences-in-Differences Estimates?*, 119 Q.J. Econ. 249, 252 (2004).

<sup>190</sup> See *infra* Figures A.4 & A.7.

<sup>191</sup> Devin Caughey & Christopher Warshaw, *Policy Preferences and Policy Change: Dynamic Responsiveness in the American States, 1936–2014*, 112 AM. POL. SCI. REV. 249, 258 (2018).

Model.<sup>192</sup> These data cover political variables, such as party control of state government and policy liberalism of a state;<sup>193</sup> state capacity variables, such as the size of the state's workforce and gross state product;<sup>194</sup> legislative oversight variables, such as the existence of legislative vetoes and committee oversight capacity;<sup>195</sup> executive oversight variables, such as the existence of regulatory review procedures and the line item veto power;<sup>196</sup> and, finally, doctrinal variables, such as the approach to the nondelegation doctrine in a particular state.<sup>197</sup>

## B. Results

We employ three basic empirical strategies to get at the potential impact of nondelegation decisions on legislative drafting and delegation. First, we use our data to estimate two-way fixed-effects regressions where the outcome variables (e.g., measures of state session laws and delegation) are regressed on predictor variables, or treatments (e.g., measures of state supreme court use of the nondelegation doctrine), all while holding state-level and biennium-specific nationwide factors constant.<sup>198</sup> Second, we use certain features of the data—namely, temporally isolated nondelegation decisions from state supreme courts—to construct an event study and difference-in-differences analysis.<sup>199</sup> In effect, we look at what the shock of a nondelegation invalidation does to legislative drafting in the immediate aftermath of the decision. Third, we use a machine learning technique called a Random Forest Model, as well as conventional regression analysis, to explore the *relative im-*

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<sup>192</sup> See *infra* Figures A.5 & A.8. For more information on our Random Forest Model, which we also use generally to see the relative explanatory value of the nondelegation case variables, see *infra* section II.B.3.

<sup>193</sup> These measures come from Matt Grossman, Marty P. Jordan & Joshua McCrain, *The Correlates of State Policy and the Structure of State Panel Data*, 21 STATE POL. & POL'Y Q. 430, 436 (2021). The data are available for download at *Correlates of State Policy*, IPPSR, <http://ippsr.msu.edu/public-policy/correlates-state-policy> [<https://perma.cc/7BXM-J4UJ>] (last visited Dec. 14, 2022).

<sup>194</sup> These measures also come from *id.* at 450.

<sup>195</sup> These data are pulled from *Checks and Balances in Action: Legislative Oversight Across the States*, LEVIN CENTER, WAYNE STATE L. SCH. (2018), <http://stateoversightmap.org/about-the-report/> [<https://perma.cc/839Z-E6BN>].

<sup>196</sup> The data were compiled from the data appendices to Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483 (2017), which are available at Miriam Seifter, *Gubernatorial Administration: Appendices* (Univ. Wis. Law Sch. Legal Studies Research Paper Series, Paper No. 1407, 2017), <https://ssrn.com/abstract=2934671> [<https://perma.cc/9ZNY-Y87W>].

<sup>197</sup> Walters, *supra* note 17854, at 120.

<sup>198</sup> See *infra* section II.B.1.

<sup>199</sup> See *infra* section II.B.2.

pact of nondelegation decisions compared to other institutional, demographic, and political factors.<sup>200</sup>

### 1. *Two-Way Fixed-Effects (TWFE) Analysis*

The simplest test of the Field of Dreams Theory is to look at the relationship between a nondelegation treatment variable and each of our statutory outcome variables, all while controlling for state- and biennium-specific factors that might drive differences. We operationalize this test using a two-way fixed-effects regression (TWFE regression) with fixed effects for each state and each biennium and robust standard errors clustered at the state level. We lag each of the three treatment variables—*share of validations*, *validations*, and *invalidations*—by one biennium (two years) in order to avoid reverse-causation problems (i.e., a situation where delegation decisions by state legislatures might influence nondelegation decisions by state supreme courts). To make all of the regressions comparable, all of the outcome variables and all of the treatment variables are standardized to mean zero and standard deviation one. This means that for an estimated effect coefficient, *beta*, the model implies that shifting the associated explanatory variable by one standard deviation is predicted to change the associated outcome variable by *beta* standard deviations. A positive value corresponds to an increase in the observed value of the outcome variable after the treatment, while a negative value corresponds to a decrease in the observed value of the outcome variable after the treatment. We also break the analysis out into regressions using all of the data and regressions using only the data since 1950.

The combination of three treatment variables, twenty-six outcome variables, and two time periods yields 156 separate regressions. Displaying all of these results would be unwieldy, so instead we report in Figure 4 only the statistically significant results, with the cutoff for statistical significance being  $p < .1$ .<sup>201</sup>

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<sup>200</sup> See *infra* section II.B.3.

<sup>201</sup> We also report in the appendix results of additional specifications. Specifically, we ran the same regressions including a time trend control to account for the fact that there may be secular trends on the outcome variables of interest; we separately ran the same regressions including the lagged dependent variable as a control, again, to account for long-term trends in the data. While some results are different, on the whole these specifications led to similar proportions of statistically significant results and roughly similar results on specific variables. Of course, to the degree that results differ from our baseline models in Figure 4, which set of results is preferable depends in part on how likely it is that there are long-term trends in the data.

For ease of interpretation,<sup>202</sup> the coefficients of interest from our TWFE analysis are presented using a dot-and-whisker plot.<sup>203</sup> Those interested in the rest of the results can obtain them by contacting the authors. Each dot represents the point estimate for a single regression, with the associated whisker indicating the 95% confidence interval for that point estimate. According to our statistical model, based on the precision in the data, the true effect is 95% likely to reside within this interval. The further to the right an estimate falls, the larger the estimated treatment effect of the treatment variable on the outcome variable. If the confidence interval falls fully to the right or the left of the dashed vertical line at zero, then the result is statistically significant at the  $p < .05$  level. The results are given different shades of gray corresponding to which of the three treatment variables was used in that regression run.

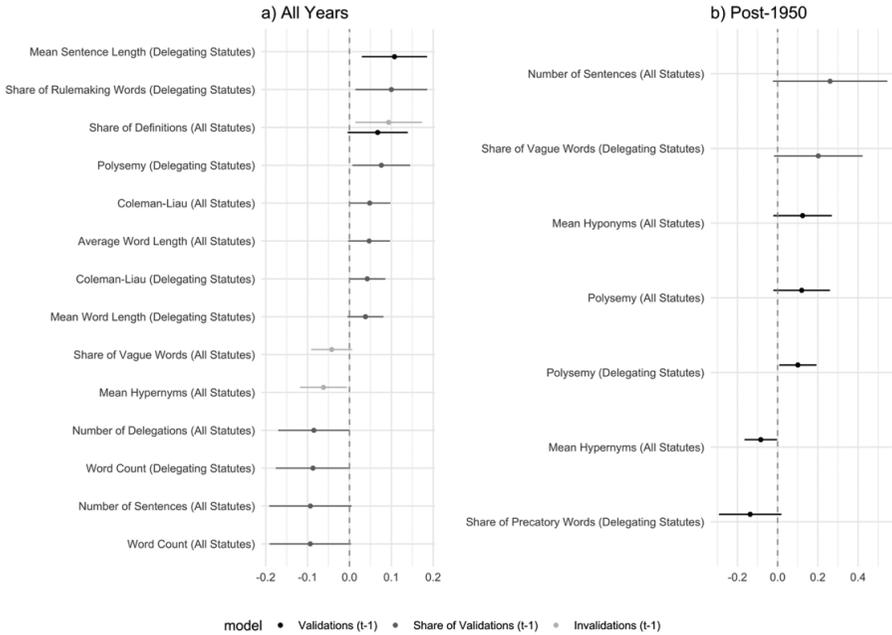
Overall, Figure 4 provides some support for the Field of Dreams Theory, but also some puzzling results that seem at odds with it. Start with *validations* and *share of validations*, which the theory predicts ought to lead to more “abdication” by legislatures. Some of the outcome variables do appear to respond to these “positive” treatments in the expected manner. For instance, in Figure 4a, the share of validations is strongly associated with the presence of rulemaking words in delegating statutes, with polysemy (which captures forgone specificity), and with several measures of the complexity of the language. Looking just at statutes after 1950 in Figure 4b, there are fewer significant results, but it is notable that polysemy again is positive and statistically significant (both when measured in all statutes and when measured just in delegating statutes), as is the share of vague words in delegating statutes. All of this suggests that legislatures respond to cases upholding legislation by writing statutes in ways that are likely to be more difficult to understand. Likewise, in Figure 4a, share of validations is associated with a decrease in the word count of both delegating statutes and all statutes. This finding is facially consistent with versions of the Field of Dreams Theory that emphasize that the legislature will respond to enforcement of the nondele-

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<sup>202</sup> Cf. Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811, 1845–51 (2006) (emphasizing the importance of graphical display of regression results in law reviews).

<sup>203</sup> We use the package *dotwhisker* in Frederick Solt & Yue Hu, *dotwhisker: Dot-and-Whisker Plots of Regression Results*, COMPREHENSIVE R ARCHIVE NETWORK (Sept. 2, 2021), <https://cran.r-project.org/web/packages/dotwhisker/vignettes/dotwhisker-vignette.html> [<https://perma.cc/4AQY-YXAC>].

FIGURE 4: TWFE ESTIMATES OF THE EFFECT OF NONDELEGATION DECISIONS ON LEGISLATIVE DRAFTING ALL STATUTES AND ALL BIENNIA



gation doctrine by writing more statutes for itself rather than leaving matters to an agency.<sup>204</sup> It is also inconsistent with another version of the Field of Dreams Theory—one more associated with conservative or libertarian commentators—that enforcement of the nondelegation doctrine will make it impossible for Congress to do its job. Finally, the other treatment variable—*invalidations*—yields more limited results (perhaps suggesting that invalidation is less influential on legislative behavior than positive decisions), but the results it does yield are consistent with the Theory. Invalidations are associated in Figure 4a with an increase in the number of definitions in statutes, as well as with a decrease in the share of vague words in statutes and the mean number of hyponyms connected to

<sup>204</sup> We can examine the substantive magnitude of this change by estimating a one standard deviation increase in the share of validations (an increase of 27% on this treatment variable). This computes to a decrease of 23,124 words per state and biennium—about 10.2% of the mean. The other negative effects of share of validations are illuminating as well: we estimate an 11.1% decrease in delegations, a 10.4% decrease in words in delegating statutes, and a 10.8% decrease in statutory sentences. Shrinking the increase in share of validations to just 2.7% (perhaps a more realistic expectation, see Walters, *supra* note 54, at 470–84) would mean an expected decrease on all of these variables of about 1%.

the words that were used in statutes (bottom line, possibly some additional specificity).

Despite these findings, several of the statistically significant results are difficult to square with the Field of Dreams Theory. On this front, consider that the share of validations is associated in Figure 4a with a decline in delegating statutes. If legislatures were attempting to exploit the long leash given to them by an increase in the share of validations in court, presumably they would delegate more, not less. It could be that there are other reasons that delegations go down—for instance, maybe the long leash from the courts would lead to a relative shift toward implied delegations rather than explicit delegations. We do not know the answer to this puzzle, but this finding can only be described as unexpected. Another unexpected finding is in Figure 4b, where we observe a negative effect of an increase in the number of validations on the share of precatory words in delegating statutes. That is, when there have been a lot of nondelegation decisions upholding statutes, legislatures appear to use relatively less of this particular kind of open-ended language. On its face, this would seem to be the opposite of what the Field of Dreams Theory would predict, and it possibly suggests some dangers in enforcing the nondelegation doctrine, insofar as we prefer Congress not to use precatory language.

The foregoing analysis does not distinguish between different topic areas, instead assuming that the average effect is what is most important. However, readers may have interest in particular substantive areas of the law, and some may be open to administrative law exceptionalism (i.e., applying different standards to different, topic-specific areas of the administrative law rather than having one uniform administrative law doctrine).<sup>205</sup> Accordingly, in Figure 5 we report the effects on delegating legislation separately by topic. We take our baseline TWFE regression from Figure 4, but the outcome variable—log of delegation count—is disaggregated by topic. Again, the topics are defined in the Appendix.<sup>206</sup>

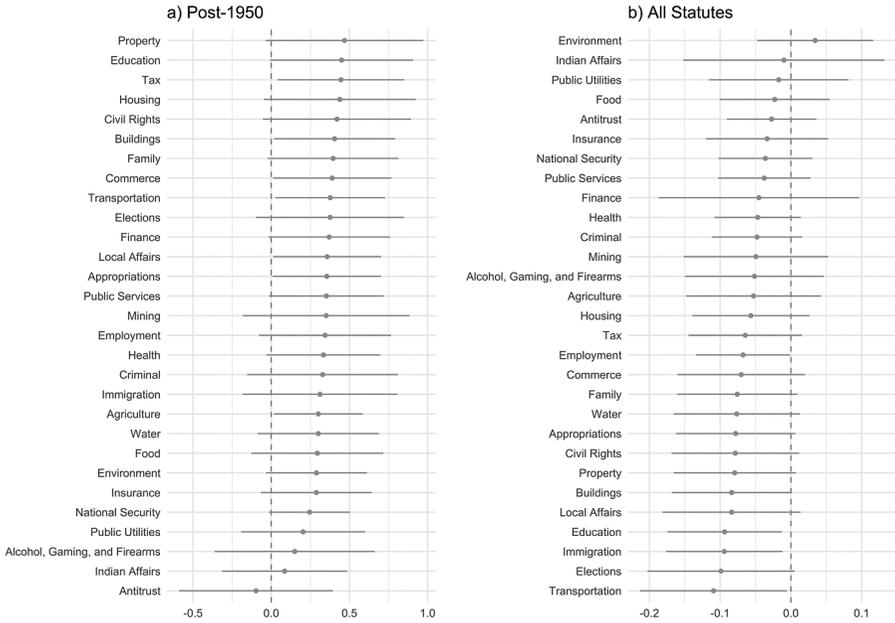
The results in Figure 5 are of potential relevance in underscoring the validity of our TWFE approach. Within each speci-

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<sup>205</sup> See, e.g., James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1118 (2015); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1541 (2006); Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1683 (2007); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 593 (2017).

<sup>206</sup> See *infra* Table 1.A, Panel C.

FIGURE 5: TWFE REGRESSIONS PREDICTING THE EFFECT OF SHARE OF VALIDATIONS ON DELEGATIONS, DISAGGREGATED BY STATUTORY TOPIC



fication, the results are remarkably consistent. With the post-1950 data (Figure 5a), nearly every subject area has a positive coefficient (antitrust is the only exception). Using all of the data (Figure 5b), nearly every subject area has a negative coefficient (environment is the only exception). This kind of consistency is what would be expected if the nondelegation doctrine, which is usually couched as a trans-substantive doctrine, is being adequately measured as a treatment in our TWFE models. The flip from generally negative coefficients to generally positive coefficients in the post-1950 period is itself interesting, as it implies that the effect of cases (specifically, invalidations) on statutory delegations is sensitive to the time frame. While the more recent data will be more relevant to ongoing policy debates, the changes in effect sizes over time should make policymakers interpret and apply the results with caution.

Taking a step back and reviewing the findings so far, the upshot of our TWFE analysis is that there is some statistically verifiable evidence that enforcement of the nondelegation doctrine matters for subsequent legislative drafting behavior. This alone differentiates this study from the only other attempt to test the Field of Dreams Theory, where the only results were

null results.<sup>207</sup> However, the results are only partially consistent with the theoretical expectations of the Field of Dreams Theory. Some of the findings are directly contrary to the theory, which suggests a danger of unintended consequences in enforcing the doctrine.<sup>208</sup> Moreover, it should not be lost on readers that the handful of statistically significant results presented here are far outnumbered by null results, which we have not displayed. Indeed, we find that about 14.7% of the regressions yielded a statistically significant treatment effect; the other 85.3% of the models cannot be statistically distinguished from there being absolutely no effect on legislative behavior. These null results include some of the best measures of delegation, such as the share of delegations in all statutes. Different people could draw different conclusions about how much weight to give the statistically significant findings versus those that are not. In the end, we believe the evidence justifies extremely qualified support for the Field of Dreams Theory.

## 2. *Event Study and Difference-in-Differences Analysis*

One potential downside of the TWFE analysis is that the resulting estimates could be biased by confounders. In particular, there is an issue of joint causality, where a legislature is on an upward trend of delegating powers, which causes more litigation, and then results in more cases—validating or invalidating. Thus, the previous estimates could be due to a mechanical correlation from such a confounding trend—we cannot entirely rule out the possibility that rising levels of delegation led to rising levels of validation in the courts. To be sure, we accounted for this by lagging the key predictor variables by one biennium (it would be odd to find an effect with a lag unless the causal arrow runs from the predictor to the outcome variable, but it is still a possibility).

Another method that may be even better at eliminating a potential mechanical correlation is to exploit discontinuities in the use of the nondelegation doctrine and differences across state on those discontinuities to isolate the subsequent effect on a treated state's legislative output. We can do this in two ways: with a panel event study with distributed leads and lags for treatment, and with a difference-in-differences regression. In essence, an event study estimates a panel trend using data from before the event and then extrapolates that trend through the post-event period. Using those estimates of normal circum-

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<sup>207</sup> See *supra* notes 149–51.

<sup>208</sup> See *infra* subpart III.C (elaborating on these dangers).

stances, it then analyzes whether the observed data in the post-event period depart significantly from the predictions.<sup>209</sup> A difference-in-differences approach uses the panel structure of the data to not only capture this pre- and post-treatment variation within a single state, but to compare it to nontreated states in that same window of observation. Both methods—the single-treatment event study and the difference-in-differences comparison to nontreatment panels—are strong approaches to eliminate concerns about joint causality.

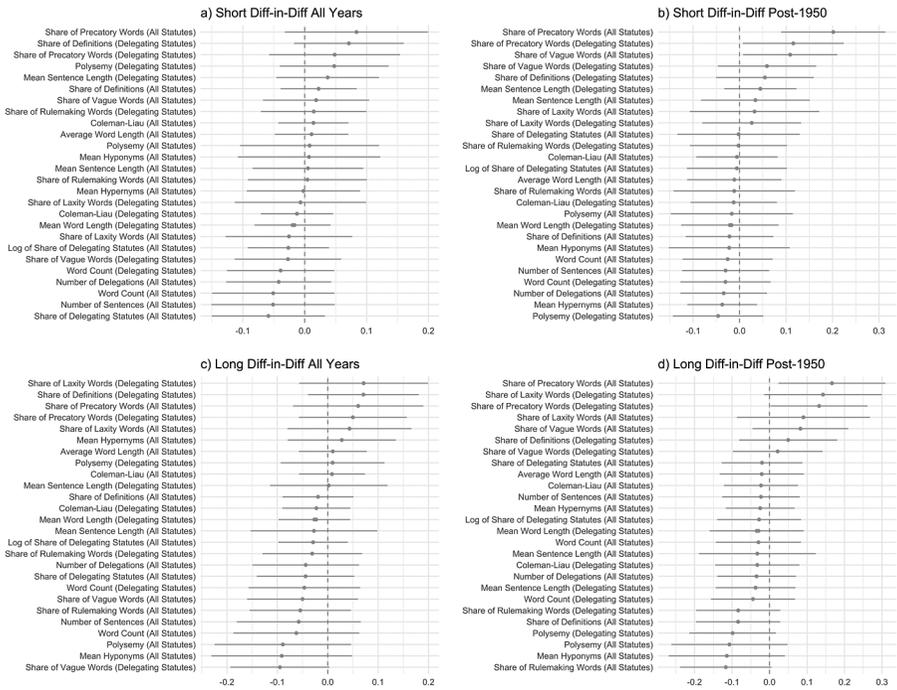
Implementing this approach with our data presented some additional challenges. The approach works well in contexts where treatment is binary and occurs once within a single state. In our case, treatment takes on many values and shifts repeatedly. For instance, in certain states, like Illinois, it was at times common for there to be multiple cases invalidating statutes per year for consecutive years. In such instances, it becomes difficult to identify an appropriate measure of the treatment. In order to use the event study and difference-in-differences approach, we had to restrict our analysis to events that met certain conditions. First, we focused on invalidation cases, which are less frequent and represent a stronger assertion of judicial power. Second, we limited our events to invalidations for which there had not been another invalidation holding by that state supreme court in the previous five biennia. In other words, we focus on isolated and arguably somewhat surprising nondelegation decisions. There are 150 such invalidation events in our dataset, and they are listed in Table A.2.

We report only our difference-in-differences results, which are reported in dot-and-whisker plots in Figure 6 (the results using the event study methodology are similar). Here, unlike in Figure 4, we report all the regression runs—significant and

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<sup>209</sup> A recent literature in econometrics has also pointed out that the estimators used in the above analysis—whether TWFE or the event study—have a problem of negative weights. We follow the method in Pamela Jakiela, *Simple Diagnostics for Two-Way Fixed Effects* (Williams College Dep't Econ. Working Paper, Paper No. 2021-05), <https://ideas.repec.org/p/wil/wileco/2021-05.html> [<https://perma.cc/CV94-2ALH>], to diagnose the importance of this problem in the event study. We compute the regression weights on each observation and find that 8.9% of the observations in the treatment group have negative weights. Following the advice by Jakiela, we can reduce this proportion to 3.7% by limiting to the treatment of five biennia after the invalidation events. Further, even in the full treatment window, the weights in the treatment group sum to 1.00006, extremely close to one and suggesting that the presence of negative weights will not significantly bias the estimates away from the average treatment effect.

FIGURE 6: DIFFERENCE IN DIFFERENCES REGRESSIONS COMPARING TREATED STATES TO NON-TREATED STATES



non-significant alike—as there are far fewer regressions to visualize. We break these into four groups of models: in the upper-left quadrant, we report the difference-in-differences estimates for all of our available data, going back to 1700, using a short window of observation after each treatment. Moving to the right, we narrow the data to the post-1950 period but retain the short observation window. On the bottom row, we again vary the scope of the data used but also switch to a long observation window after the treatment. The short window is akin to the event studies we report below. In general, each coefficient estimate captures the difference between treated states and non-treated states for the window specified, and, as above, the confidence interval is 95%. Again, for all of these results, the “treatment” is an invalidation, so for certain outcome variables (namely, those capturing explicit or implicit delegations) we would expect a decrease, and for others (specifically, those capturing specificity) an increase.

Reviewing the results, we see that, in general, there is more of an effect of treatment in the post-1950 period than in the specifications with all of the data. This could be due to noisiness in the data prior to 1950. The only result that approaches statistical significance using all of the data is the long-window

difference-in-differences regression with share of vague words in delegating statutes as the outcome variable. As expected under the Field of Dreams Theory, the sign here is negative: we can be about 90% confident that legislatures that are “treated” use less vague language in the long run after the treatment.

Turning to the post-1950 period, the results are much more pronounced, although it is difficult to square them with the theory. Start with the long-window results in Figure 5d. First, share of vague words in delegating statutes is no longer close to statistically significant. On the other hand, we see a positive effect of treatment on the share of precatory words in all statutes and in delegating statutes, both significant at the  $p < .05$  level or better. Of course, this is not what proponents of the nondelegation doctrine want to see happen. Precatory words—words like *may*—are little nuggets of discretion. The data suggest that legislatures are more likely to use these terms over the long run when courts use the nondelegation doctrine to invalidate a statute. Were these results standing on their own, perhaps it could be brushed off as an anomaly, but shifting to Figure 5b and the short window of observation, the results are even more pronounced. There, we see the same positive results on the share of precatory words, but also on the share of vague words in all statutes, again at the  $p < .05$  confidence level. We report the difference-in-differences results with additional specifications in the Appendix, but the results are virtually identical. It seems as though the most likely outcome of using the nondelegation doctrine to invalidate statutes is to cause subsequent legislatures to insert certain kinds of vague or precatory language more than other legislatures that were permitted to legislate as they saw fit. The only evidence we see as consistent with the Field of Dreams Theory is the negative long-term effect of an invalidation on vague words in delegating statutes using all of the available data.

To check that the significant reported results are not driven by a confounding pre-trend, we estimated panel event study regressions with leads and lags of treatment timing. The results of the event studies were consistent with the short-window difference-in-differences results, and there was no evidence of a confounding pre-trend.

### 3. *The Relative Impact of Nondelegation Decisions*

The results above provide some tentative—albeit quite limited—support for the Field of Dreams Theory. In certain empirical specifications, we identified a probable impact of

nondelegation decisions on legislative propensity to delegate. Yet we might still ask how robust these findings are to the inclusion of other factors that plausibly effect legislative drafting. In other words, our analysis above did not specify controls, instead opting for fixed effects for all unspecified variables within panels. But we are not just interested in the effect of nondelegation decisions operating in isolation; we also want to know whether other factors are as good of a predictor, or even better, of changes in legislative behavior regarding delegation.

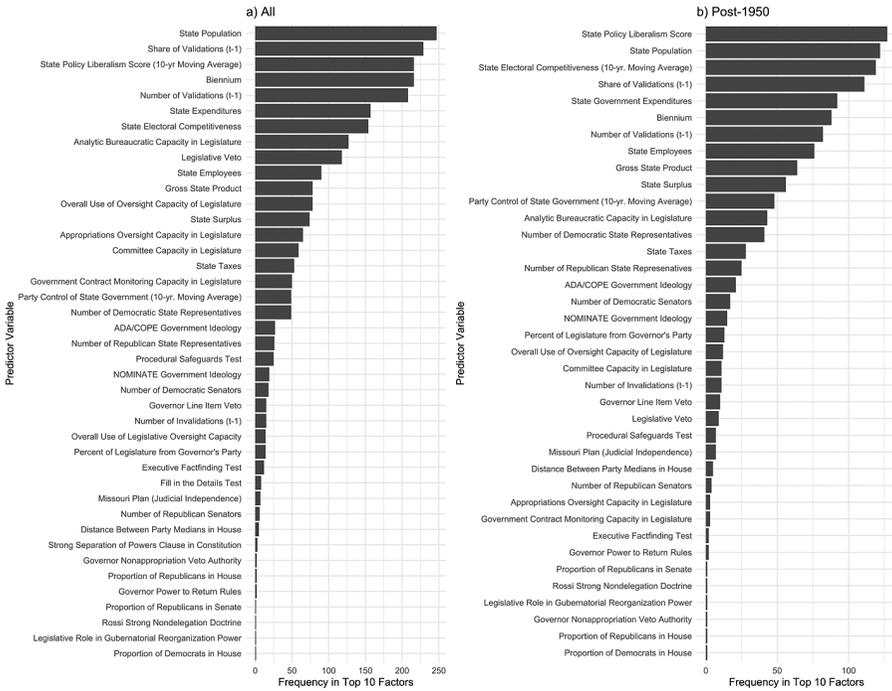
As a starting point, we used a machine learning approach called a Random Forest Model (RFM) to analyze the importance of variables in predicting delegation share. An RFM consists of an ensemble of decision trees that “vote” on the predicted outcome. In each decision tree in the ensemble, informative variables (e.g., population, number of validating cases), are iteratively selected and then the tree splits on a value of that variable (e.g.,  $x > 100$ ) to better predict the outcome. The decision tree then branches off for additional splitting, and so on, until reaching a terminal node. Each decision tree produces a prediction for the outcome. By combining many decision trees, random forests can model significant non-linearities and subtle patterns in the data. For our purposes, we used the default parameters for RFM training from the python package `scikit-learn`.

Further, after training, the importance of each variable in a random forest can be assessed. We can rank the input variables by their *feature importance*, a statistical quantity that summarizes how often the forest uses that variable in the sense that one of the constituent decision trees splits on it. More so than running linear regressions, the feature importance measure accounts for non-linearities and interactions in the data, so a variable might contribute to the prediction through other variables, for example.

Here we use the feature importance ranking to better understand what factors contribute most to our legislative-text outcomes. We compute feature importance metrics for all of the outcomes and specifications, and then count the number of times that each feature is among the top ten features ranked by importance. Figure 7 presents the results from our RFM.

While nondelegation decisions are not the most important factor influencing legislative drafting—that honor goes to the population of a state for the model using all statutes and to the overall liberalism of a state for the post-1950 model—it is nota-

FIGURE 7: MOST IMPORTANT FACTORS IN A RANDOM FOREST MODEL PREDICTING ALL OUTCOME VARIABLES



ble that share of validations is the second-most-important factor in one RFM (the one using all statutes) and the fourth-most-important factor in the other (the one analyzing only post-1950 statutes). Number of validations is also a relatively important factor. On the other hand, the number of *invalidations* is not as comparatively important, and the formal doctrine a state adheres to does not appear to have much explanatory value at all.<sup>210</sup>

But what is most important about this Figure is the sheer number of other factors that appear to have some significance in impacting delegating behavior. Political variables are consistently important: for instance, state liberalism and electoral

<sup>210</sup> See also Walters, *supra* note 54, at 445–46 (discussing the different versions of the nondelegation doctrine that states apply and finding that ostensibly more stringent versions of the doctrine, such as the “fill up the details” standard from Justice Gorsuch’s *Gundy* dissent, do not seem to predict higher invalidation rates compared to more lenient versions of the doctrine used by other states). The evidence here reinforces those findings and suggests that the impact of the doctrine alone on legislative behavior is also minimal. Notable as well is that, of the various forms of the doctrine, the procedural safeguards standard—widely thought to be a liberal test—has the most explanatory value in predicting legislative behavior.

competitiveness are relatively important.<sup>211</sup> Demographic and economic variables are also major factors. Perhaps not surprisingly, the overall size of the government and economy seems to be just about as important as nondelegation decisions validating statutes.<sup>212</sup> Finally, a number of institutional variables stand out as consistently predictive and roughly on par with the nondelegation decision variables. For instance, the analytic bureaucratic capacity of the legislature (i.e., the strength of legislative offices or institutions with expertise in policy analysis) and legislative committee capacity are highly explanatory, as is the existence of formal tools of bureaucratic oversight like the legislative veto.<sup>213</sup> In both models, the extent to which the legislature uses these legislative oversight capacities is also highly explanatory. In sum, adding other variables into the mix greatly enhances our ability to predict legislative behavior; relying on the nondelegation decisions alone would paint a very incomplete picture.

### III

#### PUTTING THE NONDELEGATION DOCTRINE IN PERSPECTIVE

What we have called the Field of Dreams Theory—that is, the theory that if we build the nondelegation doctrine, Congress will start taking responsibility for legislation<sup>214</sup>—reverberates like a drumbeat in the march toward a democratic revolution. For decades, theorists have offered variations on this most basic idea that enforcing the nondelegation doctrine will positively change the way that Congress works and improve the functioning of our democracy.<sup>215</sup> To date, though, we have had very little evidence to go on in evaluating even the most basic empirical predictions of the theory.<sup>216</sup> No wonder, then, that virtually everyone can find a little bit of something to love in the Field of Dreams Theory. It offers nothing short of

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<sup>211</sup> Interestingly, the results suggest that a state's overall liberalism is negatively associated with polysemy and positively associated with complexity (as measured by the Coleman-Liau statistic) and with word length in the post-1950 period. Electoral competitiveness is positively associated with the share of both vague and precatory words, as well as negatively associated with word length.

<sup>212</sup> We see a strong positive association between population and both word count and delegations in the post-1950 period. The other variables in this category have mixed effects and are less statistically significant.

<sup>213</sup> The direction of the analytic bureaucratic capacity variable is significant and negative for share of delegations.

<sup>214</sup> See *supra* Part I.

<sup>215</sup> See *id.*

<sup>216</sup> See *supra* notes 149–151 and accompanying text (discussing the one prior empirical study that looked at this question and its null results).

the promise of a constitutional reset, and one that may be consistent with widely varying ideological perspectives about what good government looks like. Libertarians and conservatives can hope that Congress will rarely find the political courage to legislate regulatory solutions to public problems when delegation is not an option, and that, when it does, we can be confident that the voters, rather than “unelected bureaucrats,” were the driving force behind that action.<sup>217</sup> Progressive and liberal supporters of more regulatory intervention in the economy or in society can likewise put their faith in the nondelegation doctrine: Congress would be forced to pay the price for failing to use its legislative power to advance public policies that democratic majorities elect representatives to enact as law.<sup>218</sup> With no evidence to check our intuitions, it is easy to let our imaginations run wild.

In the previous Part, we reported on the most comprehensive evidence ever amassed to test the empirical predictions of the Field of Dreams Theory. As a general matter, we found unprecedented evidence that enforcement of the nondelegation doctrine can and does matter for legislative behavior, at least in the context of the states.<sup>219</sup> But we also found that that the effects of enforcement of the doctrine are not overwhelming, and sometimes even contrary to what theorists would expect.<sup>220</sup> In this Part, we unpack what these findings mean for the important debates, currently playing out in real time in the Supreme Court, about the future of the nondelegation doctrine. We group these takeaways into three categories mapping onto the ambiguous evidence discussed in Part II: first, takeaways from the fact that the doctrine does appear to impact state legislative behavior to some degree; second, takeaways from the fact that this effect is fairly limited and comparable to many other factors that influence delegating behavior; and finally, takeaways from the fact that the effects we do observe are not always in line with what the theory might have suggested. Different readers may pull different takeaways from our evidence, but we believe that the takeaways we discuss have direct relevance to ongoing discussions about the future of the nondelegation doctrine and the major questions doctrine and should be heeded by the Supreme Court.

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<sup>217</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., dissenting).

<sup>218</sup> See *supra* notes 119–20 and accompanying text.

<sup>219</sup> See *supra* Part II.

<sup>220</sup> *Id.*

### A. Why It Matters That the Nondelegation Doctrine Matters for Legislative Drafting

It would be easy to write off the Field of Dreams Theory as nothing more than, well, a fever dream. After all, in order for there to be a measurable impact on legislative behavior from nondelegation decisions, many factors would have to align. First, Congress would have to somehow learn about court decisions invalidating statutes. While this is easy to imagine in high-profile cases such as the recent decision invalidating OSHA's vaccine mandate on proto-nondelegation grounds,<sup>221</sup> it is more difficult to entertain as a possibility in the vast majority of ordinary matters, which are far too remote from Congress's day-to-day business to capture legislators' or legislative drafters' attention. A central finding in the growing literature on how statutes are drafted in Congress is that members and even staffers are strikingly unaware of what is happening in the courts.<sup>222</sup> In fact, some evidence suggests that a critical player in the drafting of most legislation is agency staff,<sup>223</sup> and agency staff might be more inclined than legislative staffers or members of Congress to resist any kind of movement away from practices of delegation and might take advantage of principal-agent slack to draft legislation that members of Congress would not support were they aware of limits on delegation.<sup>224</sup> Second, even if legislative drafters were somehow aware of what the courts were doing and open to complying with court decisions, nothing would guarantee that what the courts were doing

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<sup>221</sup> Nat'l Fed'n Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022)

<sup>222</sup> Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901, 945 (2013) (finding that “only about 30% of [congressional drafters] said they could name any clear statement rule that they thought was important in the drafting process (of any sort, not just federalism related) and, when asked to list such rules, of that number only six respondents (4% of 137) named a rule that actually was a clear statement rule”); see also Victoria F. Nourse & Jane S. Schachter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 598–600 (2002) (suggesting that the legislative drafting process is highly variable and contextual); Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 2–3 (2009) (arguing for a legislative solution to empower traditionally disadvantaged interests in the legislative process).

<sup>223</sup> Walker, *supra* note 20, at 1390.

<sup>224</sup> See Rao, *supra* note 20, at 1518 (making such an argument). Notice, though, that it makes just as much sense that agencies would want to lock in language if they have strong preferences about how programs should be administered; and if they do not have strong preferences but seek to avoid blame in the same ways that the public choice literature assumed Congress did, see *supra* Part I, then we would expect to see agency staff try to influence the drafting process to avoid being passed the political hot potato.

would matter enough to actually change how legislation is drafted. Legislative drafting is driven by a complex brew of considerations, including navigating a surprisingly thick surround of institutional politics<sup>225</sup> and the need to hold together a winning coalition and to deliver policy wins to favored constituencies.<sup>226</sup> It is easy to imagine these concerns as winning out over the risk of judicial scrutiny (which may never happen). Third, even assuming that the signal from the courts still got through all of this noise, Congress might well call the courts' bluff in any number of cases, essentially saying, "The courts have their decision; now let them enforce it."<sup>227</sup> In the domain of ordinary statutory interpretation, Abbe Gluck and Lisa Schultz Bressman find that congressional drafters sometimes do not adapt drafting practice according to certain canons that they know courts will rely on.<sup>228</sup> There is, in short, a lot of

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<sup>225</sup> See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part II*, 66 STAN. L. REV. 725, 728 (2014) (discussing how the "overlooked legislative underbelly: the personnel, structural, and process-related factors . . . drive the details of legislative drafting"); Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1543–44 (2020) (describing the "congressional bureaucracy" as the "collection of approximately a dozen non-partisan offices that, while typically unseen by the public and largely ignored by courts and practicing lawyers, provides the specialized expertise that helps make congressional lawmaking possible").

<sup>226</sup> See generally ROGER H. DAVIDSON, WALTER J. OLESZEK & FRANCES E. LEE, CONGRESS AND ITS MEMBERS 293–94 (12th ed., 2010) (discussing the tradeoffs and collective action problems that legislators face in negotiating over bills).

<sup>227</sup> A large literature examines Court-Congress conflict in "separation of powers" models, and at least some of this literature finds that the Court and Congress anticipatorily change their behavior in light of the preferences of the other branches. See, e.g., MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 17–18 (2011) (noting literature on the Court's strategic responses to the possibility of being overridden by other actors); Anna Harvey & Barry Friedman, *Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court's Agenda*, 71 J. POL. 574, 574–75 (2009) (finding "strong evidence that the Court's constitutional agenda is systematically influenced by congressional preferences"); Lee Epstein, Jeffrey A. Segal & Jennifer Nicoll Victor, *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395, 399–403 (2002) (presenting an account of the Supreme Court's decision making at the certiorari stage). Direct clashes between the Court and Congress are rare in practice because there is generally an ideological/partisan alignment between the current Congress and the Supreme Court. See KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT (2019). Aggressive implementation of the nondelegation doctrine could buck that trend, setting up ideal circumstances for finally and definitively testing Congress's willingness and ability to push back.

<sup>228</sup> Gluck & Bressman, *supra* note 222, at 949 (discussing what they call "rejected canons").

reason to believe that the effect of the nondelegation doctrine would be impossible to observe, if it even exists.

Yet that is not exactly what we found. As discussed above, we have some evidence, culled from a variety of approaches, that state legislatures respond to nondelegation decisions in the state courts by delegating less and using generally more specific language. To be sure, this evidence is far from overwhelming,<sup>229</sup> but in light of the biases against finding any effect and the existing evidence from a prior study, it is remarkable. Beyond being remarkable in a purely academic sense, it puts into perspective exactly what is at stake in contemporary debates about the nondelegation doctrine. Put bluntly, it likely will matter to some degree if the Supreme Court decides to resurrect the nondelegation doctrine—if Congress is at all like state legislatures,<sup>230</sup> it would probably respond in measurable ways.

Moreover, the evidence does not suggest that invalidations of statutes would stop the flow of legislation generally; in fact, if anything, the evidence suggests that a lower rate of validation would lead to more legislative output in terms of raw word count.<sup>231</sup> This perhaps suggests that critics of the current nondelegation doctrine are not entirely wrong when they say

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<sup>229</sup> See *infra* subpart III.B for a discussion of these (non)findings and their importance.

<sup>230</sup> We are aware that differences between the political and institutional environment in the federal policymaking arena versus the states may present concerns that the results in the states will not carry over to the federal government—a potential problem with external validity. To name just one difference that might be relevant, many states tend to be dominated by just one party, whereas the federal government is often mired in partisan stalemate. See ALAN ROSENTHAL, IN ENGINES OF DEMOCRACY: POLITICS AND POLICYMAKING IN STATE LEGISLATURES 109–39 (2009). In part because of this, the state policymaking environment may be more insular and parochial, and news of state supreme court decisions invalidating statutes under the nondelegation doctrine may travel faster and carry more weight, biasing toward finding an effect. While we acknowledge these potential difficulties, our specifications that included controls for political variables, such as a moving average of party control of government, did not change the main results. In addition, political scientists have noted that there is an increasing nationalization of many political issues, see DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 2–4 (2018), and the nondelegation doctrine, in particular, already seems to have been nationalized, see Rick Hills, *Attack of the Clones: How State Courts' Adoption of SCOTUS' Constitutional Doctrinal Disputes Defeats the Purpose of Federalism*, BALKINIZATION (Oct. 4, 2020), <https://balkin.blogspot.com/2020/10/attack-of-clones-how-state-courts.html> [<https://perma.cc/Q3NS-HPE9>] (noting a Michigan Supreme Court opinion on a certified question from federal court that called for interpretation of Michigan's nondelegation doctrine and arguing that the Michigan Supreme Court “nationalized” the analysis).

<sup>231</sup> See *supra* Part II.

that enforcement of the doctrine would not “render government unworkable,”<sup>232</sup> and defenders of the current underenforcement of the doctrine are not entirely right when they say that a change to the nondelegation doctrine would grind everything to a halt.<sup>233</sup> The truth is somewhere in the middle: Congress would likely slightly change the way it writes statutes, but would not entirely stop writing them and might even do a bit more legislating.

Knowing that Congress would likely delegate a bit less and legislate a bit more in a world with a stringent nondelegation doctrine underscores the importance of deciding once and for all whether less delegation is actually a desirable goal in the first place. Recall that the normative motivation for the Field of Dreams Theory is the idea that delegation creates a policy lottery that is bad from a public choice perspective because it undermines accountability, facilitates interest group capture of agencies, undermines the rule of law, and/or results in the accumulation of power in the presidency.<sup>234</sup> The theory that Congress has perverse incentives to delegate, the critiques that stem from it, and the solution offered (stringent enforcement of the nondelegation doctrine) have been deeply influential—so much so that they are often presented as simple, self-evident facts about how the world works.<sup>235</sup> But they are far from convincing as a theoretical matter. Indeed, there are reasons for skepticism about both the empirical validity of the assumptions behind the critique as well as the normative conclusions drawn from the model. It is important to remember that the decrease in delegation is only an “improvement” on the status quo if the status quo levels of delegation are very likely to be slanted towards bad outcomes. And in all likelihood, they are not, or at least not as slanted as critics of the nondelegation doctrine make them seem. This introduces the possibility that,

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<sup>232</sup> David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1276 (1985).

<sup>233</sup> See Millhiser, *supra* note 31 (“If the Supreme Court strips the government of much of its power to promulgate these regulations, it could effectively grind down the Biden presidency—not to mention dismantle much of American law.”).

<sup>234</sup> See *supra* notes 93–115 and accompanying text.

<sup>235</sup> See, e.g., Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 712 (1994) (reviewing SCHOENBROD, *supra* note 6) (“Few who consider Schoenbrod’s detailed analysis of the political and economic ramifications of delegation—the excessive benefits to concentrated interests and the political disenfranchisement of citizens—will fail to be impressed by the inefficiency and inequity of many of the resulting administrative schemes.”).

in reducing Congress's propensity to delegate, the Court may very well do more harm than good.<sup>236</sup>

Start with the allegation that vague delegations sever the lines of accountability between voters and members of Congress: this claim rests in part on a supposition that members of Congress would pay an electoral price for making the supposedly unpopular decisions that agencies ultimately make pursuant to a delegation of regulatory authority. There is, to be sure, some limited laboratory evidence to support the theory that principals can shift blame to an agent under tightly controlled and simplified conditions.<sup>237</sup> But as Nicholas Stephanopoulos has recently showed, the weight of the evidence is against the idea that congressional electorates in the real world have the capacity to reward and punish their members of Congress (or, for that matter, agencies) for the kinds of specific legislative decisions that Congress would have made *but for* delegation.<sup>238</sup> Imagine a counterfactual world where Congress, not agencies, adopted the kinds of technical rules that agencies produce, and suppose that Congress in fact made bad decisions: would the median voter in a congressional district likely be able to 1) draw that conclusion from a close review of thousands of pages of legislation, and 2) connect the decision to a failure of their own representative? It seems doubtful,<sup>239</sup> and careful work in political science supports that intuition.<sup>240</sup> This is a serious problem for the theory of abdication through delegation. If members of Congress would not likely be punished or rewarded for their bad actions when embedded in legislation, why would delegating those same decisions to an agency disrupt any ac-

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<sup>236</sup> See Oren, *supra* note 130, at 146 (describing some of the pitfalls of complexity and specificity in statutes, including that complexity can “submerge rather than elucidate policy questions and thus make it impossible for legislature, executive or judiciary alike to address basic policy questions or resolve ambiguity”).

<sup>237</sup> See Adam Hill, *Does Delegation Undermine Accountability? Experimental Evidence on the Relationship Between Blame Shifting and Control*, 12 J. EMP. LEGAL STUD. 311, 334 (2015); Justin Fox & Stuart V. Jordan, *Delegation and Accountability*, 73 J. POL. 831, 835 (2011) (modeling circumstances in which a lack of accountability created by delegation is most likely to occur).

<sup>238</sup> Stephanopoulos, *supra* note 49, at 993–94.

<sup>239</sup> MASHAW, *supra* note 56, at 140 (“Even if we were to imagine that statutory precision would be informative, it is hard to envisage how rational voter calculation is appreciably improved. When one votes for Congressperson X, presumably one votes on the basis of a prediction about what X will do in the next time period in the legislature. How much better off are voters likely to be in making that prediction—that is, in determining how well Congressperson X is likely to represent them over a range of presently unspecified issues—by knowing that he or she voted yes or no on the specific language in certain specific bills in some preceding legislature?”).

<sup>240</sup> See Stephanopoulos, *supra* note 49, at 1032–40 (collecting sources).

countability whatsoever? There is no reason to think that specific legislation would in fact be systematically easier for voters to observe and evaluate; in fact, the opposite might be closer to the truth.<sup>241</sup> Perhaps, then, the better critique is not of delegation, but of the capacity of the electorate to keep tabs on what legislators are doing.

The capture version of the critique fares no better, as there is no reason to believe that vague delegations are more likely than specific legislation to facilitate interest-group politics. If anything, the opposite is likely to be the case. The central claim of the capture critique is that Congress can harness statutory vagueness (i.e., delegation) to selectively claim credit with (false) beneficiaries and shift blame to agencies for policy failures or regulatory costs that do materialize and affect some concrete interest group. What this ignores is that even a single-minded, reelection-seeking member of Congress has an interest in delivering real benefits when a majority coalition of voters asks for beneficial legislation. Empirical evidence confirms that when the diffuse public is paying attention, Congress prefers *not* to delegate.<sup>242</sup>

And when the diffuse public is *not* paying attention, then the optimal strategy would definitely not be delegation. If we assume that members of Congress generally seek to deliver rents, or “private goods,” to powerful interest groups rather than pursue the public interest,<sup>243</sup> then the incentive to deliver

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<sup>241</sup> MASHAW, *supra* note 56, at 140 (“[W]hen making a general appraisal of [a member of Congress’s] likely behavior in the future, it is surely much more important that voters know the general ideological tendencies that inform those votes (pro-labor, pro-business, pro-disarmament, pro-defense) than that X votes for or against the particular language of [a] particular bill. I know of no one who argues that statutory vagueness prevents the electorate from becoming more informed on the general proclivities of their representatives.”); *id.* at 147 (“Nor does specificity help voters police for inconsistency in legislators’ ideological positions. Indeed, it would seem to me much easier for a voter to detect the inconsistency in a legislator’s statement that he or she intended ‘to protect the public health through strict air quality regulation while avoiding any serious economic dislocation’ than by attempting to figure out that the specific provisions of a bill were indeed trading off these values and in precisely what ways.”).

<sup>242</sup> See Stéphane Lavertu, *For Fear of Popular Politics? Public Attention and the Delegation of Authority to the United States Executive Branch*, 9 REGUL. & GOVERNANCE 160, 161 (2015).

<sup>243</sup> Aranson, Gellhorn & Robinson, *supra* note 23, at 64 (assuming that “delegation is predominantly a tool of private-goods production, not public-goods production”). This is highly dubious and empirically unfalsifiable as a general claim. For critical discussions of public choice caricatures about the welfare-reducing effects of all legislation and/or regulations, see generally STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2008); Daniel Carpenter & David A. Moss, *Introduction*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (2013).

goods through statutory text rather than through open-ended delegation would seem even stronger. By definition, delegation to an agency leaves open the possibility that the special interest that Congress hypothetically seeks to benefit will lose out in subsequent rounds of agency policymaking.<sup>244</sup> If a majority of Congress prefers to deliver rents to some narrow interest and is not electorally disciplined when it does so, then the most logical strategy for Congress is not to engage in “strateg[ic] ambiguity,”<sup>245</sup> but to lock in those rents in statutory language that cannot be undone by an agency. For precisely this reason, highly specific legislation may be more likely to indicate the provision of private goods than general language.<sup>246</sup> It is only when Congress can be certain that an agency will do precisely what Congress itself would have done that it might theoretically make sense for Congress to attempt to obfuscate through delegation and shift blame to the agency for catering to special interests. This is, of course, probably an empty set—the administrative process is packed with uncertainty, and delegation is fraught with peril for Congress, particularly when agencies are subject to the pushes and pulls of multiple principals.<sup>247</sup>

Finally, if we are dealing with a situation where there is not enough agreement on any one course of action among relevant constituencies, but enough agreement to do something like delegate authority to an agency to do something, then it may be that this preserves the possibility for agency-level capture that will ultimately decrease social welfare. Yet that is only a possi-

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244 Slippage between Congress's intent to benefit a particular constituency and the agency delegatee's actual decisions is not unheard of. See generally Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663, 670–71 (1998) (showing that a piece of health care legislation was intended to benefit certain parties but, after rulemaking, benefitted others with opposed interests).

245 Aranson, Gellhorn & Robinson, *supra* note 23, at 60.

246 MASHAW, *supra* note 56, at 145 (“[W]hile [Aranson, Gellhorn, and Robinson]’s general theory of legislation may capture the dynamics and welfare consequences of certain classes of legislation—appropriations bills for defense installations or for river and harbor improvements—it is a theory which seems to explain specific, not vague, legislation. And to the extent that we believe that such ‘Christmas tree bills’ are indeed instances of private interest legislation that reduce general welfare, we should favor statutory vagueness as a potential correction. Perhaps the Defense Department or the Army Corps of Engineers could avoid at least some of the worthless projects that pure pork-barrel politics produce. Indeed, the recent use of a ‘base closing commission’ to remove that issue partially from political bargaining is an example of just such a move.”).

247 Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 121–22 (1996).

bility,<sup>248</sup> and for the time being, enough of a majority is able to find it beneficial to delegate. The nature of lawmaking is that it is not always possible to know everything that one might want to know, nor to forge consensus on just one course of action,<sup>249</sup> but if Congress manages to find the lowest common denominator and it happens to be something that is not terribly specific, what's not to like from a democratic perspective? The political science literature on delegation suggests that there are major institutional benefits (as well as some manageable risk) from delegation.<sup>250</sup> Moreover, should it turn out that such a decision to delegate leads to agency-initiated capture or "empire building" down the road,<sup>251</sup> there is nothing preventing voters from holding the delegating legislators to account for the initial, ill-advised decision to delegate.<sup>252</sup>

The final two versions of the critique—that vague delegations undermine the rule of law and empower executive officials—are also suspect. Discretion in the hands of agencies

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<sup>248</sup> It also is more unlikely than many assume, given the many means that Congress has at its disposal for monitoring and controlling agency action. Some of these controls are encoded in the DNA of administrative law—the procedural constraints on agency decision making in, for example, the Administrative Procedure Act. See, e.g., Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 481 (1989) (discussing how administrative procedures reinforce political control of the bureaucracy by Congress). Other forms of "police patrol" oversight of agency decision making are available as well. See, e.g., Kenneth Lowande & Rachel Augustine Potter, *Congressional Oversight Revisited: Politics and Procedure in Agency Rulemaking*, 83 J. POL. 401, 408 (2021) (showing that Congress keeps tabs on agency proposals and leverages ex post procedural mechanisms to constrain agency decision-making). And this is to say nothing of other checks on agency capture in the executive branch and in the courts.

<sup>249</sup> HRAFN ASGEIRSSON, *THE NATURE AND VALUE OF VAGUENESS IN THE LAW* 5 (2020) (arguing that deference is due to vague legislation that represents a legislative bargain).

<sup>250</sup> See generally Sean Gailmard & John W. Patty, *Formal Models of Bureaucracy*, 15 ANN. REV. POL. SCI. 353 (2012) (reviewing this literature); Huber & Shipan, *supra* note 156 (same).

<sup>251</sup> Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932 (2005) (collecting sources arguing that "administrative agencies will be inclined toward, and be able to get away with, engorging themselves at the public's expense").

<sup>252</sup> MASHAW, *supra* note 56, at 146–47 ("A decision to go forward notwithstanding continuing ambiguity or disagreement about the details of implementation is a decision that the polity is better off legislating generally than maintaining the status quo. Citizens may disagree, but they can also hold legislatures accountable for their choice. If citizens want more specific statutes, or fear that legislating without serious agreement on implementing details is dangerous, they can, after all, throw the bums out.").

may well be abused,<sup>253</sup> but a lack of discretion is not an unalloyed good.<sup>254</sup> Few would prefer to live in a society governed by rigid rules at every turn. Moreover, agencies often reduce their own discretion through the promulgation of “legislative rules,” which are just as binding as a statute would be.<sup>255</sup> This practice should vindicate those who worry about the level of discretion that agencies are given through delegations in statutes, unless the real concern is with the comparative democratic pedigree of the rules agencies promulgate versus the rules that Congress might have enshrined in statutory language.<sup>256</sup> Finally, while delegated discretion may enable a great deal of executive power, Congress knows this and in fact systematically alters its delegating behavior in response to the risk that hostile Presidents will undermine statutory programs.<sup>257</sup> To the extent that Congress decides the risk of slippage is not a concern and delegates discretion to agencies, it is not at all clear from a normative perspective why executive power to exercise that discretion is a dysfunction rather than just the equilibrium that the separation-of-powers competition yielded.

All of these points have been made before, but they take on new urgency in light of our findings that the Court could very well induce measurable changes in Congress’s behavior. Whether or not this would be an improvement on existing practice remains open to debate, but there are reasons to believe that less delegation would in fact make us worse off and substantially complicate the operation of our democracy in practice. Unfortunately, our data cannot resolve this debate because there is so far no reliable and objective way to categorize delegations en masse as welfare enhancing or welfare reducing, or democracy enhancing or democracy reducing, but we welcome future work along these lines. At the very least, our findings suggest that it is more important than ever to answer this question (or perhaps to simply acknowledge that

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<sup>253</sup> See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969) (reflecting on the concept of discretion and its possible abuses).

<sup>254</sup> MASHAW, *supra* note 56, at 139 (“[W]hile focusing on the rule of law and its undeniable importance in maintaining liberty, we should not forget the apparently equal importance of a contradictory demand: the demand for justice in individual cases.”).

<sup>255</sup> *Id.* at 141.

<sup>256</sup> *Id.*

<sup>257</sup> See DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICYMAKING UNDER SEPARATE POWERS* (1999) (demonstrating empirically the importance of the “ally principle”—that Congress delegates to agencies when it has less reason to fear that they will take policy action that Congress would disagree with).

this is an area resistant to absolutist claims), given that the Court may very well move the needle toward a world with less opportunity for agency discretion.

### B. Why It Matters That the Effect Is Weak

The findings that enforcement of the nondelegation doctrine matters at the state level are subject to a significant caveat: the effect is not always there, and even when it is there, it has an explanatory value on par with a large number of other institutional, demographic, political, and legal factors. For instance, we found a statistically significant effect in only about 15% of the TWFE regressions we ran.<sup>258</sup> Our difference-in-differences and event study approach—an approach perhaps somewhat better calibrated to deal with the risk of reverse causation—failed almost completely to deliver any evidence in support of the theory that legislatures would delegate less.<sup>259</sup> Finally, we found that a variety of other variables had equal or greater explanatory power, including at least one—the legislative veto—that the Supreme Court has categorically ruled out as a solution to the perceived problem with delegation.<sup>260</sup>

It is common in public debates and court filings—particularly in the right-leaning legalverse, though not exclusively<sup>261</sup>—to find highly immoderate statements about the probable impact of enforcement of the nondelegation doctrine. Often, these statements come in the form of generalized arguments about the dearth of congressional accountability that will result as long as the Court permits delegation<sup>262</sup>—the implication being that much, if not all, of the accountability deficit that allegedly exists is enabled by judicial refusal to enforce the doctrine. For instance, the Pacific Legal Foundation stated in its amicus brief in *Gundy v. United States* that, “under the minimal require-

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<sup>258</sup> See *supra* section II.B.1.

<sup>259</sup> See *supra* section II.B.2.

<sup>260</sup> *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983) (holding that a two-chamber legislative veto violates the Bicameralism and Presentment Clauses of the Constitution).

<sup>261</sup> See *supra* note 118 and accompanying text (noting the views of John Hart Ely and David Schoenbrod, both of whom advocated for a resurrection of the nondelegation doctrine on accountability grounds, and neither of whom claims or would have claimed to be “conservative”).

<sup>262</sup> See Brief of Scholars of Congressional Accountability as Amici Curiae in Support of Neither Party at 8–9, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530), [https://www.supremecourt.gov/DocketPDF/20/20-1530/205670/20211220122640286\\_20-1530%2020-1531%2020-1778%2020-1780%20West%20Virginia%20et%20al%20v%20Environmental%20Protection%20Agency%20Amicus%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/20/20-1530/205670/20211220122640286_20-1530%2020-1531%2020-1778%2020-1780%20West%20Virginia%20et%20al%20v%20Environmental%20Protection%20Agency%20Amicus%20Brief.pdf) [<https://perma.cc/293C-Y393>] (collecting statements in cases and academic commentary).

ments of the Intelligible Principle test, this carefully crafted electoral system no longer ensures that elected lawmakers are politically accountable for the vast majority of legal rules and obligations imposed in our Republic, because Congress can employ purposefully broad and ambiguous statutes as a means to avoid democratic accountability.”<sup>263</sup> Sometimes, the reference to the Field of Dreams Theory is implied in statements about how the major questions doctrine and the nondelegation doctrine do not threaten modern government because Congress can always legislate the same response to the problem that an agency would have promulgated as a rule.<sup>264</sup> In *Sessions v. Dimaya*, a void-for-vagueness case with clear implications for the nondelegation doctrine, Justice Gorsuch told a story from Blackstone about a case involving a “statute that made ‘stealing sheep, or other cattle’ a felony,” which led the court to conclude that the statute provided no fair notice of what was and what was not covered (*cattle* was apparently not a clear enough term to use).<sup>265</sup> Justice Gorsuch, along with Blackstone, celebrated the decision as having the “salutary effect of inducing the legislature to reenter the field and make itself clear by passing a new law extending the statute to ‘bulls, cows, oxen,’ and more ‘by name.’”<sup>266</sup> For Justice Gorsuch, the existence of such a “salutary effect” of judicial intervention is important to being able to say, as he did in *Sessions v. Dimaya*, that invalidation of the statute “does not forbid the legislature from acting toward any end it wishes, but only requires it to act with enough clarity that reasonable people can know what is required of them and judges can apply the law consistent with their limited office.”<sup>267</sup> David Schoenbrod encapsulates this wide-eyed optimism when he says that the belief that “government cannot work without delegation[] is backed by neither reasoning nor citation to anything . . . . This Court has simply not done its own analysis. Such an analysis should lead the Court to conclude that government could work better without delegation . . . .”<sup>268</sup> Whatever form these arguments take, the assumptions being made about the role the courts could play

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<sup>263</sup> Brief Amicus Curiae of Pacific Legal Foundation in Support of Reversal at 10, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086), 2018 WL 2684377.

<sup>264</sup> See *supra* note 43 and accompanying text.

<sup>265</sup> *Sessions v. Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 1233.

<sup>268</sup> SCHOENBROD, *supra* note 6, at 174.

in either stopping congressional dysfunction or waking a sleeping giant are strikingly bold and completely unsubstantiated.

The scale that any salutary effect would have to operate on to make the kind of difference that commentators hope for suggests a need to check the possible size of the effect we observe. Our data allow us to put outer bounds on the scale of possible change. To judge the overall explanatory power of the case variables, we ran a set of linear regressions while including the control variables and checked the change in the  $R^2$ , a measure of model fit, when adding the three nondelegation case variables (share validated, number validated, number invalidated). We ran the regressions using every outcome variable, as done to assess feature importance with the Random Forest Model. Adding the case variables does improve model fit. The  $R^2$  increases by 0.004 on average across all the regression models. This is a 1.5% proportional increase. Overall, the additional explanatory power from the nondelegation case variables is relatively small.

Our findings provide ample reason to doubt that enforcement of the nondelegation doctrine would lead to the fundamental transformation in how Congress does its work that proponents of the doctrine hope for. The magnitude of the effect we observe amounts to a small fraction of the overall volume of legislation produced, both past and future. Even at a time when Congress is gridlocked and is producing less landmark legislation than has historically been the case,<sup>269</sup> it still manages to produce vast amounts of statutory material each year.<sup>270</sup> Were the Supreme Court to intervene, and were it to have the same kind of effect we observe state courts having on state legislative output, the effect would be real but substantively minimal. To the extent that proponents of the Field of Dreams Theory hope that the nondelegation doctrine would either stanch the flow of new regulatory law by cutting off delegation or jump start a sleeping Congress, the evidence cuts decisively against either imagined future. Not only is the absolute magnitude of the effect fairly small, but court decisions

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<sup>269</sup> Sarah A. Binder, *Legislative Productivity and Gridlock*, in *THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS* 641, 646 (George C. Edwards, Frances E. Lee & Eric Schickler eds., 2011) (discussing the relationship between gridlock and legislative productivity).

<sup>270</sup> See *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/H7PS-728Q>] (last visited Dec. 16, 2022) (compiling statistics on enacted legislation from the 117th to the 93rd Congress and finding, on average, several hundred acts per session, even in relatively gridlocked sessions with divided government).

enforcing the doctrine are one of at least ten other factors (that we know of) that influence congressional decisions about the content of statutes. The implication is clear: it is time for a reality check on what we could actually expect from court intervention, even assuming that more precise legislation would be a desirable thing. Judges, advocates, commentators, journalists, and scholars all need to bear in mind that there are documentable limits to how much Congress can or will listen to the courts when they attempt to shift the burden of democracy more squarely onto Congress's shoulders.

Of course, maybe even proponents of the nondelegation doctrine do not believe what they are saying. Perhaps the Field of Dreams Theory, in its extreme statements, is little more than a rhetorical flourish. In Justice Gorsuch's case, there is reason to doubt whether he really wants Congress to pass detailed regulatory laws (or would be persuaded that they satisfied whatever test he would apply).<sup>271</sup> Yet there is still value in carefully identifying the magnitude of the effect and putting it in context. For one thing, judicial rhetoric matters, and overblown claims about the potential impact of doctrine can undermine perceptions of legitimacy of government when those claims fail to materialize.<sup>272</sup> Second, if we are seriously looking for answers to a perceived accountability deficit or over-delegation, the evidence we unearth points to a number of other opportunities for making progress.<sup>273</sup> For instance, the evidence strongly suggests that legislatures delegate less when they are institutionally robust—that is, when they have well-developed committee structures, ample funding and staffing, and institutional oversight powers such as the legislative veto.<sup>274</sup> One

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<sup>271</sup> See *supra* note 43 and accompanying text.

<sup>272</sup> See Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 105 (2021) (“I argue that . . . judges should not aim to write engaging or aesthetically appealing opinions. Nor should they express their own personalities in their opinions or write with their own distinct voices. Not only are those objectives beside the point of judicial writing, they also stand to undermine the integrity of the judicial role and the legitimacy of the adjudicative process.”); see also Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 285–86 (2021) (arguing that certain areas of the law have been overtaken by “judicial populism,” wherein “specious claims to minimalism—of legal method and policy effect—work as a magic ticket out of the normative contestation that characterizes legal decision-making,” and arguing that this feigned neutrality and objectivity is inconsistent with republican democracy).

<sup>273</sup> See *supra* section II.B.3.

<sup>274</sup> Note that this evidence is precisely the opposite of what David Schoenbrod hypothesized would be the case. See Schoenbrod, *supra* note 232, at 1279 (suggesting that growth of committee staffs in Congress is positively associated with Congress's propensity to broadly delegate).

implication of these findings is that we collectively need to start broadening the portfolio of opportunities for strengthening Congress's ability to avoid delegation. Studies of congressional capacity are in their infancy, but it is clear that Congress's capacity to support the task of legislating is in a long-term secular decline.<sup>275</sup> Ironically, divestment in Congress's institutional capacity appears to be driven by some of the same public choice critiques and conservative political movements that gave us the Field of Dreams Theory.<sup>276</sup> Provided we are willing to reconsider reforms outside the nondelegation doctrine, there may be more opportunities within our grasp to reinvigorate Congress's lawmaking capacity. Many of these alternatives may prove easier to manage than—or may produce fewer unintended consequences than—the blunt-edged nondelegation approach. Yet as long as there is a fixation on the nondelegation doctrine as a cure-all, these and other options are likely to be overlooked.

### C. Why It Matters That the Effect Is Not Always Consistent with Theory

A final takeaway from the empirical results in this study has to do with unintended consequences. Assuming that we desire more specificity in federal statutes, and assuming that we believe that the minimal effect that courts may have on legislation through their enforcement of the nondelegation doctrine is worth the effort, there still might be reason for pause if the judicial intervention is itself imprecise, such that it could plausibly make things worse on the relevant metrics. And that is what at least some of the evidence suggests. We found in some model specifications that when the share of validations goes up in a state, there is a concomitant decrease in the num-

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<sup>275</sup> CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM (Timothy M. LaPira, Lee Drutman & Kevin R. Kosar eds., 2020).

<sup>276</sup> See, e.g., MICHAEL MALBIN, UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT (1980) (calling congressional staffers “unelected representatives,” much as current critics of the administrative state complain of unelected bureaucrats); Lee Drutman & Timothy M. LaPira, *Capacity for What?*, in CONGRESS OVERWHELMED, *supra* note 275, at 31 (noting that “[w]hen Newt Gingrich assumed the House speakership in 1995, he understood not only that long-standing expert committee staffers had their own long-standing agendas but also that they gave individual members of Congress independent power bases,” and “[a]ccordingly, he slashed committee staffing levels and weakened nonpartisan legislative support agencies;” and “Congress has not yet recovered from the institutional brain drain”). Given this history, it is a bit difficult to take seriously the suggestion that critics of delegation would be satisfied by the REINS Act’s solution of converting the administrative state to a kind of expanded congressional bureaucracy by requiring Congress to approve major rules.

ber of delegating statutes, which means that the opposite is also true: when the share of validations goes down, the number of explicit delegations goes *up*.<sup>277</sup> More concerning yet, our difference-in-differences analyses showed that the effect of invalidations was to increase the share of precatory and vague words in legislation compared to that in untreated states.<sup>278</sup> Moreover, although these are the main statistically significant results that cut against the promise of the Field of Dreams Theory, there are many more outcome variables whose sign is nevertheless inconsistent with the theory. We cannot rule out that their true effect is zero, but we need not ignore the fact that the direction of the effect is contrary to theory.

These counterintuitive results perhaps should not be that surprising. One probable effect of an invalidation of a statute (a relatively rare occurrence,<sup>279</sup> and especially so under the rarely used nondelegation doctrine) is to induce uncertainty on the part of those who draft legislation, particularly if the doctrine used to invalidate a statute is not clear enough to provide *ex ante* guidance about what does and does not pass the test.<sup>280</sup> When courts throw a monkey wrench into the normal process of legislation by invalidating a statute, legislative drafters still must engage in the difficult task of pulling together a majority for new law on complex issues, but they have to do so in the shadow of uncertainty of how this new statute will be evaluated under the nondelegation doctrine, should it be challenged. When you are used to doing something one way and then those ordinary methods are upended, it can be quite disruptive—indeed, this might be one reason why David Schoenbrod urged the Court to “ease the transition” by phasing in the nondelegation doctrine over certain statutes first and then to all statutes once Congress has had a chance to adjust.<sup>281</sup>

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<sup>277</sup> See *supra* section II.B.1.

<sup>278</sup> See *supra* section II.B.2.

<sup>279</sup> WHITTINGTON, *supra* note 227.

<sup>280</sup> Walters, *supra* note 54, at 465, 477–78 (showing that the nondelegation doctrine, including the purportedly rule-like “fill in the details” and “executive factfinding” tests, is not clear enough to provide an *ex ante* guide to reviewing courts about which statutes pass the test and which ones do not). Proving the point is the fact that some believe the approach outlined in Justice Gorsuch’s *Gundy* dissent would render vast proportions of the U.S. Code invalid, Hall, *supra* note 54, while others view it as likely limited to only a small proportion, Phillips, *supra* note 176, at 922.

<sup>281</sup> SCHOENBROD, *supra* note 6, at 174–76. Such an approach is obviously inconsistent with how courts are supposed to operate—i.e., resolving cases and controversies retroactively, not legislating prospectively and phasing in law.

One response to disruption, ironically, might well be to fall back on precisely the kinds of vague and precatory words that critics of the current approach to nondelegation lament. After all, the legislature still has all the same incentives it had before, but it also needs to please a new constituency as well: the courts. The same dynamics that allegedly drive legislatures to delegate to agencies in the first place—the desire to please multiple constituencies with different preferences—might lead the legislature to make legislation even more generally appealing but ever more vacuous. Moreover, outside of the context of the statute that a court might have invalidated under the nondelegation doctrine, where the court might well provide guidance as to how a statutory deficiency could be remedied, Congress will be forced to guess about what language will pass muster with the courts. It might well guess that words like *reasonable* will be specific enough—after all, courts use such language in much of judge-made law, and what’s good for the goose might be thought to be good for the gander. The point is that there are reasons to believe that legislatures would misread what it is that judges want or jumble the response in a way that would lead to more implied delegations through imprecise statutory language (precisely the opposite of what proponents of the nondelegation doctrine would like to see).

To be sure, the degree to which the message from the courts to the legislature is lost in translation would depend in part on how clear and consistent the courts are in articulating and applying a new nondelegation doctrine. But even though this is a variable that is in theory under the control of the Court, the reality is far more complex. Not only would Congress have to follow and correctly understand what the Supreme Court does in individual cases and over a series of cases (even as the personnel changes on the Court and the application of the doctrine in practice evolves), but it would also have to follow and correctly understand what the lower courts are doing with the doctrine.<sup>282</sup> Given the evidence that Congress often misses or misconstrues what is happening in the court system on doctrines critical to legislative drafting,<sup>283</sup> it should hardly surprise us if Congress, just like the state legislatures in this study, sometimes gets lost and writes worse legislation. These insights may pour cold water on optimistic views of “de-

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282 Walters, *supra* note 54, at 477–78.

283 See *supra* notes 222–224.

mocracy-forcing” moves in statutory interpretation or constitutional theory more generally.<sup>284</sup>

#### CONCLUSION

As of this writing, it appears that the Supreme Court is poised to do the unthinkable: resurrect the nondelegation doctrine or, at the very least, deploy a new major questions doctrine that mimics the nondelegation doctrine.<sup>285</sup> These significant changes are undergirded by arguments about democratic accountability and congressional dysfunction and the need for the Court to realign Congress’s incentives to legislate. These arguments play a critical role in selling the nondelegation doctrine and the major questions doctrine to members of the public, many of whom are not inclined toward a world without a functional government. What we have called the Field of Dreams Theory—if we build the nondelegation doctrine, Congress will legislate—helps repackage and rebrand the nondelegation doctrine, distancing it from *Lochner*ism and holding out the promise that the doctrine will actually reset American democracy.

This Article holds those inevitable claims to the fire, and they come away partially intact but also fraying at the edges. The empirical reality, which this Article uncovers using data from the laboratories of the states, is more nuanced than the rhetoric about accountability and democracy-forcing would suggest. It depicts legislatures as imperfectly responsive to courts’ pushing and prodding. By some measures, legislatures do delegate less and legislate more when courts call them out under the nondelegation doctrine. By many more measures, they do not. Moreover, sometimes enforcement of the nondelegation doctrine appears to confuse or mislead legislatures into writing legislation precisely the ways that critics of the Court’s historically lax enforcement of the nondelegation doctrine lament.

The overarching takeaway is clear: if we are serious about making Congress do its job, the nondelegation doctrine (and, by extension, the major questions doctrine) may have some legitimate, but ultimately marginal, role to play. Perhaps with careful study and consideration, these minimal effects could be

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<sup>284</sup> See Schacter, *supra* note 36; Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737 (2004). Even if it is coherent as a matter of theory, much depends on how adept courts are at surgically improving democracy rather than setting off negative feedback loops.

<sup>285</sup> See *supra* notes 30–39 and accompanying text.

amplified or maximized. But if we like the vision offered by the Field of Dreams Theory, we may have to build something other than a judicial doctrine. Instead of a panacea for all that allegedly ails us, the Court might just be selling snake oil.

## APPENDIX

TABLE A.1: LEXICONS FOR TEXT ANALYSIS

**A. Agency and Authority Words**

- *Agency*: administration, division, agency, bureau, board, commission, department, director, administrator, secretary, chairman, chair, head, authority, institution, treasurer, governor, council, office, officer.
- *Authority*: authorized, empowered, shall, may.

**B. Precatory Words**

- reasonable, fair, may, may not, public, feasible, practicable, appropriate

**C. Vague Words**

- reason, prudent, best, available, possible, optimal, appropriate, feasible, acceptable, unreason, careful, proper, undue, unavailable, impossible, infeasible, unacceptable, caution

**D. Laxity Words**

- could, might, can, probably, may, should

**E. Rulemaking Words**

- adopt, make, made, prescribe, promulgate

**G. Topic Words**

- *Agriculture*: agricultur, farm, ranch, crop, corn, wheat, soy, dairy, irrigat, plow, cultivat, agrono, till
- *Alcohol, gaming, firearms*: alcohol, liquor, casino, gambl, lotter, firearm, pistol, handgun, assault, weapon, shoot, intoxicat, game, gaming
- *Antitrust*: antitrust, monopol, price fix, sherman, merger
- *Appropriations*: appropriat, fund, revenue, allot, distribut, allow, apportion, budget, money, allotment
- *Buildings*: build, structur, construct, architect, facilit, erect, maint, edifice
- *Civil rights*: right, discrimin, speech, equal, opportun, bias, prejudic
- *Commerce*: commerc, business, enterpris, market, indust, trad, commod, exchang, currenc, deal
- *Criminal*: crim, felon, misdemeanor, prosecut, indict, police, sentenc, probat, jail, prison, exonerat, culpab, convict, culprit, fugitive, lawbreaker, mobster, offender, thug

- *Education*: educ, school, colleg, universit, K-12, teach, curricul, test, exam, grade, grading, graduat, diplom, de-  
gree, academ, matriculat, elementary
- *Elections*: elect, polling, ballot, candidate, campaign,  
referend, primary elect, general elect, political party, parti-  
sian, non-partisan, poll
- *Employment*: employ, labor, job, collective bargain, sal-  
ary, union, employment benefit, employment discriminat,  
unemployment benefits
- *Environment*: enviro pollut, toxic, climat, contaminat,  
natur, conservation, sustainab, brownfield
- *Family*: famil, dependent, child, parent, marry, marriage,  
domestic, guardian, foster, adopt, divorce, civil union
- *Financial*: financ, fiduc, stock, securities, invest, retire-  
ment, pension, mutual fund, monetar
- *Food*: food, adulterate, standard of identity, nutrit, school  
lunch, cook, feed, meal, aliment, meat, fish, dair, grain,  
vegetable, fruit
- *Health*: health, insuranc, pharmaceut, drug, hospital,  
clinic, physician, dentist, optom, doctor, patient, nurs,  
malpractice
- *Housing*: hous, mortgage, public housing, low-income  
housing, rent, lease, apartment, single-family home, home-  
owner's insurance, dwelling, home, lodgment, residenc,  
roof, shelter
- *Immigration*: immigrat, resident, citizen, naturaliz, asy-  
lum, visa, illegal alien, foreigner migrat, migrant
- *Indian affairs*: indian, native american, reservation,  
treaty, tribe, tribal
- *Insurance*: insuran, deductib, risk, premium, coverage,  
guarant
- *Local affairs*: local, municipal, home rul, township, city,  
town
- *Mining*: mine, mining, extract, mineral, ores, metal, coal,  
shale gas, oil, petrol, uranium, aluminium, copper, silver,  
gold, drill, quarr, pipeline, digg, unearth
- *National security*: security, terroris, defense, enem, war,  
army, armi, navy, national guard, air force, department of  
defense
- *Property*: propert, zone, zoning, meter, bounds, easement,  
setback, conditional use, estate, plot
- *Public services and welfare*: food stamp, snap benefit,  
social security, disabilit, worker's compensation, unem-  
ployment benefit, welfar

- *Public utilities*: utilit, electric, sewage, natural gas, natural monopoly, rate regulation, tarif
- *Tax*: tax, revenue, bracket, assessment, collect, tax credit, tax deduction
- *Transportation*: transport, road, vehicl, automobil, bus, rail, aviat, plane, jet, truck, highway, interstate, freeway, turnpike, toll, shipment, shipped, shipping, transit
- *Water*: drink, treatment, riparian, groundwater, well

TABLE A.2: EVENTS FOR EVENT STUDIES AND DIFFERENCE-IN-DIFFERENCES REGRESSIONS

| State | Biennium | State | Biennium | State | Biennium |
|-------|----------|-------|----------|-------|----------|
| AK    | 1980     | LA    | 1924     | NM    | 1994     |
| AL    | 1880     | LA    | 1980     | NV    | 1968     |
| AL    | 1922     | LA    | 2002     | NV    | 2010     |
| AL    | 1936     | MA    | 1956     | NY    | 1916     |
| AL    | 1952     | MA    | 1980     | NY    | 1936     |
| AL    | 1978     | MD    | 1928     | NY    | 1988     |
| AR    | 1948     | MD    | 1966     | OH    | 1954     |
| AR    | 1968     | ME    | 1910     | OK    | 2002     |
| AR    | 2012     | ME    | 1946     | OR    | 1936     |
| AZ    | 1920     | ME    | 1960     | PA    | 1848     |
| AZ    | 1990     | ME    | 1972     | PA    | 1936     |
| CA    | 1882     | ME    | 2010     | PA    | 1990     |
| CA    | 1922     | MI    | 1906     | PA    | 2006     |
| CA    | 1946     | MI    | 1932     | RI    | 1960     |
| CA    | 1974     | MI    | 1952     | RI    | 1988     |
| CO    | 1954     | MI    | 1986     | RI    | 2006     |
| CO    | 1980     | MN    | 1882     | SC    | 1956     |
| CT    | 1940     | MN    | 1896     | SC    | 1968     |
| CT    | 1966     | MN    | 1908     | SC    | 1982     |
| DE    | 1948     | MN    | 1934     | SC    | 2000     |
| DE    | 1964     | MN    | 1960     | SD    | 1916     |
| FL    | 1928     | MN    | 1984     | SD    | 1970     |
| GA    | 1876     | MO    | 1870     | SD    | 1994     |
| GA    | 1900     | MO    | 1908     | TN    | 1986     |
| GA    | 1936     | MO    | 1960     | TX    | 1942     |
| GA    | 1948     | MO    | 1976     | TX    | 1978     |
| HI    | 2008     | MS    | 1958     | TX    | 1998     |
| IA    | 1910     | MS    | 1974     | UT    | 1918     |
| IA    | 1934     | MT    | 1914     | UT    | 1936     |
| IA    | 1954     | MT    | 1926     | UT    | 1962     |
| IA    | 1994     | MT    | 1946     | UT    | 1978     |
| ID    | 1924     | MT    | 1960     | UT    | 1994     |
| ID    | 1960     | MT    | 1978     | VA    | 1942     |
| ID    | 1988     | MT    | 2000     | VA    | 1956     |
| IL    | 1874     | NC    | 1926     | VT    | 1984     |
| IL    | 1914     | NC    | 1940     | WA    | 1890     |
| IL    | 1994     | NC    | 1960     | WA    | 1914     |
| IN    | 1892     | ND    | 1918     | WA    | 1936     |

| State | Biennium | State | Biennium | State | Biennium |
|-------|----------|-------|----------|-------|----------|
| IN    | 1940     | ND    | 1966     | WA    | 1978     |
| IN    | 1952     | NE    | 1930     | WA    | 2000     |
| IN    | 1968     | NE    | 1956     | WI    | 1896     |
| KS    | 1900     | NH    | 1936     | WI    | 1936     |
| KS    | 1926     | NH    | 1956     | WI    | 2004     |
| KS    | 1948     | NH    | 1980     | WV    | 1932     |
| KS    | 1976     | NH    | 2000     | WV    | 1946     |
| KS    | 2008     | NH    | 2012     | WV    | 1966     |
| KY    | 1894     | NJ    | 1940     | WV    | 1994     |
| KY    | 1924     | NJ    | 1976     | WY    | 1944     |
| KY    | 1944     | NM    | 1932     | WY    | 1956     |
| LA    | 1890     | NM    | 1962     | WY    | 1978     |

FIGURE A.3: SIGNIFICANT RESULTS FROM TWFE REGRESSIONS INCLUDING A TIME TREND CONTROL

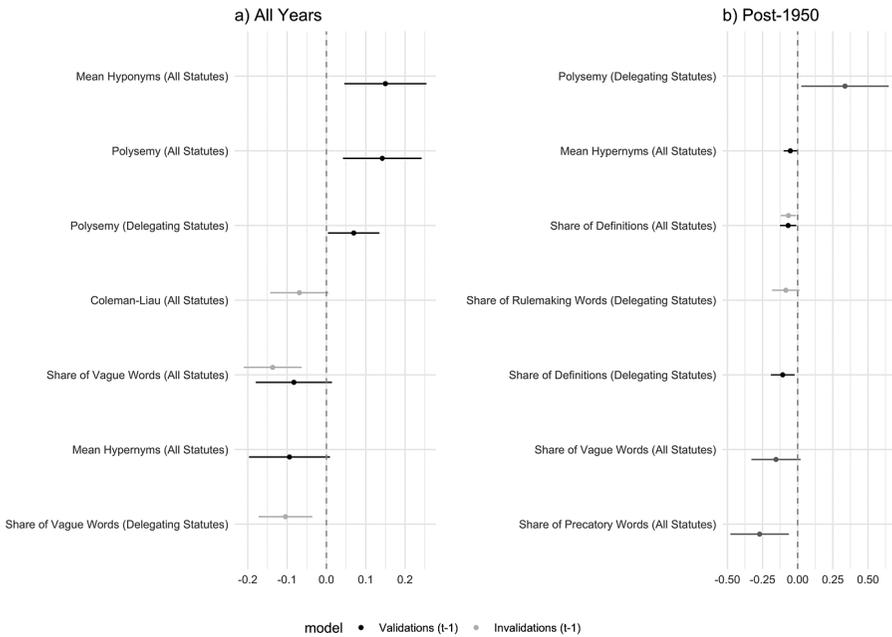


FIGURE A.4: SIGNIFICANT RESULTS FROM TWFE REGRESSIONS INCLUDING THE LAGGED DEPENDENT VARIABLE AS A CONTROL

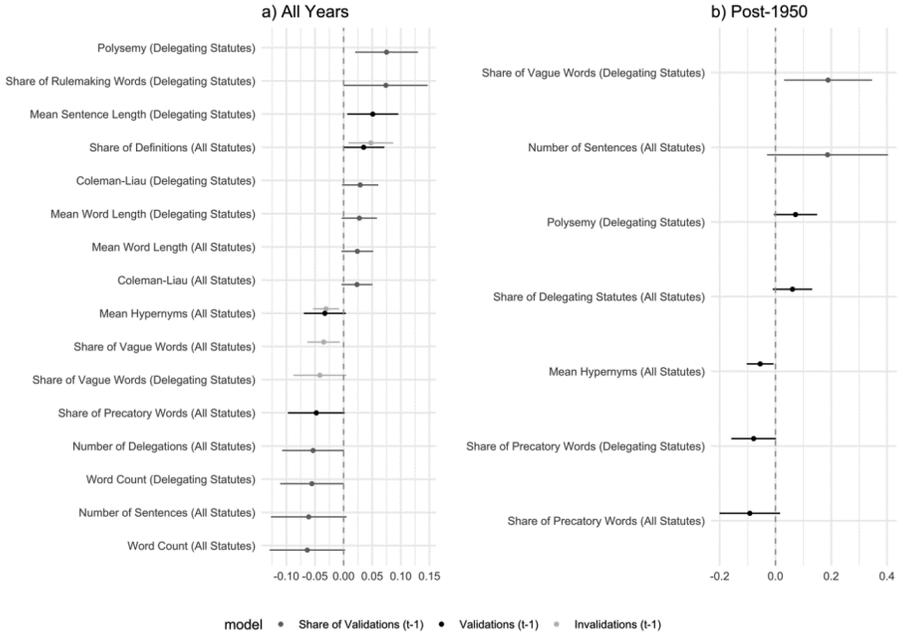


FIGURE A.5: SIGNIFICANT RESULTS FROM TWFE REGRESSIONS INCLUDING OTHER CONTROLS

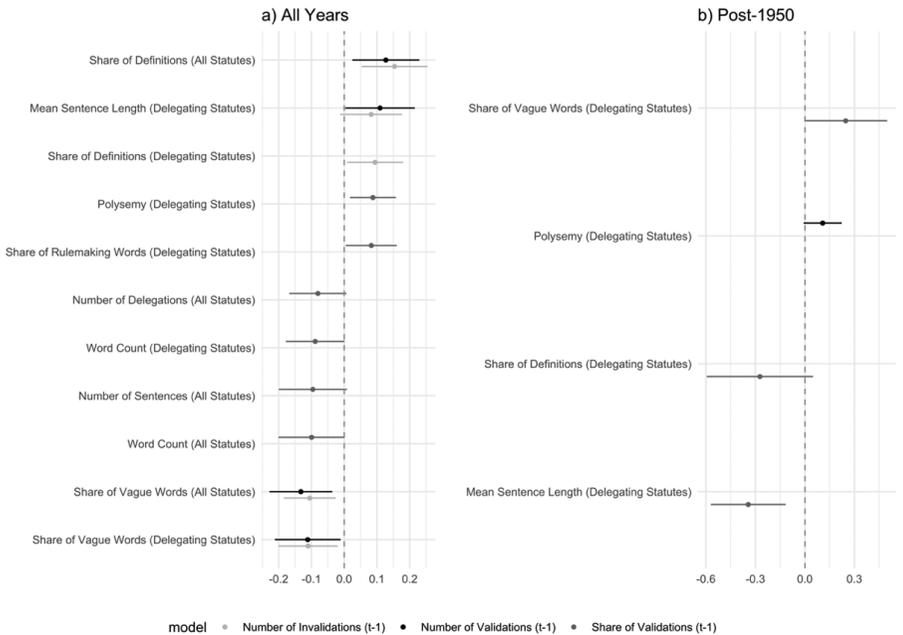


FIGURE A.6: DIFFERENCE-IN-DIFFERENCES REGRESSIONS INCLUDING A TIME TREND CONTROL

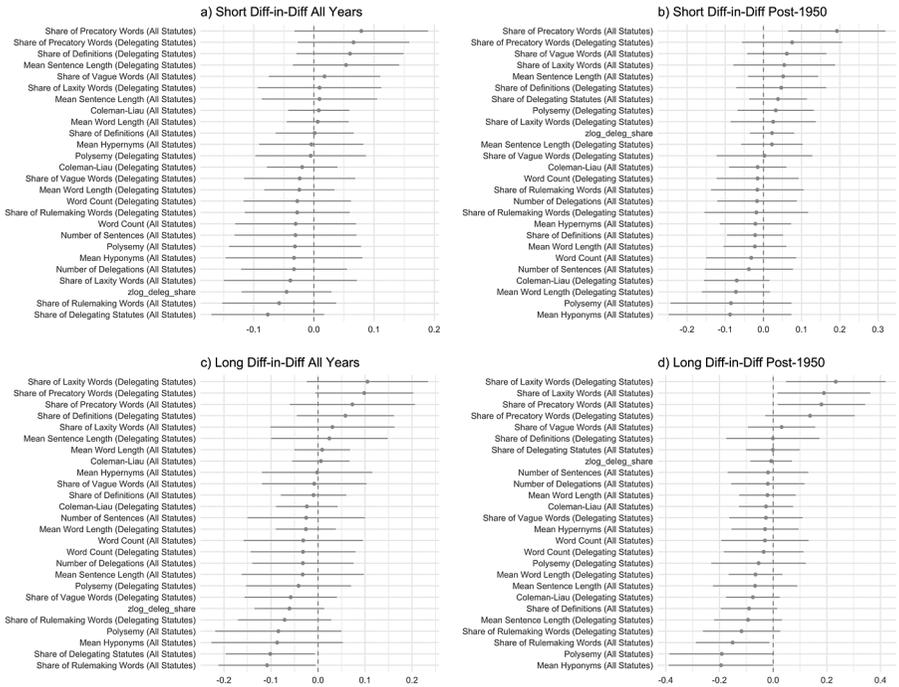


FIGURE A.7: DIFFERENCE-IN-DIFFERENCES REGRESSIONS INCLUDING THE LAGGED DEPENDENT VARIABLE AS A CONTROL

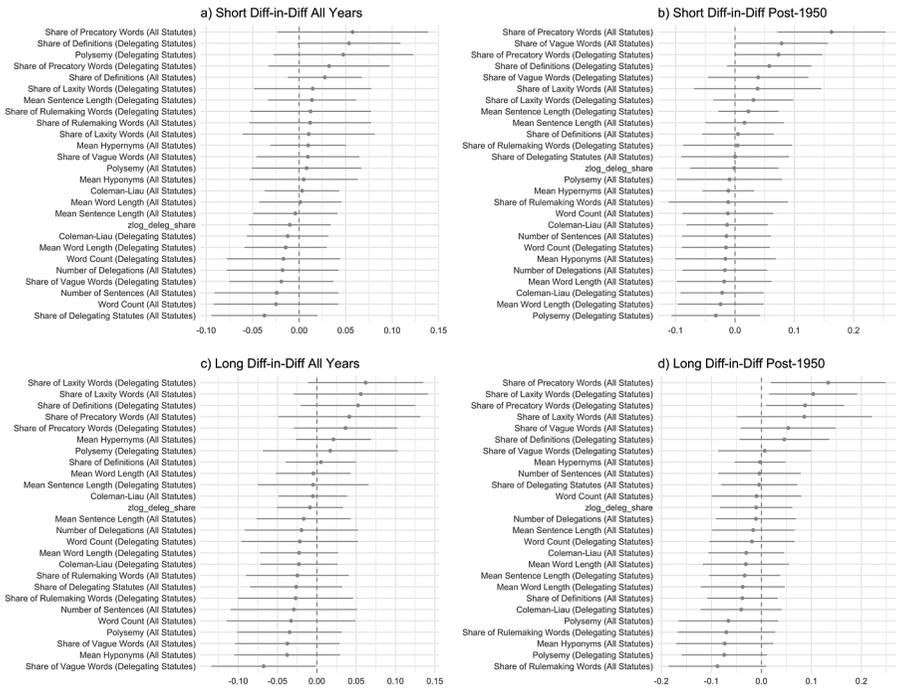


FIGURE A.8: DIFFERENCE-IN-DIFFERENCES REGRESSIONS INCLUDING OTHER CONTROLS

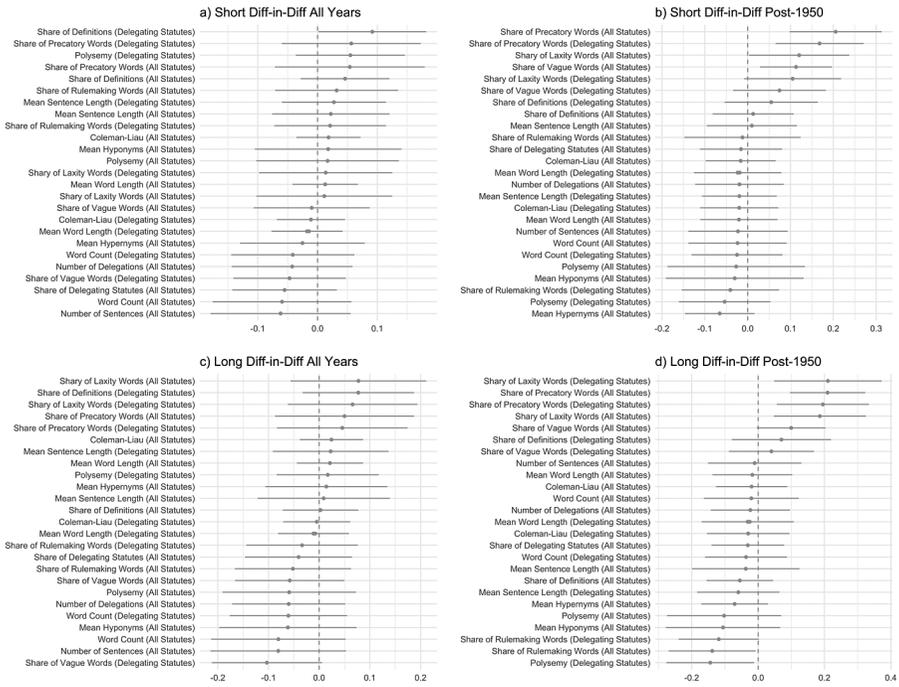


TABLE A.9: SUMMARY STATISTICS OF OUTCOME AND TREATMENT VARIABLES

| Variable                              | All Years |          |          |       |          | Post-1950 |          |          |       |          |
|---------------------------------------|-----------|----------|----------|-------|----------|-----------|----------|----------|-------|----------|
|                                       | N         | Mean     | SD       | Min   | Max      | N         | Mean     | SD       | Min   | Max      |
| <u>CaseLaw Variables</u>              |           |          |          |       |          |           |          |          |       |          |
| Diff-in-Diff Long Window              | 4644      | 0.29     | 0.45     | 0     | 1        | 1546      | 0.58     | 0.49     | 0     | 1        |
| Diff-in-Diff Short Window             | 4644      | 0.22     | 0.41     | 0     | 1        | 1546      | 0.39     | 0.49     | 0     | 1        |
| Share Validated                       | 4594      | 0.83     | 0.27     | 0     | 1        | 1496      | 0.83     | 0.11     | 0.33  | 1        |
| Number Validated                      | 4644      | 8.47     | 13.4     | 0     | 120      | 1546      | 20.04    | 17.25    | 0     | 120      |
| Number Invalidated                    | 4644      | 1.93     | 3.75     | 0     | 33       | 1546      | 4.47     | 5.16     | 0     | 33       |
| <u>Statutory Variables</u>            |           |          |          |       |          |           |          |          |       |          |
| Number of Delegations                 | 4590      | 1827.55  | 2043.24  | 0     | 15060    | 1540      | 3428.7   | 2395.22  | 0     | 15060    |
| Log of Delegations                    | 4575      | .72      | 1.57     | 0     | 9.62     | 1539      | 7.78     | 1.1      | 0     | 9.62     |
| Share of Delegations                  | 4590      | 00.25    | .1       | 0     | 0.76     | 1540      | 0.27     | 0.08     | 0     | 0.76     |
| Log of Share of Delegations           | 4575      | -1.53    | 0.62     | -5.96 | -0.28    | 1539      | -0.35    | .39      | -4.04 | -0.28    |
| Number of Sentences (All Statutes)    | 4590      | 6870.5   | 7432.76  | 2     | 63933    | 1540      | 12670.69 | 9109.96  | 2     | 63933    |
| Word Count (All Statutes)             | 4590      | 2.27E+05 | 2.31E+05 | 44    | 1.77E+06 | 1540      | 4.01E+05 | .76E+05  | 44    | 1.77E+06 |
| Word Count (Delegating Statutes)      | 4590      | 86435.94 | 89918.74 | 0     | 6.56E+05 | 1540      | 1.49E+05 | 1.03E+05 | 0     | 6.05E+05 |
| Word Length (All Statutes)            | 4590      | 5.92     | 0.27     | 5.23  | 9.07     | 1540      | 6.21     | 0.23     | 5.41  | 9.07     |
| Sentence Length (All Statutes)        | 4590      | 36.35    | .53      | 14.44 | 113.67   | 1540      | 32.35    | 5.01     | 14.45 | 50.57    |
| Coleman Liu (Delegating Statutes)     | 4590      | 18.11    | 1.58     | 13.76 | 35.51    | 1540      | 19.78    | 1.29     | 14.66 | 35.51    |
| Word Length (Delegating Statutes)     | 4575      | 5.91     | 0.24     | 5.04  | 8.3      | 1539      | 6.18     | 0.19     | 5.67  | 8.3      |
| Sentence Length (Delegating Statutes) | 4         | 575      | 51.97    | 11.39 | 18       | 217       | 44.33    | 6.86     | 24.7  | 90       |
| Coleman Liu (Delegating Statutes)     | 4575      | 18.38    | 1.36     | 13.08 | 32.07    | 1539      | 19.84    | 1.09     | 17.19 | 32.07    |

| Variable  | All Years |      |      |      |      | Post-1950 |      |      |      |      |
|---|-----------|------|------|------|------|-----------|------|------|------|------|
|   | N         | Mean | SD   | Min  | Max  | N         | Mean | SD   | Min  | Max  |
| Mean Hyponyms (All Statutes)                    | 4590      | 4.88 | 0.36 | 2.23 | 6.59 | 1540      | 4.83 | 0.36 | 2.23 | 6.59 |
| Mean Hypernyms (All Statutes)                   | 4590      | 0.71 | 0.03 | 0.58 | 0.8  | 1540      | 0.72 | 0.02 | 0.65 | 0.79 |
| Share of Precatory Words (All Statutes)         | 4 590     | 0.01 | 0    | 0    | 0.03 | 1540      | 0.01 | 0    | 0    | 0.02 |
| Share of Vague Words (All Statutes)             | 4 590     | 0    | 0    | 0    | 0.03 | 1540      | 0.01 | 0    | 0    | 0.02 |
| Share of Laxity Words (All Statutes)            | 4 590     | 0.01 | 0    | 0    | 0.02 | 1540      | 0.01 | 0    | 0    | 0.02 |
| Share of Definitions (All Statutes)             | 4590      | 0.02 | 0.02 | 0    | 0.27 | 1540      | 0.04 | 0.02 | 0    | 0.27 |
| Share of Rulemaking Words (All Statutes)        | 4 590     | 0    | 0    | 0    | 0.02 | 1540      | 0    | 0    | 0    | 0.02 |
| Polysemy (All Statutes)                         | 4590      | 5.58 | 0.36 | 2.99 | 7.31 | 1540      | 5.55 | 0.35 | .99  | 7.31 |
| Share of Precatory Words (Delegating Statutes)  | 4 505     | .01  | 0    | 0    | 0.06 | 1539      | 0.01 | 0    | 0    | 0.04 |
| Share of Vague Words (Delegating Statutes)      | 4 575     | 0    | 0    | 0    | 0.02 | 1539      | 0.01 | 0    | 0    | 0.02 |
| Share of Laxity Words (Delegating Statutes)     | 4 505     | .01  | 0    | 0    | 0.06 | 1539      | 0.01 | 0    | 0    | 0.02 |
| Share of Definitions (Delegating Statutes)      | 4 505     | .02  | 0.02 | 0    | 0.33 | 1539      | 0.02 | 0.01 | 0    | 0.22 |
| Share of Rulemaking Words (Delegating Statutes) | 4 575     | 0    | 0    | 0    | 0.11 | 1539      | 0    | 0    | 0    | 0.01 |
| Polysemy (Delegating Statutes)                  | 4575      | 5.36 | 0.26 | 2.2  | 7.98 | 1539      | 5.38 | 0.21 | 4.15 | 7.32 |

TABLE A.10: SUMMARY STATISTICS OF TOPIC VARIABLES

| Variable (Number of Delegations) | All Years |        |        |     |      | Post-1950 |        |        |     |      |
|----------------------------------|-----------|--------|--------|-----|------|-----------|--------|--------|-----|------|
|                                  | N         | Mean   | SD     | Min | Max  | N         | Mean   | SD     | Min | Max  |
| Water                            | 4590      | 16.56  | 27.03  | 0   | 284  | 1540      | 36.85  | 37.6   | 0   | 284  |
| Transport                        | 4590      | 113.7  | 133.4  | 0   | 1528 | 1540      | 187.27 | 147.57 | 0   | 987  |
| Tax                              | 4590      | 196.11 | 242.83 | 0   | 2568 | 1540      | 343.74 | 285.69 | 0   | 1827 |
| Public Utilities                 | 4590      | 17.52  | 29.06  | 0   | 390  | 1540      | 36.28  | 33.99  | 0   | 390  |
| Public Services                  | 4590      | 24.74  | 38.94  | 0   | 420  | 1540      | 56.92  | 48.57  | 0   | 420  |
| Property                         | 4590      | 112.66 | 126.94 | 0   | 1657 | 1540      | 181.88 | 141.9  | 0   | 1132 |
| National Security                | 4590      | 9.77   | 14.18  | 0   | 197  | 1540      | 16     | 15.52  | 0   | 116  |
| Mining                           | 4590      | 15.59  | 23.52  | 0   | 664  | 1540      | 25.79  | 33.56  | 0   | 664  |
| Local Affairs                    | 4590      | 253.07 | 398.08 | 0   | 7112 | 1540      | 314.88 | 395.96 | 0   | 3144 |
| Insurance                        | 4590      | 49.08  | 78.43  | 0   | 693  | 1540      | 112.56 | 103.19 | 0   | 693  |
| Indian Affairs                   | 4590      | 4.86   | 25.4   | 0   | 419  | 1540      | 8.63   | 34.87  | 0   | 392  |
| Immigration                      | 4590      | 32.64  | 35.23  | 0   | 307  | 1540      | 51.29  | 39.5   | 0   | 268  |
| Housing                          | 4590      | 57.3   | 73.4   | 0   | 575  | 540       | 116.17 | 92.09  | 0   | 575  |
| Health                           | 4590      | 111.73 | 173.34 | 0   | 1330 | 1540      | 260.4  | 223.19 | 0   | 1330 |
| Food                             | 4590      | 19.48  | 28.34  | 0   | 293  | 1540      | 35.99  | 35.35  | 0   | 293  |
| Finance                          | 4590      | 137.57 | 177.19 | 0   | 1377 | 1540      | 269.4  | 216.33 | 0   | 1377 |
| Family                           | 4590      | 50.25  | 88.82  | 0   | 1791 | 1540      | 116.06 | 126.61 | 0   | 1791 |
| Environment                      | 4590      | 17.87  | 37.32  | 0   | 382  | 1540      | 47.8   | 51.07  | 0   | 382  |
| Employment                       | 4590      | 145.27 | 194.71 | 0   | 1467 | 1540      | 303.6  | 235.43 | 0   | 1467 |

| Variable (Number of Delegations) | All Years |        |        |     |      | Post-1950 |        |        |     |      |
|----------------------------------|-----------|--------|--------|-----|------|-----------|--------|--------|-----|------|
|                                  | N         | Mean   | SD     | Min | Max  | N         | Mean   | SD     | Min | Max  |
| Elections                        | 4590      | 186.33 | 229.47 | 0   | 2215 | 540       | 274.61 | 257.31 | 0   | 2139 |
| Education                        | 4590      | 148.49 | 203.12 | 0   | 2131 | 1540      | 300.66 | 257.75 | 0   | 2131 |
| Alcohol, Gaming, and Firearms    | 4590      | 22.97  | 35.56  | 0   | 443  | 1540      | 46.51  | 48.17  | 0   | 443  |
| Criminal                         | 4590      | 93.64  | 111.34 | 0   | 1038 | 1540      | 158.6  | 136.59 | 0   | 1038 |
| Commerce                         | 4590      | 100.77 | 122.47 | 0   | 1071 | 1540      | 198.81 | 148.78 | 0   | 1071 |
| Civil Rights                     | 4590      | 82.2   | 93.86  | 0   | 925  | 540       | 147.36 | 107.8  | 0   | 746  |
| Buildings                        | 4590      | 116.71 | 131.41 | 0   | 1435 | 540       | 205.34 | 152.94 | 0   | 1435 |
| Appropriations                   | 4590      | 345.56 | 440.12 | 0   | 4283 | 1540      | 699.4  | 554.79 | 0   | 4283 |
| Antitrust                        | 4590      | 2.24   | 5.27   | 0   | 73   | 1540      | 5.41   | 7.69   | 0   | 73   |
| Agriculture                      | 4590      | 23.38  | 32.99  | 0   | 518  | 1540      | 40.96  | 37.48  | 0   | 348  |

TABLE A.11: SUMMARY STATISTICS OF CONTROL VARIABLES

| Variable  | All Years |      |      |       |       | Post-1950 |      |      |       |       |
|---|-----------|------|------|-------|-------|-----------|------|------|-------|-------|
|   | N         | Mean | SD   | Min   | Max   | N         | Mean | SD   | Min   | Max   |
| Fill in Details                                     | 4644      | 0.05 | .5   | 0     | 1     | 1546      | 0.44 | 0.5  | 0     | 1     |
| Executive Factfinding                               | 4644      | 0.17 | 0.37 | 0     | 1     | 1546      | 0.18 | 0.38 | 0     | 1     |
| Nonlegislative Power                                | 4644      | 0.02 | 0.14 | 0     | 1     | 1546      | 0.02 | 0.14 | 0     | 1     |
| Procedural Safeguards                               | 4644      | 0.32 | 0.47 | 0     | 1     | 1546      | 0.32 | 0.47 | 0     | 1     |
| Overall Use of Legislative Oversight Capacity       | 4644      | 1.89 | 0.72 | 0     | 3     | 1546      | 1.92 | 0.72 | 0     | 3     |
| Overall Legislative Oversight Capacity              | 4644      | 2.04 | 0.63 | 1     | 3     | 1546      | 2.06 | 0.64 | 1     | 3     |
| Government Contract Monitoring                      | 4644      | 0.59 | 0.69 | 0     | 2     | 1546      | 0.58 | 0.69 | 0     | 2     |
| Legislative Veto                                    | 4644      | 1.05 | .97  | 0     | 3     | 1546      | 1.16 | 0.97 | 0     | 3     |
| Committee Capacity in Legislature                   | 4644      | 1.91 | 0.72 | 0     | 3     | 1546      | 1.92 | 0.72 | 0     | 3     |
| Appropriations Oversight Capacity                   | 4644      | 1.98 | 0.71 | 0     | 3     | 1546      | 1.96 | 0.72 | 0     | 3     |
| Analytic Capacity in Legislature                    | 4644      | 0    | 1    | -2.21 | 1.26  | 1546      | 0.01 | 1    | -2.21 | 1.26  |
| Electoral Competitiveness (10 year Moving Average)  | 4644      | 0    | 1    | -0.7  | 1.79  | 1546      | 1.31 | 0.48 | -0.7  | 1.79  |
| Party Control of State Gov (10 Year Moving Average) | 4644      | 0.19 | 0.32 | 0     | 1     | 1546      | 0.65 | .31  | 0     | 1     |
| State Policy Liberalism                             | 4644      | 0    | 1    | -3.87 | 4.47  | 1546      | 0.03 | 1.63 | -3.87 | 4.47  |
| Gross State Product                                 | 4644      | 0    | 1    | -0.26 | 17.74 | 1546      | 0.53 | 1.61 | -0.26 | 17.74 |
| State Population                                    | 4644      | 0    | 1    | -0.88 | 1.5   | 1546      | 1.05 | .14  | 0.74  | 1.5   |
| State Expenditures                                  | 4644      | 0    | 1    | -0.26 | 19.8  | 1546      | 0.51 | 1.62 | -0.26 | 19.8  |
| State Employees                                     | 4644      | 0    | 1    | -0.31 | 11.44 | 1546      | 0.63 | 1.55 | -0.31 | 11.44 |
| Governor Power to Return Rules                      | 4644      | 0.03 | 0.16 | 0     | 1     | 1546      | 0.08 | 0.28 | 0     | 1     |

| Variable                                  | All Years |         |       |       |       |  | Post-1950 |         |       |       |       |  |
|---|-----------|---------|-------|-------|-------|--|-----------|---------|-------|-------|-------|--|
|   | N         | Mean    | SD    | Min   | Max   |  | N         | Mean    | SD    | Min   | Max   |  |
| Governor Power to Rescind Rules           | 4644      | 0.01    | 0.11  | 0     | 1     |  | 1546      | 0.03    | 0.18  | 0     | 1     |  |
| Governor Power to Approve Rules           | 4644      | 0.04    | 0.2   | 0     | 1     |  | 1546      | 0.13    | 0.33  | 0     | 1     |  |
| Line Item Veto                            | 4644      | 0.05    | .5    | 0     | 1     |  | 1546      | 0.86    | 0.35  | 0     | 1     |  |
| Governor Power to Review Rules            | 4644      | 0.05    | .22   | 0     | 1     |  | 1546      | 0.05    | .36   | 0     | 1     |  |
| Governor Power to Reorganize              | 4644      | 0.12    | 0.33  | 0     | 1     |  | 1546      | 0.36    | 0.48  | 0     | 1     |  |
| Biennium                                  | 4644      | 1912.42 | 62.78 | 1700  | 2010  |  | 1546      | 1979.99 | 17.86 | 1950  | 2010  |  |
| Number Validated                          | 4644      | 8.47    | 13.4  | 0     | 120   |  | 1546      | 20.04   | 17.25 | 0     | 120   |  |
| Share Validated                           | 4644      | 0.82    | 0.28  | 0     | 1     |  | 1546      | 0.8     | 0.18  | 0     | 1     |  |
| Number Invalidated                        | 4644      | 1.93    | 3.75  | 0     | 33    |  | 1546      | 4.47    | 5.16  | 0     | 33    |  |
| Governor Nonappropriation Veto Authority  | 4644      | 0.22    | 0.41  | 0     | 1     |  | 1546      | 0.34    | 0.47  | 0     | 1     |  |
| Moratorium on Rulemaking                  | 4644      | 0       | 0.05  | 0     | 1     |  | 1546      | 0.01    | 0.09  | 0     | 1     |  |
| Legislative Review of Rules               | 4644      | 0.01    | 0.09  | 0     | 1     |  | 1546      | 0.02    | 0.15  | 0     | 1     |  |
| Legislative Role in Reorganization by Gov | 4644      | 0.1     | 0.3   | 0     | 1     |  | 1546      | 0.3     | 0.46  | 0     | 1     |  |
| State Taxes                               | 4644      | 0       | 1     | -0.27 | 19.87 |  | 1546      | 0.53    | 1.61  | -0.27 | 19.87 |  |
| State Surplus                             | 4644      | 0       | 1     | -34   | 22.74 |  | 1546      | 0.19    | 1.72  | -34   | 22.74 |  |
| State Court Professionalism Score         | 4644      | 0.01    | 0.06  | 0     | 1     |  | 1546      | 0.02    | 0.11  | 0     | 1     |  |
| Proportion of Republicans in Senate       | 4644      | 0.16    | 0.25  | 0     | 1     |  | 1546      | 0.41    | 0.23  | 0     | 1     |  |
| Number of Republican Senators             | 4644      | 6.23    | 10.21 | 0     | 51    |  | 1546      | 15.91   | 10.1  | 0     | 51    |  |
| Proportion of Democrats in Senate         | 4644      | 0.22    | 0.32  | 0     | 1     |  | 1546      | 0.56    | 0.24  | 0     | 1     |  |
| Number of Democrats in Senate             | 4644      | 8.66    | 13.07 | 0     | 54    |  | 1546      | 22.16   | 11.37 | 0     | 54    |  |
| Republican Veto Proof Majority            | 4644      | 0.04    | 0.2   | 0     | 1     |  | 1546      | 0.08    | 0.28  | 0     | 1     |  |

| Variable                                   | All Years |       |       |       |       | Post-1950 |       |       |       |       |
|--|-----------|-------|-------|-------|-------|-----------|-------|-------|-------|-------|
|  | N         | Mean  | SD    | Min   | Max   | N         | Mean  | SD    | Min   | Max   |
| Republican Unified Government              | 4644      | 0.08  | 0.27  | 0     | 1     | 1546      | 0.18  | 0.39  | 0     | 1     |
| Percent of Legislature from Governor Party | 4644      | 23.03 | 32.42 | 0     | 100   | 1546      | 56.15 | 23.43 | 0     | 100   |
| Model State APA                            | 4644      | 0.04  | 0.2   | 0     | 1     | 1546      | 0.12  | 0.33  | 0     | 1     |
| Missouri Plan                              | 4644      | 0.1   | 0.29  | 0     | 1     | 1546      | 0.28  | 0.45  | 0     | 1     |
| Legislature Professionalism Score          | 4644      | 0     | 0.02  | 0     | 0.57  | 1546      | 0.01  | 0.04  | 0     | 0.57  |
| Legislative Pre-Planning Agency            | 4644      | 0.21  | 0.41  | 0     | 1     | 1546      | 0.59  | 0.49  | 0     | 1     |
| Governor Served in State Legislature       | 4644      | 0.1   | 0.3   | 0     | 1     | 1546      | 0.31  | 0.46  | 0     | 1     |
| Democrats' Power in Legislature            | 4644      | 0.23  | 0.4   | 0     | 1     | 1546      | 0.59  | 0.44  | 0     | 1     |
| ADA/COPE Government Ideology               | 4644      | 13.71 | 25.63 | 0     | 99.39 | 1546      | 41.19 | 29    | 0     | 99.39 |
| NOMINATE Government Ideology               | 4644      | 15.96 | 27.76 | 0     | 100   | 1546      | 47.94 | 27.97 | 0     | 100   |
| Proportion of Republicans in House         | 4644      | 0.16  | 0.25  | 0     | 0.99  | 1546      | 0.41  | 0.22  | 0     | 0.99  |
| Number of Republicans in House             | 4644      | 18.78 | 36.83 | 0     | 297   | 1546      | 46.71 | 42.59 | 0     | 297   |
| Proportion of Democrats in House           | 4644      | 0.22  | 0.32  | 0     | 1     | 1546      | 0.57  | 0.23  | 0     | 1     |
| Number of Democrats in House               | 4644      | 0     | 1     | -0.63 | 5.25  | 1546      | 0.97  | 0.96  | -0.63 | 5.25  |
| Party in Control of Senate                 | 4644      | 0.24  | 0.42  | 0     | 1     | 1546      | 0.61  | 0.48  | 0     | 1     |
| Distance bw Party Medians in House         | 4644      | 0.11  | 0.4   | 0     | 3.01  | 1546      | 0.34  | 0.64  | 0     | 3.01  |
| Party of Governor                          | 4644      | 0.22  | 0.41  | 0     | 1     | 1546      | 0.65  | .49   | 0     | 1     |
| Divided Government                         | 4644      | 0.17  | 0.37  | 0     | 1     | 1546      | 0.46  | 0.5   | 0     | 1     |
| Democrat Veto Proof Majority               | 4644      | 0.12  | 0.33  | 0     | 1     | 1546      | 0.3   | 0.46  | 0     | 1     |
| Democrat Unified Government                | 4644      | 0.13  | 0.34  | 0     | 1     | 1546      | 0.33  | 0.47  | 0     | 1     |
| Commission on Uniform State Laws           | 4644      | 0.08  | 0.26  | 0     | 1     | 1546      | 0.21  | 0.41  | 0     | 1     |

| Variable                     | All Years |      |      |     |     | Post-1950 |      |      |     |     |
|------------------------------|-----------|------|------|-----|-----|-----------|------|------|-----|-----|
|                              | N         | Mean | SD   | Min | Max | N         | Mean | SD   | Min | Max |
| Strict Sep. of Powers Clause | 4644      | 0.7  | 0.46 | 0   | 1   | 1546      | 0.7  | 0.46 | 0   | 1   |
| Separation of Powers Clause  | 4644      | 0.11 | 0.31 | 0   | 1   | 1546      | 0.1  | 0.3  | 0   | 1   |
| Rossi Strong Nondelegation   | 4644      | 0.4  | 0.49 | 0   | 1   | 1546      | 0.4  | 0.49 | 0   | 1   |
| Rossi Moderate Nondelegation | 4644      | 0.46 | 0.5  | 0   | 1   | 1546      | 0.46 | 0.5  | 0   | 1   |
| Greco Strict Nondelegation   | 4644      | 0.36 | 0.48 | 0   | 1   | 1546      | 0.36 | 0.48 | 0   | 1   |
| Greco Loose Nondelegation    | 4644      | 0.48 | 0.5  | 0   | 1   | 1546      | 0.48 | 0.5  | 0   | 1   |