



Perspectives from FSF Scholars
October 19, 2020
Vol. 15, No. 54

The Nondelegation Doctrine is Alive and Well in the States

by

Randolph J. May *

[The Regulatory Review](#)

October 15, 2020

As President Donald J. Trump was on the verge of nominating Justice Ruth Bader Ginsburg's replacement, I [published](#) an essay elsewhere on potential changes to the [nondelegation](#) and Chevron [deference](#) doctrines. I [contended](#) that any alteration in the size and scope of the administrative state "is likely to be more modest than melodramatic, with the array of agencies continuing to carry out their core missions, including protecting the health and safety of the American people."

At the time that earlier essay was published, [U.S. Court of Appeals for the Seventh Circuit](#) Judge [Amy Coney Barrett](#) had not yet been [nominated](#) by President Trump. Now that she has been, I am not aware of anything that would change my conclusion.

Here, I want to concentrate only on the nondelegation doctrine, but this time at the state level, where much administrative law occurs—and often goes unnoticed. Earlier this month, the [Michigan Supreme Court](#) issued an important decision in [Midwest Institute of Health v. Governor](#) in which the court held that Michigan's [Emergency Powers of the Governor Act of 1945](#) (EPGA)

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

[constitutes](#) “an unlawful delegation of legislative power to the executive branch in violation of the [Michigan Constitution](#).”

Michigan Governor [Gretchen Whitmer invoked](#) the EPGA in declaring a state of emergency and issuing executive “lockdown” orders in response to the COVID-19 pandemic. The governor [issued](#) a succession of executive orders over a six-month period [limiting](#) public and private gatherings, imposing restrictions upon certain businesses, and regulating a broad variety of other aspects of Michiganders’ daily lives.

The EPGA [states](#) that, after declaring a state of emergency, “the governor may promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary* to protect life and property or to bring the emergency situation within the affected area under control.” Any such “orders, rules, and regulations . . . shall [cease](#) to be in effect upon declaration by the governor that the emergency no longer exists.”

Addressing the nondelegation doctrine challenge, the Michigan Supreme Court [explained](#) that “challenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency’s or individual’s exercise of the delegated power.” From another of its earlier decisions, the court explained that, “in making this determination whether the statute contains sufficient limits or standards, we must be mindful of the fact that such standards must be sufficiently broad to [permit](#) efficient administration in order to properly carry out the policy of the Legislature but not so broad as to leave the people unprotected from uncontrolled, arbitrary power in the hands of administrative officials.”

The majority opinion written by Justice [Stephen Markman](#) also [said](#) that Michigan's nondelegation caselaw is similar to the federally developed nondelegation doctrine case law—that, as the court put it quoting from Justice Elena Kagan's majority opinion in the U.S. Supreme Court’s [Gundy v. United States](#) decision, “the constitutional question is whether Congress has [supplied](#) an intelligible principle to guide the delegee’s use of discretion.”

Justice Markman [determined](#) the EPGA's terms “reasonable” and “necessary” to be “illusory ‘non-standard’ standards”:

The consequence of such illusory “non-standard” standards in this case is that the governor possesses free rein to exercise a substantial part of our state and local legislative authority—including police powers—for an indefinite period of time. There is . . . nothing within either the “necessary” or “reasonable” standards that serves in any realistic way to transform an otherwise impermissible delegation of *legislative* power into a permissible delegation of *executive* power.

Although there has not been a successful nondelegation doctrine challenge at the federal level since 1935, when the Supreme Court [struck down](#) two New Deal laws, state courts, invoking separation of powers principles under their own constitutions, have not been nearly so reticent to [sustain](#) nondelegation doctrine challenges. One does not have to reach back into ancient history to find such cases.

In a 2018 [article](#), [Edward Stiglitz](#) examined state supreme court decisions from 1990 to 2010 in which the nondelegation doctrine was implicated. Based on a close reading of the 163 nondelegation cases, Stiglitz [found](#) that, in 22 of these, the state courts held that the challenged state statutes violated the nondelegation doctrine. So, the nondelegation doctrine is alive and well in the states.

This essay is not the place to examine the body of successful state nondelegation challenges, but a representative sample of a few of them, for a sense of the language used, includes the following: [Florida Dept. of State, Division of Elections v. Martin](#); [Board of Trustees of the Judicial Form Retirement System v. Attorney General](#); and [Guillou v. State of New Hampshire, Division of Motor Vehicles](#). In each instance, in one way or the other, the courts refer to the lack of sufficient guidance in the challenged law as an invitation for the exercise of arbitrary power or abuse of discretion by the administrative body.

No doubt a rejoinder to those who, like myself, would like to see the nondelegation doctrine revitalized at the federal level, is that line-drawing in nondelegation doctrine challenges is too difficult for the courts in assessing the work of another branch of government. As Justice Antonin Scalia put it in his dissenting opinion in [Mistretta v. United States](#), the nondelegation doctrine [is](#) “not an element readily enforceable by the courts.”

Without denying that nondelegation doctrine challenges involve difficult line-drawing, I do not subscribe to the view that, for this reason, the federal courts can shirk their responsibility to enforce important constitutional separation of powers principles. As I have [said](#) elsewhere, the Supreme Court could reinvigorate the nondelegation at the federal level by undertaking a more exacting review that “would engage in a ‘hard look’ to determine whether the agency has given enough guidance to apply any necessary factual findings to the statutory criteria.”

In his separate opinion in the Michigan case invalidating the EPGA, Chief Justice Pro Tempore [David Viviano](#) [put](#) the stakes this way, saying that when a court declares that “reasonableness is enough to make a delegation proper, the court is not simply letting the legislature recalibrate its institutional interests,” but rather it “is allowing the legislature to pass off responsibility for legislating, thereby endangering the liberties of the people.”

Justice Viviano has this right. The U.S. Supreme Court might usefully look to the Michigan Supreme Court and other state supreme courts for inspiration to revitalize the nondelegation doctrine that is central to preserving the U.S. Constitution’s separation of powers.

[Randolph J. May](#) is President of the Free State Foundation and former Chair of the American Bar Association’s Section of Administrative Law and Regulatory Practice. *The Nondelegation Doctrine is Alive and Well in the State* was published in [The Regulatory Review](#) on October 15, 2020.