THE JUDICIAL NONDELEGATION DOCTRINE

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"Nondelegation doctrine." Lawyers know it as the rule barring Congress from delegating power to other branches of government. The doctrine, however, has another side—one that applies to the judiciary. This aspect of the doctrine holds that courts may not delegate judicial power to other branches of government. Nonetheless, courts do precisely that. And they do it thousands of times each and every day. Judges empower non-judicial actors to do everything from making legal findings and rendering sentences to resolving custody disputes and setting probation conditions.

This Article is the first to explore the constitutionality of these kinds of delegations. To that end, this piece presents an original dataset of more than one thousand judicial nondelegation challenges. Reviewing these cases will illustrate the scope of judicial delegations, the problems with current case law, and the need for a clear rule to guide courts in delegating judicial power. This Article concludes by arguing that courts should look to the intelligible principle standard for such a guiding rule.

INTRODUCTION

Imagine you are a judge presiding over a criminal trial and you have just received word that a friend is ill. You likely see two options: (1) adjourn the trial and rush to your friend's bedside or (2) continue the trial and visit your friend after the day's session concludes. You may debate the merits of both options. How bad is the illness? How close is the friendship? How will adjourning the case impact the court's docket?

One early judge, however, saw a third option—a way in which he could satisfy his judicial and personal duties. The solution: appoint someone else to run the trial while he visits his friend.[1] If this solution strikes you as bizarre, that's because it is. The delegation is anathema to modern sensibilities. We know that a judge cannot just designate someone else to rule in his stead. But why? One might reply that the act is a constitutional violation.[2] But what is the violation? It cannot be the mere delegation of judicial power.

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1. *See* Ellerbe v. State, 22 So. 950, 950–52 (Miss. 1898) (involving a challenge to a judge who appointed a member of the bar to run a murder trial while the judge left the courthouse to visit a sick friend).

2. Such a person would be pleased to learn that the appellate court struck down the delegation as an impermissible abdication of judicial power. *See id.* at 952. That person, however, would be less heartened to learn that many judges have attempted to hand off their judicial power to leave the courtroom and even more distraught to find out that some judges have been successful in delegating such power. *See, e.g.*, Reid v. Mitchell, 93 Ind. 469, 474 (1884) (refusing to order a retrial for a case in which the judge appointed a member of the bar to preside as a judge, hear evidence, and receive the verdict while the judge was outside the courtroom); Meredeth v. People, 84 Ill. 479, 482 (1877) (finding a similar delegation unconstitutional and writing that "[i]t makes no difference the judge was in another part of the same building. It is no less error than if he had been in another county. Where the judge is engaged in trying causes, there is the court . . . .").

Judges authorize others to use judicial power all the time. They ask magistrates to rule on motions.[3] They order probation officers to set restitution payments.[4] They even empower private actors—such as therapists and counselors—to decide whether parents may visit their children.[5] These delegations happen each and every day, and they are all constitutional. So the mere delegation of judicial power cannot be what gives us pause. It must be something else. And that puzzle is the focus of this Article. What is the line between constitutional and unconstitutional delegations of judicial power? The answer lies in the Judicial Nondelegation Doctrine.

But before broaching that subject, it is worth situating the problem. Why are judges delegating away their constitutional powers? The reason is straightforward: Courts are overburdened. Too few judges are tasked with handling too many cases. In search of a solution, judges delegate their powers to other government officials.

For many litigants, the modern legal experience is defined by their interactions—not with judges, but—with these other government actors.[6] For instance, in bankruptcy proceedings, judges empower trustees to oversee hearings, make preliminary rulings on plan confirmations, and resolve aspects of the case without court intervention.[7] And when a dispute does require judicial examination, the trustee prepares a recommendation that the court weighs heavily.[8] Similarly, in family courts, judges leave visitation rights and related custody disputes up to the discretion of therapists and counselors.[9] And in criminal cases, judges give probation officers broad authority to set the terms of a defendant's probation.[10]

Although this system promotes efficiency, it is not without its costs. With each delegation, judges become further removed from disputes. And our system of adversarial litigation becomes supplanted by a system of bureaucratized negotiation. As such delegations grow more commonplace and

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3. *See* Ruggiero v. Pellicci, 987 A.2d 339, 342–43 (Conn. 2010) (holding valid a judicial delegation empowering a referee to rule on a motion to amend); Coy v. State, No. 03-09-00331-CR, 2010 WL 3190039, at *2 (Tex. App.—Austin Aug. 11, 2010, pet. ref'd, untimely filed) (upholding a delegation to a magistrate judge to rule on a motion).

4. *See* United States v. Sawyer, 521 F.3d 792, 796 (7th Cir. 2008) (upholding a delegation authorizing a probation officer to schedule the amount and timing of restitution payments).

5. *See* David F. v. Superior Ct. of S.F., No. A136713, 2012 WL 5935330, at *6 (Cal. Ct. App. Nov. 26, 2012) (upholding a delegation in which a court ordered that parent–child visitations shall resume after the therapist "determines it to be appropriate").

6. *See* Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMP. L. REV. 875, 877 (2015) (commenting on bankruptcy court delegations and positing that "individual debtors have passed through the bankruptcy system possibly believing that the Chapter 13 trustees are, in fact, the federal judges").

7. *See id.* at 875–76 (observing that "America's bankruptcy court system runs on delegation, all the way down" and noting that "some bankruptcy judges hand over their courtrooms to Chapter 13 trustees, who then supervise plan confirmation hearings in the courtroom without a judge present").

8. *See id.* at 879.

9. *See infra* Part I.C.2.

10. *See infra* Part I.C.5.

more expansive in scope, it is increasingly important to understand the extent to which courts may vest other officials with judicial power.

In its normal usage, "nondelegation doctrine" refers to the constitutional prohibition on congressional delegations of legislative power.[11] There are, however, two other nondelegation doctrines in the U.S. Constitution. These lesser-known doctrines prohibit the President from delegating executive powers to non-executive actors and forbid the Supreme Court and inferior courts from delegating judicial powers to non-judicial actors.[12] It is this latter prohibition that is the focus of this Article. Which powers are courts forbidden from delegating?

As with all constitutional questions, the inquiry begins with the text of the Constitution itself. Specifically, the Article III Vesting Clause states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[13] Although courts have opined frequently on this provision, much of that commentary has been shallow.

Take the Supreme Court's declaration that "[t]he inexorable command of [Article III, § 1] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."[14] Or the Seventh Circuit's statement that "Article III of the Constitution vests the judicial power of the United States in judges possessing life tenure and undiminishable salaries . . . ."[15] Or the Eleventh Circuit's assertion that "delegating a judicial function violates Article III of the U.S. Constitution."[16]

These quotes sound forceful and commanding, but they provide little practical guidance.[17] What precisely is judicial power? And when has it been delegated away? Case law, unfortunately, provides few clarifying principles. The standard template in judicial nondelegation opinions is to offer high-level maxims—such as those quoted above—and then jump directly to deciding whether the challenged delegation violates Article III. Just a declaration that judges may not delegate judicial power and then a conclusory ruling that some

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11. *See, e.g.*, Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 380 (2017); Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 621 (2017).

12. Presidential Succession and Delegation in Case of Disability, 5 Op. O.L.C. 91, 93–98 (1981) (discussing the nondelegation doctrine for the executive branch).

13. U.S. CONST. art. III, § 1.

14. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58–59 (1982) (plurality opinion), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. §§ 1334(a), (b) (2005).

15. TPO, Inc. v. McMillen, 460 F.2d 348, 353 (7th Cir. 1972).

16. United States v. Faulk, 181 F. App'x 882, 883 (11th Cir. 2006); *see also* United States v. Skyles, 165 F. App'x 807, 809 (11th Cir. 2006) ("delegating a judicial function is a violation of Article III of the U.S. Constitution").

17. *See also* N.L.R.B. v. Detroit Newspapers, 185 F.3d 602, 606 (6th Cir. 2009) ("The district court does not have the discretion to delegate an Article III responsibility to an Article II judge.").

delegation is or is not constitutional. The intermediate step is missing—the policy and theory that can animate the Article III Vesting Clause and help courts reach consistent, defensible outcomes.

That is where this Article comes in. It is the first to tackle the judicial nondelegation doctrine as a subject in its own right. And the first to offer data on judicial delegations of power. But the Article's contribution is not limited to a descriptive analysis. It also seeks to provide a guiding principle that can illuminate existing judicial nondelegation cases and provide a template for courts to analyze future challenges. Specifically, the Article sets forth a range-bound test modeled on the legislative "intelligible principle" standard.

But before tackling those details, I want to say a brief word on why the judicial nondelegation doctrine is worth investigating. There are two main reasons. First, in its implementation, the judicial nondelegation doctrine does not resemble its congressional and executive counterparts. The most striking difference is that courts do not engage in an intelligible principle analysis but, rather, rely on an assortment of vague tests and principles to assess the constitutionality of judicial delegations.[18] This divergence is especially noteworthy given that all three Vesting Clauses from which the doctrines are derived share a parallel structure.[19]

A second reason this topic merits exploration is the frequency with which judicial delegations occur. They far exceed the number of legislative delegations. Given that Congress passes fewer than two hundred bills a year, its opportunities to violate the nondelegation doctrine are fairly limited.[20] The federal judiciary, by contrast, makes thousands of delegations each day.[21] Consider that every time a judge confers discretion on a bankruptcy trustee or permits a probation officer to determine how a sentence will be implemented, that judge has delegated power and opened the door to a potential nondelegation challenge.[22]

Having taken this brief digression, I now circle back to the central issue: What is the judicial nondelegation doctrine? This Article seeks to answer that question. To that end, Part I provides an overview of judicial nondelegation challenges, reporting on an original dataset of more than one thousand cases. Next, Part II examines efforts by courts to constrain judicial delegations of

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18. *See infra* Part II.

19. *See* U.S. CONST., art. I, § 1 (setting forth the legislative nondelegation doctrine); U.S. CONST., art. II, § 1, cl. 1 (setting forth the executive nondelegation doctrine); U.S. CONST., art. III, § 1 (setting forth the judicial nondelegation doctrine).

20. *See Statistics and Historical Comparison*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics [https://perma.cc/9JNK-X5K2] (providing figures of enacted legislation for the past fifty years).

21. Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 998 (2018) (discussing the numerous procedural delegations that the judiciary makes daily).

22. *See Occupational Employment and Wage Statistics*, U.S. BUREAU LABOR STATS. (May 2022), https://www.bls.gov/oes/current/oes211092.htm (estimating that there are more than ninety thousand probation officers in the United States).

power and highlights their virtues and shortcomings. Finally, Part III argues that courts should look to the legislative nondelegation doctrine and its associated case law to construct a test that limits judicial delegations.

I. AN ANALYSIS OF JUDICIAL DELEGATIONS

The analysis in this Part draws on an original dataset of 1,355 federal and state cases decided between 1789 and 2021.[23] The search parameters used to construct this dataset were designed to be comprehensive, capturing every case involving a nondelegation doctrine challenge to a judicial delegation of power.[24]

Notably, only cases that reached a final judgment on the merits of the nondelegation challenge are included in this dataset. Cases that were resolved on grounds of ripeness[25] or mootness[26] are excluded. Likewise, all cases are excluded in which the court ruled that the claimant had waived the nondelegation challenge,[27] was estopped from asserting the claim,[28] or had otherwise forfeited the right to bring the case.[29] These exclusions ensure that findings from the dataset reflect the resolution of judicial nondelegation challenges on the merits and are not distorted by resolutions on other grounds.

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23. In order to identify judicial nondelegation cases, I conducted the following search on Westlaw for all state and federal cases between 1789 and 2021: TO("delegation of powers by judiciary") or (delegat! /2 judici! /1 (power! or authority)) or (delegat! /2 court! /1 (power! or authority)). I then proceeded to examine every search result to see if the case involved a nondelegation challenge. If it did not, I excluded the case from the dataset. If it did, I coded the case along a variety of dimensions, as discussed throughout this Part.

24. The data collection methodology builds upon two articles I authored with Keith Whittington on legislative delegations of power. For those pieces, we developed a search protocol to capture cases involving legislative delegations of power between 1789 and 2015. *See* Whittington & Iuliano, *supra* note 11, at 418; Iuliano & Whittington, *supra* note 11, at 635–39.

25. *See, e.g.*, United States v. Rasheed, 981 F.3d 187, 200 (2d. Cir. 2020) ("declin[ing] to consider [defendant's nondelegation] challenge to [a] condition of supervised release" because defendant's "claim is not yet ripe for review"); United States v. Frye, 826 F. App'x 19, 25 (2d Cir. 2020) (finding that a defendant's nondelegation challenge to a third-party risk notification order was not ripe for review); United States v. Burdick, 789 F. App'x 886, 888 (2d. Cir. 2019) (holding that a judicial nondelegation challenge to an order granting a probation officer authority to oversee defendant's polygraph testing was not ripe for review).

26. *See, e.g.*, *In re* Samuel A., No. B299022, 2020 WL 773681, at *3 (Cal. Ct. App. Feb. 18, 2020) (finding that a nondelegation challenge to an order allowing the Department of Children and Family Services to determine the location of parental visitation was moot); *In re* Ruben P., No. A120031, 2008 WL 2057832, at *1 (Cal. Ct. App. May 14, 2008) (declining to consider whether an order granting "the probation officer the authority to place the minor in Juvenile Hall for up to three weekends . . . was an improper delegation of judicial authority . . . [because] the issues raised in the minor's appeal are moot").

27. *See, e.g.*, United States v. Ortiz, 784 F. App'x 285, 286–87 (5th Cir. 2019) (finding that the defendant's signed appellate waiver provision in his plea agreement barred him from asserting a nondelegation challenge); State v. Bahl 159 P.3d 416, 421 (Wash. Ct. App. 2007) (holding that the defendant waived his right to bring a nondelegation challenge on appeal), *rev'd in part*, 193 P.3d 678 (Wash. 2008); Leach v. State, 170 S.W.3d 669, 675–76 (Tex. App.—Fort Worth 2005, pet. ref'd) (finding that the defendant waived his right to challenge an order on nondelegation grounds because he failed to file a timely appeal).

28. *See, e.g.*, Tye v. Cnty. of Orange, No. SA CV 18-0544 (FFMx), 2018 WL 6136786, at *2–4 (C.D. Cal. Sept. 7, 2018) (holding that the defendant was collaterally estopped from litigating the constitutionality of a delegation because he had already litigated the issue in state court).

29. *See, e.g.*, People v. Cardenas, No. D072269, 2020 WL 913353, at *9 (Cal. Ct. App. Feb. 26, 2020) (holding that the defendant forfeited his right to appeal an order on nondelegation grounds).

As with all data collection efforts, the first step involves defining the scope of the relevant data. In this case, that step requires answering the question, "What is a judicial delegation of power?" At first, the answer seems clear: a judicial delegation arises when one entity delegates judicial power to another entity.[30] But, in short order, this simple definition reveals itself as incomplete. For instance, does it matter which entity has performed the delegation? If Congress passes a statute granting a bankruptcy court authority to conduct jury trials, is that a judicial delegation?[31] Moreover, which powers are within the scope of a judicial delegation? If, for example, a judge fixes alimony payments to the Consumer Price Index, has a judicial power been delegated?[32] And lastly, which recipients of delegations are included within the scope of the definition? All entities? Only entities outside the judiciary?[33] What if the delegation is to another judge who is already vested with judicial power?[34]

With these questions in mind, I propose the following definition: a judicial delegation is any action by which an entity that is constitutionally vested with judicial power delegates some subset of that power to another entity that is not constitutionally vested with that power. Three elements form the core of this definition of judicial delegation.

First, the actor who delegates power must be constitutionally vested with the power being delegated.[35] This criterion has the function of limiting judicial nondelegation cases to those in which the delegating entity has authority to exercise the power itself. As a stylized example, suppose the President attempts to delegate authority to sentence convicted felons to the Department of Justice, and the delegation is challenged. Under the above definition, the resulting case would not be a dispute over a judicial delegation of power. The case is excluded because the President's inability to delegate sentencing authority is not a function of the nondelegation doctrine. Instead, the President is constrained by the fact that the power to sentence felons is not one that the President, himself, may constitutionally exercise. In other words, the President's lack of authority to perform an action precludes him from delegating authority to perform that

30. *See, e.g.*, *Delegation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

31. *See* Citibank, N.A. v. Park-Kenilworth Indus., Inc., 109 B.R. 321, 329 (N.D. Ill. 1989) (holding that a congressional statute authorizing bankruptcy courts to conduct jury trials was not an unconstitutional delegation of power).

32. *See* Fitts v. Fitts, 202 S.E.2d 414, 415 (Ga. 1973) (holding that fixing alimony payments to the Consumer Price Index is an unconstitutional delegation of power to the Bureau of Labor Statistics), *overruled by* Hayes v. Hayes, 283 S.E.2d 875 (Ga. 1981).

33. *See In re* Kamil, 242 A.3d 801, 812–13 (N.H. 2020) (finding that permitting a therapist to determine parents' visitation rights amounted to an unconstitutional delegation of power).

34. *See* N.L.R.B. v. Detroit Newspapers, 185 F.3d 602, 605-06 (6th Cir. 1999) (finding unconstitutional an order granting an administrative law judge power to determine whether certain documents are protected by attorney–client privilege).

35. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

action to someone else. Insofar as a case can be resolved by that principle, it is not a judicial delegation.

For a real-world example, suppose Congress passes a statute that permits bankruptcy court judges to impose criminal contempt sanctions.[36] Although this dispute centers on the delegation of a judicial power,[37] there has been no judicial delegation. Because Congress, itself, lacks the power that it has attempted to delegate to bankruptcy courts,[38] resolution of the case does not, in any way, implicate the judicial nondelegation doctrine.

The second element of a judicial delegation is that the delegated power must be a judicial power. By this, I mean that the power is inherently judicial in nature—not a power vested in the legislative or executive branches. This element complements the first. Whereas the first cordoned off cases where non-judicial actors attempted to delegate judicial powers, this element sets aside cases where judicial actors attempt to delegate non-judicial power.

For example, the power to amend court procedural rules is an inherently legislative power.[39] However, through the Rules Enabling Act, Congress delegated this power to the Supreme Court.[40] If the Supreme Court were to redelegate that power to another entity—perhaps a panel of court of appeals judges—that would not be a judicial delegation under this Article's definition. This claim should not be understood to mean that the delegation would be appropriate and valid, but rather only to mean that no judicial power has been delegated.

The third element of a judicial delegation requires that the delegee be an individual who is not already constitutionally vested with the power being

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36. *See In re* Indus. Tool Distribs., Inc., 55 B.R. 746, 751 (N.D. Ga. 1985) (holding "that the delegation of contempt powers to bankruptcy judges in the [Bankruptcy Amendments and Federal Judgeship Act of 1984] was unconstitutional and that the contempt order on appeal must accordingly be vacated").

37. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *282 (describing the contempt power "as [ancient] as the laws themselves"); Armstrong v. Guccione, 470 F.3d 89, 103–04 (2d. Cir. 2006) ("When Congress established the lower federal courts and vested them with the 'judicial Power of the United States' . . . it was not operating in a vacuum. The 'judicial Power' consisted of all the inherent powers of the courts . . . and naturally included the power to enforce their orders through contempt."). *But see* Green v. United States, 356 U.S. 165, 193 (1958) (Black, J., dissenting) (describing contempt orders as "an anomaly in the law"), *overruled by* Bloom v. State of Ill., 391 U.S. 194 (1968); Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L.Q. 1, 2 (claiming that the contempt power is "violative of basic philosophical approaches to the relations between government bodies and people").

38. Congress's own power of contempt is quite distinct from the power it attempted to delegate in this case. For a discussion of the differences between the judicial and congressional contempt powers, see State *ex rel.* Groppi v. Leslie, 171 N.W.2d 192, 198 (Wis. 1969) ("Under the judicial contempt power, a contemnor is imprisoned . . . to punish him for having completed a contemptuous act in the presence of the court . . . . In contrast, the legislative power of contempt . . . is not to punish for a past deed but to prevent threatened conduct which interferes with the proper function of the legislative body.").

39. *See* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1681–82 (2004) ("The lawmaking powers of Congress . . . enable Congress to make . . . law throughout the broad field of procedure.").

40. Rules Enabling Act, 28 U.S.C. § 2072 (1934) (empowering the Supreme Court to "prescribe general rules of practice and procedure").

delegated. For example, if a judge were to delegate the power to hear a given case to another judge of equivalent rank,[41] that would not meet the definition of a judicial delegation. Since both judges had the power to act prior to the delegation, such a delegation would not constitute a transfer of judicial power. Again, this claim does not mean that the delegation is appropriate but merely that its invalidity does not hinge on the judicial nondelegation doctrine.

A. Overview of Cases

The very first judicial nondelegation case arose in 1791 in the matter of *Schooley v. Thorne*.[42] Here, two parties agreed to resolve their dispute via arbitration, and the court entered an order referring the case to an arbitrator.[43] The arbitrator ruled in favor of Thorne, and the court entered judgment affirming that decision.[44] Schooley sued to overturn the decision, arguing that, by entering an order in accordance with the arbitrator's decision, the court had unconstitutionally delegated judicial power to the arbitrator.[45] On appeal, the New Jersey Supreme Court dismissed this argument, holding that the court had not unconstitutionally delegated power but rather had agreed to follow a decision-making procedure to which both parties had consented.[46] If not presaging the ubiquity of arbitration today, this case, at the very least, was a necessary condition for its expansion.

Notwithstanding its impact on arbitration, *Schooley* failed to open the floodgates for judicial nondelegation challenges. It would be twenty-five years before another case was filed,[47] and fifty years before a court would uphold a judicial nondelegation challenge.[48] All told, the first half century following the founding of the United States was an era of little import for the judicial nondelegation doctrine, with the period averaging less than one challenge every fifteen years.

To the extent there was a turning point, it would be the 1840 case of *Emerson v. Clark*.[49] There, the Supreme Court of Illinois ruled that a judge could

41. For an example of such a case, see Durden v. People, 61 N.E. 317, 319 (Ill. 1901) ("Where a cause has been submitted to a judge . . . he cannot delegate to another judge the consideration and determination of that case, even though the latter possesses the same or equal judicial power.").

42. Schooley v. Thorne, 1 N.J.L. 71 (1791).

43. *Id.* at 71–72.

44. *Id.* at 71.

45. *Id.*

46. *Id.* at 72–73 ("The justice has not delegated his judicial authority. The parties themselves withdraw from him the investigation of the facts; but the judgment is his own, and pronounced upon an award to which they must be considered as consenting.").

47. *See* Bennett v. Hall, 1 Conn. 417, 418–19 (1815) (upholding as valid a delegation from the county court to the court clerk to oversee the collection of child support payments).

48. *See* Emerson v. Clark, 3 Ill. 489, 491 (1840).

49. *Id.*

not grant a clerk power to sign off on a bill of exceptions.[50] As the justices explained, "It was not in the power of the [c]ourt to delegate its authority. It is a judicial act."[51] Following *Emerson*, the next five judicial nondelegation challenges were successful.

In *Butler v. Foster*, the Supreme Court of Alabama invalidated a delegation whereby the circuit court judge authorized the clerk to determine whether a defendant would be eligible for bail.[52] In *Pace v. State*, the Mississippi Supreme Court invalidated a similar delegation to a sheriff.[53] In *Codwise v. Taylor*, the Supreme Court of Tennessee held that a judge could not grant a clerk authority to determine how much the defendant must pay the claimant.[54] As the court wrote, "[t]o sanction such a practice would be to admit the delegation of judicial authority by the [c]ourt to the [c]lerk, which, in a matter of this nature, is not allowable."[55]

In *Weeks v. Boynton*, the Vermont Supreme Court ruled that a probate court could not delegate to a bank cashier authority to determine whether to accept and execute a mortgage bond.[56] And lastly, in *Wight v. Wallbaum*, the Supreme Court of Illinois held invalid a judicial delegation authorizing the sheriff to open and adjourn court proceedings in the judge's absence.[57]

Six different cases in five different state supreme courts, all ruling a judicial delegation unconstitutional. These cases mark the beginning of a particularly successful era for the judicial nondelegation doctrine. From the decision in *Emerson* through 1900, courts heard twenty-eight judicial nondelegation cases and invalidated delegations in eighteen. That distribution yields a 63% success rate—an extraordinary rate for any type of constitutional challenge. Although the overall success rate for all judicial nondelegation cases in the dataset sits lower at 41%, it is still quite high relative to other constitutional challenges.[58]

Figure 1 depicts judicial nondelegation trends from the Founding through 2021. As the diagram shows, the number of cases surged in the 1960s and has

50. *See id.* at 490.

51. *Id.*

52. Butler v. Foster, 14 Ala. 323, 325 (1848) ("The laws of this State do not permit the circuit judges to clothe the clerks of the circuit courts with authority to admit to bail . . . for a judicial officer cannot delegate to another the powers and authority by law intrusted to him.").

53. Pace v. State, 25 Miss. 54, 54–55 (1852).

54. Codwise v. Taylor, 36 Tenn. 346, 351 (1857).

55. *Id.*

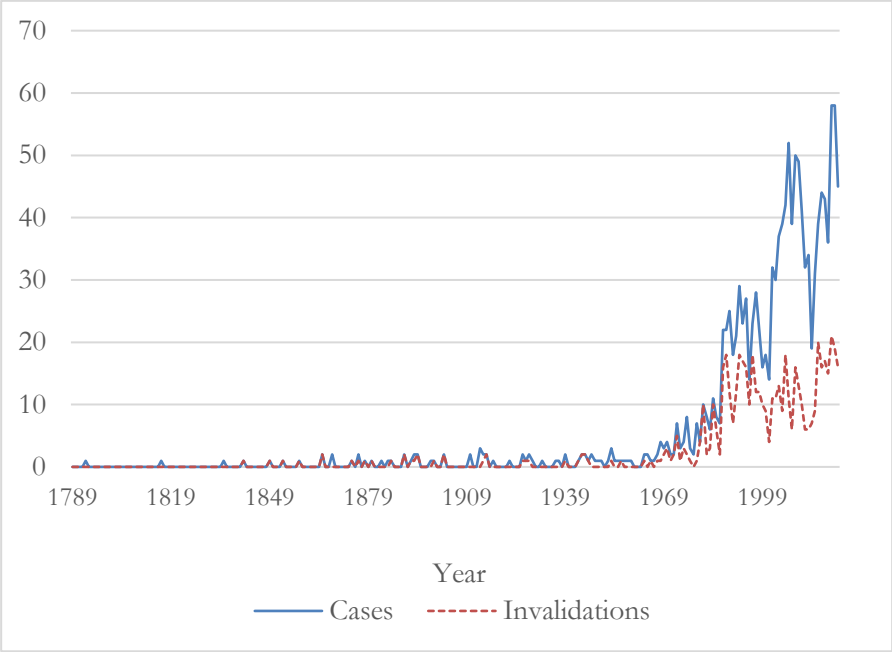
56. Weeks v. Boynton, 37 Vt. 297, 301 (1864) (explaining the judge "is not authorized to delegate any part of his power or discretion to any other person").

57. Wight v. Wallbaum, 39 Ill. 554, 561 (1864) ("The judge had no power to authorize the ministerial officers of the court to exercise judicial powers, even in opening and adjourning the court.").

58. *See, e.g.*, Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms after* Heller, 67 DUKE L.J. 1433, 1472 (2018) (finding a success rate of 9% for Second Amendment claims); Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 821 (finding a success rate of 27% for First Amendment cases in the U.S. courts of appeals).

continued its ascent through the present day. Notably, this trend diverges from the trend seen in legislative nondelegation challenges.[59]

FIGURE 1: JUDICIAL NONDELEGATION CASES AND INVALIDATIONS, 1789–2021



In the following sections, I look deeper into the types of judicial nondelegation challenges that are successful, with a particular focus on the types of entities to which judges delegate powers and the types of powers that are delegated. But first, it is worth examining how courts ground their understanding of the judicial nondelegation doctrine.

Analysis of the opinions reveals two key sources of support that courts rely upon: precedent[60] and constitutional text.[61] These are familiar categories that

59. *See* Iuliano & Whittington, *supra* note 11, at 633 (showing a marked decline in legislative nondelegation challenges over the previous forty years).

60. *Precedent*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining precedent as a "decided case that furnishes a basis for determining later cases involving similar facts or issues").

61. For a federal example, see United States v. Bear, 769 F.3d 1221, 1230 (10th Cir. 2014) (holding that "Article III of the United States Constitution confers the authority to impose punishment on the judiciary, and the judiciary may not delegate that authority to a nonjudicial officer"); for a state example, see *In re* S.H., 111 Cal. App. 4th 310, 318 n.11 (Ct. App. 2003) ("Article III, section 3, of the California Constitution provides, 'The powers of state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.'").

form the basis of judicial opinions in a wide variety of contexts,[62] so it should come as no surprise that they are prominent in judicial nondelegation cases. As to precedent, a full 68% of opinions cited prior court rulings to illuminate the contours of the judicial nondelegation doctrine.[63] This source of support dominated court opinions.

Constitutional text, although still important, was less frequently cited—appearing in just 11% of opinions.[64] Notably, almost every case that cited constitutional text also cited judicial precedent. The reverse, though, did not hold, with more than half of cases citing judicial precedent but making no reference to constitutional text. Perhaps most interestingly, in 32% of challenges, judges dispensed with the case without citing to either precedent or constitutional text. In this last block of cases, courts were substantially more likely to uphold delegations than to invalidate them.

This correlation between citation frequency and invalidation holds at the state and federal levels. In both domains, cases finding judicial delegations unconstitutional were more likely to cite precedent and constitutional text. And federal cases invalidating delegations were particularly likely to invoke the Constitution. Table 1 goes into greater depth with respect to this information, showing the rate at which state and federal cases cited precedent or constitutional text and contrasting the rates in cases upholding delegations against cases invalidating delegations.

62. *See* MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 147–48 (2008) (commenting on the ubiquity of precedent and observing that "it is practically impossible to find any modern Court decision that fails to cite at least some precedents in support").

63. *See, e.g.*, United States v. Stephens, 821 F. App'x 905, 906 (9th Cir. 2020) (citing a Supreme Court case and a Ninth Circuit case for the proposition that "[u]nder the Constitution, the power to punish is exclusively judicial"); United States v. Villafane-Lozada, 973 F.3d 147, 152 (2d Cir. 2020) (observing that "a district court may not delegate 'authority [that] would make a defendant's liberty itself contingent on a probation officer's exercise of discretion'" (quoting United States v. Degroate, 940 F.3d 167, 177 (2d Cir. 2019))). For an in-depth examination of the use of precedent in judicial nondelegation cases, see *infra* Part II.A and II.B.

64. *See, e.g.*, *Bear*, 769 F.3d at 1230 ("Article III of the United States Constitution confers the authority to impose punishment on the judiciary, and the judiciary may not delegate that authority to a nonjudicial officer."); United States v. Byrd, 808 F. App'x 161, 164–65 (4th Cir. 2020) (discussing the contours of Article III's prohibition on the delegation of judicial powers); United States v. Garcia, No. CR 19-2846, 2020 WL 2219437, at *14–16 (D.N.M. May 7, 2020) (same).

TABLE 1: PERCENTAGE OF CONSTITUTIONAL AND UNCONSTITUTIONAL DELEGATIONS FOR WHICH THE FEDERAL AND STATE COURTS CITED SUPPORT

	Precedent		**Constitution**	
	Con.	Uncon.	Con.	Uncon.
Federal	68%	79%	19%	25%
State	60%	72%	5%	8%

B. Objects of Delegations

Objects of delegation are the individuals or entities to whom the judiciary has delegated power.[65] Although the specific delegees vary broadly, they can be grouped into five categories: court officers, the executive branch, other judges, private entities, and probation officers. Table 2 describes these objects of delegation, detailing both the frequency of these cases and the percentage of challenges that were successful.

TABLE 2: OBJECTS OF DELEGATION

Object	**Cases**	**Unconstitutional**
Court Officer	13%	40%
Executive Branch	15%	37%
Judge	4%	39%
Private Entity	30%	40%
Probation	38%	45%

The data reveal that the constitutionality or unconstitutionality of a delegation turns far more on the power being delegated than on which individual is the recipient of the delegation. Accordingly, this Subpart will be comparatively brief. Nonetheless, it is still useful to touch on each object of delegation and provide some case examples.

Let us begin with court officers. Delegations to this category accounted for 13% of all cases. Understandably, many judges were enthusiastic about

65. *See* Whittington & Iuliano, *supra* note 11, at 420–21 (discussing objects of delegation in the context of the legislative nondelegation doctrine).

delegating judicial tasks to bailiffs,[66] law clerks,[67] court reporters,[68] referees,[69] special masters,[70] and other administrative personnel of the judiciary.[71] Such delegations lighten the judge's load while still keeping the task close at hand and easy to oversee. Most (60%) of these delegations were upheld due to their ministerial nature.[72]

The second category is the executive branch. Delegations to this group accounted for fifteen percent of all cases, and challenges were successful 37%

66. *See* Parham v. State, 250 So. 2d 613, 617 (Ala. Crim. App. 1971) (holding unconstitutional a delegation that tasked the bailiff with discharging the jury and declaring a mistrial if the jury was unable to render a verdict by 10:00 p.m.: "As stated by Chancellor Kent, 'The general rule is that judicial offices must be exercised in person, and that a judge cannot delegate his authority to another. I do not know of any exception to this rule with us.'" (quoting 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 457 (O.W. Holmes ed., 12th ed. 1896))).

67. *See In re* Jud. Misconduct, 752 F.3d 1204, 1205 (9th Cir. 2014) (upholding a delegation granting law clerks authority to identify cases with jurisdictional defects and to file orders to show cause); People v. Ramos, 877 N.Y.S.2d 177, 179 (App. Div. 2009) (upholding an order tasking a law clerk with informing a defendant of his right to be present at trial); People v. Galdamez, 652 N.Y.S.2d 65, 66 (App. Div. 1996) (holding unconstitutional a delegation that tasked a clerk with clarifying an unlawful imprisonment instruction for the jury on the grounds that "[t]he court may not delegate to a nonjudicial staff member its authority to instruct the jury on matters affecting their deliberations").

68. *See* People v. Smart, 954 N.Y.S.2d 232, 324 (App. Div. 2012) (upholding an order tasking a court reporter with responding to jury questions by reading back testimony); Culliner v. Nash, 76 Ill. 515, 515–16 (1875) (striking down a delegation authorizing a court reporter to determine which evidence shall be incorporated into a bill of exceptions).

69. *See* Visser v. Visser, 829 N.W.2d 242, 246 (Mich. Ct. App. 2012) (upholding a delegation to a referee to conduct evidentiary hearings and recommend findings of fact and observing that "[o]ur Supreme Court has held that judicial power is not improperly delegated as long as the ultimate decision-making responsibility remains with a judge"), *vacated in part*, 836 N.W.2d 693 (Mich. 2013); State *ex rel.* Universal Processing Serv. of Wis., LLC v. Circuit Court of Milwaukee Cnty., 892 N.W.2d 267, 287 (Wis. 2017) (striking down a delegation to a referee to decide all motions subject to review by the judge under the standard of "erroneous exercise of discretion").

70. *See In re* U.S. Dep't of Def., 848 F.2d 232, 233 (D.C. Cir. 1988) (upholding a delegation to a special master to compile a representative sample of FOIA requests totaling 14,000 pages for review by the judge); Burlington N. R.R. Co. v. Dep't of Revenue of Wash. 934 F.2d 1064, 1072 (9th Cir. 1991) (The court held unconstitutional an order that gave a special master "all powers and privileges normally exercised by a United States District Court Judge, in presiding over litigation" and made the decisions of the special master final unless appealed within fifteen days. In ruling, the court observed that "the district court's 'rubber stamp' of the master's order is an inexcusable abdication of judicial responsibility and a violation of article III of the Constitution.").

71. *See* People v. Wheelings, 28 N.Y.S.3d 435, 436–37 (App. Div. 2016) (upholding a delegation that tasked court personnel with discussing a juror's continued availability to deliberate); Harris v. Commonwealth, 878 S.W.2d 801, 802 (Ky. Ct. App. 1994) (holding improper a judicial delegation that authorized a court administrator to excuse individuals from jury duty).

72. *See, e.g.*, People v. Miller, 869 N.Y.S.2d 150, 151 (App. Div. 2008) (upholding a judicial order tasking a clerk to inform jurors to begin deliberations on the grounds that such an act was merely a ministerial communication); People v. Richardson, 841 N.Y.S.2d 221, 221 (App. Div. 2007) (upholding a delegation tasking a court officer with informing the jury that requests "first for a dictionary and second for a definition of the word 'emaciated,' . . . could not be granted" on the grounds that "[t]he officer's communication with the jury was purely ministerial").

of the time. Examples include delegations to administrative agencies,[73] district attorneys,[74] municipalities,[75] and law enforcement.[76]

At just 4% of cases, the judge category is the smallest. Nevertheless, the invalidation rate of 39% puts it squarely in line with the other categories. Objects of delegation in this category include various non-Article III judges, such as administrative law judges,[77] bankruptcy judges,[78] magistrate judges,[79] justices of the peace,[80] and juvenile court judges.[81]

Delegations in the private entity category account for 30% of cases. This high figure evinces a strong judicial willingness to delegate power beyond the scope of government. Objects of delegation in this category are the most varied

73. *See, e.g.*, *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 176 (4th Cir. 2019) (striking down a delegation that empowered an agency to determine whether attorney–client privilege or the work-product doctrine applied and citing the maxim that "a court is not entitled to delegate its judicial power and related functions to the executive branch"); United States v. May, 568 F.3d 597, 608 (6th Cir. 2009) (finding valid a delegation to the Internal Revenue Service to schedule the amount and timing of restitution payments owed by a defendant).

74. *See, e.g.*, Breedlove v. State, 445 P.3d 1101, 1111 (Kan. 2019) (upholding a court's adoption of a district attorney's recommended findings of fact and conclusions of law); People v. Brown, 961 N.Y.S.2d 293, 295 (App. Div. 2013) (invalidating a delegation that tasked an assistant district attorney with instructing the jury on matters of law during closing arguments because, by making such a delegation, "the court improperly surrendered its nondelegable judicial responsibility").

75. *See, e.g.*, City of Napoleon v. Kuhn, 2015 ND 75, ¶ 22, 860 N.W.2d 460, 465–66 (reversing a court order on the grounds that the "sentence in this case, ordering [defendant] to remove from the dump or relocate within the dump unspecified rubbish 'to the City's satisfaction,' is vague and ambiguous and may represent an improper delegation of [the court's] sentencing authority").

76. *See, e.g.*, Brock v. Eubanks, 288 S.W.3d 272, 274–78 (Ark. Ct. App. 2008) (striking down a delegation that authorized police officers to determine whether a parent was in violation of a restraining order); Commonwealth v. Millen, 194 N.E. 463, 480 (Mass. 1935) (upholding a delegation that authorized a sheriff to determine whether a defendant required shackles in the courtroom).

77. *See, e.g.*, N.L.R.B. v. Detroit Newspapers, 185 F.3d 602, 604–06 (6th Cir. 2009) (holding unconstitutional a delegation authorizing an administrative law judge to determine whether certain documents were privileged and observing that "[t]he district court does not have the discretion to delegate an Article III responsibility to an Article II judge").

78. *See, e.g.*, Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 670–71, 680–83 (2015) (upholding a delegation authorizing bankruptcy courts to decide *Stern* claims); *In re* Matlock Trailer Corp., 27 B.R. 318, 327–29 (M.D. Tenn. 1983) (striking down a delegation automatically referring all bankruptcy proceedings to the bankruptcy court).

79. *See, e.g.*, United States v. Underwood, 597 F.3d 661, 671 (5th Cir. 2010) (upholding a delegation authorizing a magistrate judge to conduct plea hearings); United States v. Johnston, 258 F.3d 361, 366–72 (5th Cir. 2001) (finding unconstitutional a delegation empowering a magistrate judge to decide a motion to vacate, set aside, or correct sentence).

80. *See, e.g.*, People v. De Meaux, 160 N.W. 634, 636–37 (Mich. 1916) (upholding a delegation from one justice of the peace to a different justice of the peace elected by citizens of a different municipality).

81. *See, e.g.*, *In re* Thornton, 422 P.2d 199, 200–01 (Utah 1967) (striking down a delegation from the district court to a juvenile court to determine the issue of custody).

and include everything from bar associations,[82] banks,[83] and juries,[84] to parents,[85] children,[86] and therapists.[87] Given that the judicial power is not being transferred to the legislative or executive branches but rather outside of government entirely, one might expect nondelegation challenges to be more successful. That expectation, though, would not be met. With an invalidation rate of 40%, the private entity category sits in the middle of the pack.

The fifth and final category is probation—the least varied of the groups. Probation delegations run to probation officers[88] and related entities such as the Bureau of Prisons.[89] A full 45%—the highest of any category—of probation

82. *See, e.g.*, Potter v. New Jersey Sup. Ct., 403 F. Supp. 1036, 1039–40 (D.N.J. 1975) (holding a rule requiring attorneys to have graduated from a law school accredited by the American Bar Association (ABA) did not unconstitutionally delegate judicial power to the ABA); Bd. of Comm'rs of Alabama State Bar v. State *ex rel.* Baxley, 324 So. 2d 256, 258–59 (Ala. 1975) (upholding delegation to the state bar association to set requirements for admission to the bar).

83. *See, e.g.*, *In re* Gonzalez, 993 S.W.2d 147, 161 (Tex. App.—San Antonio 1999, no pet.) (upholding a delegation to a bank to oversee and administer a child-support trust); Weeks v. Boynton, 37 Vt. 297, 301–03 (1864) (striking down a delegation authorizing a bank cashier to determine whether to approve a mortgage bond and execute a sale on the grounds that a judge "is not authorized to delegate any part of his power or discretion to any other person").

84. *See, e.g.*, United States v. Zipkin, 729 F.2d 384, 387 (6th Cir. 1984) (striking down a delegation authorizing the jury to resolve a question of law and observing that "[i]t is the function of the trial judge to determine the law of the case"); People v. Artwell, 736 N.Y.S.2d 591, 591 (App. Div. 2002) (holding that it is not an unconstitutional delegation of judicial power for the judge to ask a juror to remind other jurors that all inquiries must be in writing).

85. *See, e.g.*, Int. of K.E.S. & L.R.S., No. 11-20-00167-CV, 2021 WL 219668, at *2 (Tex. App.—Eastland Jan. 22, 2021, no pet.) (upholding a delegation empowering a custodial father to require the children's mother to take a drug test before visiting the children); Acosta v. Melendez, 118 N.Y.S.3d 730, 733 (App. Div. 2020) (holding unconstitutional a delegation to a child's mother to determine the visitation rights of the child's father).

86. *See, e.g.*, Zilkha v. Zilkha, 183 A.3d 64, 79–81 (Conn. App. Ct. 2018) (upholding an order setting no minimum visitation rights but authorizing children to allow visitation at their discretion); *In re* Julie M., 81 Cal. Rptr. 2d 354, 358 (Ct. App. 1999) ("The juvenile court did abuse its discretion in giving the children absolute discretion to decide whether [their mother] could visit with them. The order essentially delegated judicial power to the children—an abdication of governmental responsibility . . . .").

87. *See, e.g.*, United States v. Wagner, 872 F.3d 535, 543 (7th Cir. 2017) (holding that authorizing a therapist to determine whether a defendant may view pornography "is an impermissible delegation of the district court's Article III authority to determine the nature of [defendant's] punishment"); United States v. Morin, 832 F.3d 513, 514–19 (5th Cir. 2016) (striking down a delegation authorizing a therapist to set "lifestyle restrictions" on a probationer); United States v. Bender, 566 F.3d 748, 752 (8th Cir. 2009) (upholding a delegation authorizing a therapist to set "lifestyle restrictions" on a probationer).

88. *See, e.g.*, United States v. Janis, 995 F.3d 647, 652–53 (8th Cir. 2021) (upholding a delegation authorizing a probation officer to decide whether a defendant must notify others that he poses a risk to them); United States v. Metz, 610 F. App'x 206, 206–07 (3d Cir. 2015) (upholding a delegation authorizing a probation officer to determine whether a defendant who had conspired to defraud the Internal Revenue Service may obtain employment in the financial services industry); United States v. Kieffer, 257 F. App'x 378, 381 (2d Cir. 2007) (striking a delegation authorizing a probation officer to determine whether a defendant convicted of possessing child pornography could be in areas where children frequent).

89. *See, e.g.*, United States v. Springs, 835 F. App'x 986, 989–90 (11th Cir. 2020) (upholding a delegation to the Bureau of Prisons to schedule the timing and method of restitution payments); Robinson v. Gonzales, 493 F. Supp. 2d 758, 764 (D. Md. 2007) (upholding a delegation to the Bureau of Prisons to oversee a defendant's participation in a substance abuse treatment program).

delegations were held unconstitutional. Having discussed to whom powers are delegated, this Article will now explore which powers are delegated.

C. Subjects of Delegation

Judicial orders delegating authority to non-judicial actors vary not only according to who received the delegated power but also by the type of power that was delegated. With that in mind, this Subpart explores the subjects of delegation (i.e., what powers do judges attempt to delegate beyond the judiciary?). Table 3 sorts judicial nondelegation cases into eight subject matter categories: administrative, custody, fact, law, probation, procedure, restitution, and sentencing. Likewise, Table 3 details the percent of delegations in each case type that was ruled unconstitutional.

In dividing these cases into eight groups, I do not suggest that these are the only possible categories. Instead, I make the milder claim that this taxonomy is an appropriate method of classifying judicial nondelegation cases. The remainder of this Subpart walks through each of the eight case types, defining their key features and providing illustrative examples.

TABLE 3: SUBJECTS OF DELEGATION

Subject	**Cases**	**Unconstitutional**
Administrative	9%	27%
Custody	28%	37%
Fact	2%	13%
Law	10%	43%
Probation	25%	35%
Procedure	5%	44%
Restitution	18%	64%
Sentencing	3%	55%

1. Administrative

Administrative cases are defined by the ministerial nature of the delegated power. The delegation is bureaucratic, definite, and not open to interpretation. It is more akin to a command than a transfer of authority. If the delegation were made to a hundred different individuals, those hundred individuals would perform the same task in the same manner and reach the same outcome. In other words, the object of delegation must perform the delegated power in a prescribed way with little or no ability to exercise judgment or discretion.

For example, consider the case of *United States v. Bernardine*.[90] Here, the judge tasked a probation officer with "issu[ing] a summons requiring [the defendant] to appear at a supervised release violation hearing."[91] The court of appeals held that such a delegation was appropriate because it amounted to no more than a "ministerial act or support service."[92] In the court's analysis, the probation officer possessed no true power or discretion but rather "act[ed] at the direction of the district court."[93] It is this lack of discretion that is at the core of administrative delegations.[94] A New York state case will further illustrate.

In *People v. Wheelings*, a judge asked a court officer to relay messages between himself and a juror regarding that juror's ability to continue deliberations.[95] Focusing on the officer's lack of discretion and the ministerial nature of the messages, the court found that such a task did not amount to an unconstitutional delegation of judicial power.[96] To the contrary, the court emphasized that it is often necessary for judges to vest judicial officers with the power to communicate with jurors so that they may perform their "administerial duties."[97]

Notably, lack of discretion does not mean that the scope of a task is one hundred percent defined by the judge. Administrative delegations may still allow for minor deviations. For instance, consider *Reid v. State*.[98] In this case, the judge made an oral ruling from the bench and then tasked the prosecutor with preparing a written sentencing order consistent with the ruling.[99] Of particular note, the judge departed from the sentencing guidelines by imposing a harsher sentence—a decision that requires written reasons to support the departure.[100]

Given the scope of the task, the prosecutor necessarily had discretion. The judge did not dictate the sentencing order and require the prosecutor to type it up verbatim but rather orally pronounced the key points and left the particular

90. United States v. Bernardine, 237 F.3d 1279 (11th Cir. 2001).

91. *Id.* at 1282.

92. *Id.* at 1283.

93. *Id.* at 1282.

94. *See, e.g.*, People v. Felder, 793 N.Y.S.2d 20, 22 (App. Div. 2005) (holding that a court officer who relayed communications between the judge and a defendant who refused to appear at trial "performed purely a ministerial function"); People v. Greene, 720 N.Y.S.2d 453, 454 (App. Div. 2001) (finding that a delegation that ordered a court officer to remind the jury that it could view exhibits was a "simple communication" that "was ministerial and devoid of substantive legal content, and thus did not constitute an improper delegation of judicial authority").

95. People v. Wheelings, 28 N.Y.S.3d. 435, 437 (App. Div. 2016).

96. *Id.* (noting that the court officer's "inquiry was purely ministerial and wholly unrelated to the substantive legal and factual issues of the trial").

97. *Id.*

98. Reid v. State, 673 So. 2d 972, 973 (Fla. Dist. Ct. App. 1996).

99. *Id.*

100. *Id.*

verbiage up to the prosecutor.[101] No two prosecutors would prepare the exact same order using the exact same words in the exact same format. One might spend an extra paragraph expounding on one of the judge's reasons while another might dedicate more time to a different justification. Likewise, the order in which the document details the reasons for departing from the sentencing guidelines might differ.

Despite these (and many other) potential differences, any order that might arise from the judge's delegation would be functionally identical. It would specify the correct sentence and provide the judge's articulated reasons for enacting that sentence. Any discretion the prosecutor has is limited to the legally irrelevant details of the sentencing order. For that reason, the court of appeals held that the lower court's delegation was valid.[102]

Although most (73%) administrative delegations are upheld, that is not always the case. When judges attempt to delegate ministerial tasks but permit too much discretion, such delegations are struck down. Consider *Barbera v. State*—a case very similar to the last, save in one respect.[103] Here, the judge made a decision to depart from the sentencing guidelines but failed to specify reasons for doing so, instead directing the prosecutor to adopt appropriate justifications while drafting the sentencing order.[104] This twist transformed an otherwise valid act into an unconstitutional delegation of judicial power.[105]

Although some administrative delegations do not pass constitutional muster, the vast majority raise no issues. Indeed, they are necessary components of any functional court. Judges cannot perform every judicial task; they need assistance from others. And such assistance is increasingly vital as judicial dockets grow evermore overburdened.

2. Custody

Custody cases are defined by the topic of the delegation—namely, that the delegated authority is aimed at addressing the legal relationship between a parent and a child. The delegation imbues the object of delegation with the power to make a decision that bears on the wellbeing of a child, particularly with respect to that child's relationship with a parent. The precise power varies

101. *Id.*

102. *Id.* ("The court . . . simply directed the prosecutor to perform the clerical task of preparing a written order consonant with the court's decision . . . . The law does not preclude such a delegation.").

103. Barbera v. State, 505 So. 2d 413 (Fla. 1987).

104. *Id.* at 414.

105. *Id.* (ruling that "the formulation of reasons for departure is 'a function committed exclusively to the judiciary'" and "[t]hat function must be performed by the trial judge and cannot be delegated to others" (quoting Johnson v. State, 483 So. 2d 839, 839 (Fla. Dist. Ct. App. 1986))). For similar cases, see Wilson v. State, 485 So. 2d 42, 42 (Fla. Dist. Ct. App. 1986) (invalidating a delegation ordering the prosecutor to come up with reasons to justify departing from the sentencing guidelines); Carnegie v. State, 473 So. 2d 782, 783 (Fla. Dist. Ct. App. 1985) ("find[ing] that the trial court improperly delegated to the state attorney's office" the task of determining reasons for departure from the sentencing guidelines) (alteration in original).

widely. Some examples include determining the residence of a child,[106] setting the length of family reunification therapy,[107] settling custody disputes,[108] selecting a child's school,[109] and assessing whether child support is owed.[110]

Far and away, however, the most common subset of custody cases involves visitation rights. In these cases, the object of delegation is tasked with determining how often, and under what conditions, a parent may visit a child.[111] Despite there being nearly three hundred cases on this issue, no clear rule exists for whether such delegations are permissible. Instead, there is a permissibility spectrum: the more authority and discretion delegated to a third party, the more likely the delegation is to be struck down.[112]

At the permissible end of the spectrum, the court may specify the frequency and duration of visitations but allow a third party to determine the particularities, such as the time and place of the visitation.[113] At the impermissible end of the spectrum, the court is forbidden from abdicating all decision-making authority over whether visits shall occur.[114] Although the extremes are clear, the middle is, unfortunately, a morass.

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106. *See, e.g.*, State *ex rel.* Ryley G. v. Ryan G., 943 N.W.2d 709, 720 (Neb. 2020) (invalidating a delegation to a child's mother authority to determine whether the child should move to a different state).

107. *See, e.g.*, Meyr v. Meyr, 7 A.3d 125, 138–40 (Md. Spec. App. 2010) (upholding a delegation to the guardian ad litem to determine how long children must attend reunification therapy with their mother).

108. *See, e.g.*, Van Schaik v. Van Schaik, 24 A.3d 241, 244–47 (Md. Ct. Spec. App. 2011) (invalidating a delegation that empowered a guardian ad litem to resolve "any disputed matter regarding the minor children"); *In re* Davis, No. 46613-5-1, 2001 WL 919348, at *3 (Ct. App. Aug. 13, 2001) (upholding a delegation that permitted the guardian ad litem to make a custody recommendation).

109. *See, e.g.*, Lawrence v. Lawrence, 687 N.W.2d 748, 752–53 (Wis. Ct. App. 2004) (permitting a guardian ad litem to determine which school a child should attend); *In re* D.D., No. A-92-253, 1993 WL 19018, at *5 (Neb. Ct. App. Feb. 2, 1993) (upholding a delegation to the Department of Social Services authority to select a child's special education program).

110. *See, e.g.*, *In re* Marriage of Soden, 834 P.2d 358, 364–65 (Kan. 1992) (upholding a delegation to an administrative hearing officer authority to hear child support modification motions); *In re* Bopp, 58 N.Y.S.2d 190, 198–99 (Sup. Ct. 1944) (invalidating a delegation to another court authority to determine whether a father owes child support).

111. *See, e.g.*, Acosta v. Melendez, 118 N.Y.S.3d 730, 731 (App. Div. 2020) (vacating an order that "condition[ed] the father's parental access on the mother's wishes and le[ft] the determination as to whether there should be access at all to the mother"); *In re* L.M., No. 19-0165, 2019 WL 1486618, at *5 (Iowa Ct. App. Apr. 3, 2019) (upholding a delegation to the Department of Human Services to determine whether children were emotionally ready for visitation to occur).

112. *See, e.g.*, *In re* Christian L., No. D070342, 2016 WL 6311691, at *7–8 (Cal. Ct. App. Oct. 28, 2016) (upholding a lower court delegation that specified the minimum frequency and duration of custodial visits but encouraged both parents to work together to permit more visitations). *But see In re* Julie M., 81 Cal. Rptr. 2d 354, 358 (Ct. App. 1999) (finding that "[t]he juvenile court did abuse its discretion in giving the children absolute discretion to decide whether [their mother] could visit with them. The order essentially delegated judicial power to the children—an abdication of governmental responsibility.").

113. *See, e.g.*, *In re* C.N., No. F057946, 2010 WL 555920, at *10 (Cal. Ct. App. Feb. 18, 2010) (holding that a delegation requiring one visitation a month but allowing mother to determine time and place of visitation is constitutional).

114. *See, e.g.*, *In re* J.D.R., 768 S.E.2d 172, 180 (N.C. Ct. App. 2015) ("To give the custodian of the child authority to decide when, where[,] and under what circumstances a parent may visit his or her child . . . would be delegating a judicial function to the custodian.") (alteration in original); Tarachanskaya v. Volodarsky, 897 A.2d 884, 902 (Md. Ct. Spec. App. 2006) (invalidating an order stating that "[v]isitation will not occur until

Sometimes it is sufficient for the court to articulate a limiting principle that guides the third party in exercising the delegated power.[115] This was the situation in *In re M.A.F.*—a case that upheld a delegation directing a California social services agency to permit a father to visit his children "as frequently as possible consistent with the children's well-being."[116] Similarly, in *In re AM*, the court approved a visitation schedule but permitted the therapist to withhold visitation if doing so would be in the best interests of the children.[117]

But sometimes these limiting principles are held insufficient, as in *Hardin v. Hardin*—a Georgia case that overturned an order making visitation contingent on the parent's successful completion of a therapy program.[118] In striking this order, the court of appeals held that the trial court impermissibly delegated judicial authority to a therapist.[119] Likewise, in *Schmeidler v. Schmeidler*, the court invalidated a delegation permitting a child's mother to terminate a father's visitation if he failed a breathalyzer test during a visitation session.[120]

Ultimately, this lack of clarity has led to untenable distinctions. For brevity, consider just one pair of cases from a single state. In 2005, a California court of appeals held that it was unconstitutional for a judge to submit an order permitting "[v]isitation between the child and parents [to] be supervised and arranged by the legal guardians at their discretion."[121] But less than a year later, the court held valid an order granting legal guardians complete discretion over visitation because it set a floor of ten minutes of phone time each week.[122] The court reasoned that the second case was permissible because, if the guardians allowed increased visitation, "the parents will reap an added benefit and will suffer no prejudice."[123]

By drawing this distinction, the court failed to recognize the obvious parallel with the 2005 case, in which the order set a floor of zero minutes of weekly visitation while permitting the legal guardians to increase visitation.[124] In both instances, the court set a minimum visitation amount and allowed the

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[the child's] therapist recommends it" on the grounds that "[t]he manner in which the court in the case *sub judice* relegated to the therapist reunification plans and recommendations . . . constituted an improper delegation of judicial authority") (alteration in original), *rev'd*, 916 A.2d 991 (Md. 2007); *In re* Donnovan J., 68 Cal. Rptr. 2d 714, 715–16 (Ct. App. 1997) (invalidating an order granting sole discretion to a child's therapist to determine visitation rights).

115. *See, e.g.*, *In re* Nicholas M., No. D043714, 2004 WL 1588335, at *2 (Cal. Ct. App. July 16, 2004) ("A court may avoid delegating its authority by setting guidelines and limits in the order.").

116. *In re* MA.F., No. A160938, 2021 WL 2430956, at *1 (Cal. Ct. App. June 14, 2021).

117. *In re* AM, 629 S.E.2d 620, 620 (N.C. Ct. App. 2006).

118. Hardin v. Hardin, 790 S.E.2d 546, 548 (Ga. Ct. App. 2016); *see also In re* H.A., No. E071602, 2019 WL 1341998, at *7 (Cal. Ct. App. Mar. 26, 2019) (striking an order that conditioned visitation on a child's continued progress in therapy).

119. *Hardin*, 790 S.E.2d at 548.

120. Schmeidler v. Schmeidler, 912 N.W.2d 278, 287–90 (Ct. App. 2018).

121. *In re* M.R., 33 Cal. Rptr. 3d 629, 630 (Ct. App. 2005).

122. *In re* Anthony C., No. B184963, 2006 WL 848191, at *4 (Cal. Ct. App. Apr. 3, 2006).

123. *Id.*

124. *In re M.R.*, 33 Cal. Rptr. 3d at 630–31.

child's guardians absolute discretion over whether the parents would be allowed greater visitation rights.[125]

3. Fact

Although cases of fact make up only 2% of judicial nondelegation challenges, they are nonetheless deserving of their own category. This set is the only one that involves delegations of powers that are traditionally held by the factfinder. And in all cases, the specific power bestowed by judges upon third parties was to make or recommend findings of fact. Three brief examples will help illustrate.

In one case, the court tasked a referee with determining whether one party's check had been deposited into the bank account of the opposing party.[126] After emphasizing that a "referee's power cannot exceed the 'constitutional limitations on the delegation of judicial power to a referee,'" the court upheld the delegation as an appropriate transfer of power.[127] In a second case, a trial court delegated factfinding authority to a master in chancery.[128] Upholding the delegation, the Supreme Court of Illinois succinctly concluded, "Direction to a master in chancery to . . . determine . . . matters of fact is not a delegation of judicial power."[129]

A last example helps clarify the boundary between permissible factfinding delegations and impermissible delegations. In *Ex Parte Mid-Continent Systems, Inc.*, the court ordered an auditor to gather factual information regarding financial transactions between the parties and to prepare a report based on that information.[130] The Supreme Court of Alabama upheld the delegation, observing that "[o]nly when the trial court allows a master to resolve purely legal questions can it be said there is an unlawful delegation of judicial powers."[131]

Courts are almost unanimous in upholding delegations of factfinding power. Only three times has such a delegation been struck down.[132] And as *Ex*

125. *Id.*; *In re Anthony C.*, 2006 WL 848191, at *4.

126. Ching Ching Lee v. Mali Kuo, No. H032436, 2009 WL 1478730, at *13 (Cal. Ct. App. May 26, 2009).

127. *Id.* at *14 (quoting De Guere v. Universal City Studios, Inc., 65 Cal. Rptr. 2d 438, 449 (Ct. App. 1997)); *see also id.* ("It is well established . . . that a referee is a fact finder who is necessarily authorized to make credibility findings.").

128. Eich v. Czervonko, 161 N.E. 864, 865 (Ill. 1928).

129. *Id.* at 866 (emphasis omitted) (internal citations omitted).

130. *Ex parte* Mid-Continent Sys., Inc., 447 So. 2d 717, 718 (Ala. 1984).

131. *Id.* at 720.

132. *See* Hastings v. Rigsbee, 875 So. 2d 772, 777 (Fla. Dist. Ct. App. 2004) (vacating the trial court's order because the court delegated excessive factfinding authority to a parenting coordinator); Settlemire v. Superior Ct., 129 Cal. Rptr. 2d 560, 566–67 (Ct. App. 2003) (striking down a broad delegation to a commissioner that transferred both factfinding and legal power); *In re* Marriage of Olson, 17 Cal. Rptr. 2d 480, 485 (Ct. App. 1993) ("The delegation to the Special Master of authority to determine what business

Parte Mid-Continent Systems, Inc. hints at, those cases are ones in which questions of fact are intertwined with questions of law. Take, for instance, *Settlemire v. Superior Court*.[133] There, a family court referred a case to a commissioner "for a hearing, and findings on any matter of fact upon which information is required by the Court."[134] The appellate court found that reference unconstitutional on the grounds that its broad scope transferred legal decision-making authority to the commissioner.[135]

4. Law

The law category, quite naturally, encompasses delegations pertaining to questions of law.[136] Some examples of delegated powers in this category include conducting settlement proceedings,[137] deciding motions,[138] determining whether a defendant is competent to stand trial,[139] and even running an entire trial.[140]

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expenses to allow as deductions from income for [the claimant], to make tax determinations and to adjust for extraordinary tax circumstances he accepted constituted an improper delegation of judicial authority.").

133. *Settlemire*, 129 Cal. Rptr. 2d 560.

134. *Id.* at 564 (internal quotations omitted).

135. *Id.* at 565, 567 (rhetorically questioning "how does the commissioner adjudicate, without proper directive, the factual basis of an application for temporary child custody or the disposition of a community asset or a restraining order without necessarily deciding the underlying legal issues" before concluding that "[t]he trial court's broad order for reference of a case with multiple factual issues was an improper delegation of judicial duties").

136. *See, e.g.*, United States v. Dees, 125 F.3d 261, 268 (5th Cir. 1997) (holding valid a delegation that empowered a magistrate judge to conduct plea hearings and observing that "[o]nly when a magistrate judge possesses final decisionmaking authority over a substantial issue in a case does an Article III problem arise"); United States v. Avenatti, 559 F. Supp. 3d 274, 281–82 (S.D.N.Y. 2021) (finding valid a delegation that permitted the Department of Justice to identify materials protected by attorney–client privilege and the work-product doctrine); Smith v. Guest Pond Club, Inc., 586 S.E.2d 623, 626–27 (Ga. 2003) (invalidating a delegation to a homeowners association authority to determine whether a landowner complied with a court order); State v. Canelo, 653 A.2d 1097, 1102 (N.H. 1995) (finding unconstitutional a delegation to a prosecutor to determine whether there is probable cause sufficient to justify issuance of a search warrant).

137. *See, e.g.*, Turner v. Architectural Design Grp., 262 Cal. Rptr. 375, 378 (Ct. App. 1989) (invalidating a delegation that empowered a referee to conduct settlement proceedings on the grounds that "such assignment would amount to an unconstitutional delegation of judicial power" and noting that only "subordinate judicial duties" may be delegated) (depublished).

138. *See, e.g.*, United States v. Johnston, 258 F.3d 361, 372 (5th Cir. 2001) (finding that a delegation of power to a magistrate judge to decide a motion to vacate, set aside, or correct sentence "violates Article III of the Constitution"); TPO, Inc. v. McMillen, 460 F.2d 348, 359–60 (7th Cir. 1972) (invalidating a delegation to a magistrate to decide motions to dismiss and motions for summary judgment on the grounds that such a delegation "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation" (quoting La Buy v. Howes Leather Co., 352 U.S. 249, 256 (1957)) (internal quotations omitted)).

139. *See, e.g.*, Sibug v. State, 126 A.3d 86, 116 (Md. 2015) (invalidating a delegation to a psychiatrist to determine whether a defendant was competent to stand trial).

140. *See, e.g.*, Carson Fischer Potts & Hyman v. Hyman, 559 N.W.2d 54, 56 (Mich. Ct. App. 1996) (invalidating a delegation that gave a court-appointed expert witness the power to "mak[e] conclusions of law, review[] motions, requir[e] the production of evidence, issu[e] subpoenas, conduct[] and regulat[e] miscellaneous proceedings, examin[e] documents and witnesses, and prepar[e] final findings of fact" on the grounds that "judicial power is vested in the courts under our state constitution").

In contrast to cases in the fact category, cases in this category often yield successful judicial nondelegation challenges. Perhaps because pronouncing legal decisions is at the very core of a judge's duties, courts are reluctant to validate orders that attempt to hand off that power. Even so, a majority (56%) of delegations in this group are upheld.

Any attempt to draw a line between the constitutional and unconstitutional delegations in the law category leads to the following principle: the more authority a judge retains in making the final legal decision, the more likely the delegation is to be upheld. An early case emphasizes this point.

In *McAuslan v. McAuslan*, a Rhode Island court delegated authority to a master to hear all evidence in a case and make recommendations as to the appropriate legal findings; essentially, to run the trial and make a preliminary legal ruling.[141] This delegation feels sweeping. However, the Rhode Island Supreme Court upheld the order, explaining:

> A court of equity cannot abdicate its functions; but . . . the court [may] refer to a master such matters as were contained in this decree of reference, not for his determination, but that he may hear the testimony, and report it and his findings thereon to the court. The master's report may be objected to, and be the subject of exception from all parties. It is only after such exceptions as may be taken have been heard and passed upon by the court that the court can avail itself of the information contained in the report. There was no delegation to the master of the court's power of decision in the cause.[142]

The last sentence in the excerpt is key. So long as the "power of decision" is reserved to the judge, the delegation is permissible.[143] Judicial opinions in the law category affirm that point again and again. The Second Circuit, for instance, was presented with the question of whether delegating jury selection to a magistrate violated Article III of the Constitution.[144] The court concluded that because the district court judge engaged in *de novo* review of the magistrate's rulings, the delegation was permissible.[145] Numerous other cases follow the same line of reasoning when upholding delegations.[146] And even cases striking down delegations reinforce the principle.

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141. McAulsan v. McAulsan, 83 A. 837, 838–39 (R.I. 1912).

142. *Id.* at 842.

143. *Id.*

144. United States v. Taylor, 92 F.3d 1313, 1326–27 (2d Cir. 1996).

145. *Id.* at 1326 ("In order to meet the constitutional requirements of Article III, however, de novo review by the district judge of the magistrate's jury selection decisions must be available if requested by one of the parties.").

146. *See, e.g.*, Bowman v. Bordenkircher, 522 F.2d 209, 210 (4th Cir. 1975) (upholding a delegation to a magistrate to make recommendations on habeas corpus petitions because the judge "review[ed] the entire record before the district court, consider[ed] the magistrate's report, and satisf[ied] himself that the recommended disposition [was] fair and proper"); State v. Peralta, 856 P.2d 1194, 1196 (Ariz. Ct. App. 1993) (upholding an order delegating to the Department of Corrections authority to adjudge violations of its rules because the court carefully reviewed the Department's determinations).

The Ninth Circuit case of *Burlington Northern Railroad Co.* is illustrative.[147] Here, the court of appeals reviewed the constitutionality of an order in which the district court delegated to a special master "all powers and privileges normally exercised by a United States District Court Judge, in presiding over litigation . . . ."[148] Further broadening the special master's authority, the district court specified that the special master's rulings would be final unless appealed within fifteen days.[149] For all practical purposes, the district court created another tier of judicial decision-making and, thereby, elevated itself to the role of an appellate court.[150]

The Ninth Circuit, unsurprisingly, was not pleased. In a unanimous opinion, the court struck down this delegation, holding that "the district court's 'rubber stamp' of the master's order is an inexcusable abdication of judicial responsibility and a violation of article III of the Constitution."[151]

5. Probation

The probation category includes all delegations that bear on the terms of an offender's probation.[152] This list includes a varied set of delegations, such as determining the frequency of polygraph testing,[153] defining "sexually explicit materials,"[154] deciding whether an offender may use social networking

147. Burlington N. R.R. Co. v. Dep't of Revenue of Wash., 934 F.2d 1064 (9th Cir. 1991).

148. *Id.* at 1072 (internal quotations omitted).

149. *Id.*

150. *Id.* at 1074 (observing that, if the special master's ruling were appealed, the district court planned to employ a "deferential standard of review").

151. *Id.* For similar cases invalidating overbroad judicial delegations in the law category, see Smith v. Superior Ct. of Sacramento Cnty, 265 Cal. Rptr. 3d 736, 750 (Ct. App. 2020) (invalidating a delegation that granted a local government independent-contractor authority to determine whether to approve defense service requests submitted by indigent defendants on the grounds that such a delegation "undermines the independence and integrity of the judicial branch by 'encourag[ing] and facilitat[ing] local government intrusion into exclusive powers of the judiciary,' and thus violates the separation of powers doctrine" (quoting Corenevsky v. Superior Ct., 682 P.2d 360, 371 (Cal. 1984))); Fed. Deposit Ins. Corp. v. Old Republic Ins. Co., No. 17-CV-734, 2018 WL 4639280, at *3 (E.D. Wis. Sept. 27, 2018) (striking down a delegation that empowered a special master to reach conclusions of law and issue rulings consistent with those conclusions, reasoning that the "Wisconsin constitution prohibits a circuit court from delegating the 'judicial power' to a referee").

152. *See generally* Mark Thompson, *Who Are They to Judge?: The Constitutionality of Delegations by Courts to Probation Officers*, 96 MINN. L. REV. 306 (2011) (discussing the constitutionality of judicial delegations of power to probation officers).

153. *See, e.g.*, United States v. Brigham, 569 F.3d 220, 231–32 (5th Cir. 2009) (upholding a delegation to a therapist to determine the frequency of polygraph testing and allowing the therapist to decide that no polygraph tests at all were necessary); United States v. York, 357 F.3d 14, 21–22 (1st Cir. 2004) (same).

154. *See, e.g.*, State v. Peralta-Reyes, 169 Wash. App. 1021, 1021 (Ct. App. 2012) (upholding a delegation that permitted the Department of Corrections to define "sexually explicit materials" that a probationer could not access); State v. Sansone, 111 P.3d 1251, 1257 (Wash. Ct. App. 2005) (invalidating a delegation that permitted the Department of Corrections to determine what materials qualified as "pornography" that a probationer could not access).

accounts,[155] setting curfew restrictions,[156] and fixing the length of mental health treatment.[157] Although probation delegations could arguably fit within the sentencing category discussed later,[158] I treat them as a distinct group in this Article. There are three main reasons for this differential treatment.

First, the judiciary has a long history of delegating authority to probation officers.[159] Second, a federal law (The Probation Act of 1925) explicitly empowers courts to suspend traditional sentences and place offenders on probation under the supervision of probation officers.[160] And third, and most important, there is a fundamental difference between a term of probation and an ordinary criminal sentence. Indeed, to be on probation means to have one's sentence suspended.[161] The Probation Act of 1925 specifically contemplates this difference when it provides for probation as an alternative, lesser form of punishment that is separate from traditional sentencing.[162]

A practical reason also counsels for treating probation as a category of its own: there is no common principle that even remotely governs probation decisions.[163] Time and again, cases with identical fact patterns lead to opposite conclusions. It is worth highlighting those inconsistencies and the concomitant

155. *See, e.g.*, United States v. Comer, 5 F.4th 535, 548 (4th Cir. 2021) (holding constitutional a delegation to a probation officer to determine whether a defendant may use social networking accounts given the extensive "Fourth Circuit case law permitting probation officers to support judicial functions").

156. *See, e.g.*, United States v. Floyd, 840 F. App'x 625, 628 (2d Cir. 2021) (upholding an order that allowed a probation officer to set curfew times on the basis that the order "did not delegate to the Probation Office decision-making authority that makes [the offender's] liberty contingent on his probation officer's exercise of discretion").

157. *See, e.g.*, United States v. Fivaz, 521 F. App'x 696, 702 (10th Cir. 2013) (upholding a delegation that allowed a probation officer to determine how long an offender must undergo mental health treatment).

158. *See* 18 U.S.C. § 3551(b)(1) (2008) (describing "a term of probation" as a kind of sentence).

159. *See Probation and Pretrial Services History*, U.S. CTS., https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history [https://perma.cc/XX25-S6WN].

160. *See History of U.S. Probation*, U.S. PROB. S. DIST. OF CAL., https://www.casp.uscourts.gov/history-us-probation [https://perma.cc/75MT-W79D]. Of course, Congress cannot give courts the ability to delegate a power that the Constitution prohibits courts from delegating. *See* Smith v. Superior Ct. of Sacramento Cnty, 265 Cal. Rptr. 3d 736, 750 (Ct. App. 2020); Fed. Deposit Ins. Corp. v. Old Republic Ins. Co., No. 17-CV-734, 2018 WL 4639280, at *3 (E.D. Wis. Sept. 27, 2018). However, I cite this law for a simpler point—namely, that its existence and long history counsel in favor of treating probation delegations as separate from sentencing delegations.

161. *See Probation*, MERRIAM-WEBSTER DICTIONARY (2023), https://www.merriam-webster.com/dictionary/probation [https://perma.cc/2VFQ-2GUV].

162. *See The History of Probation*, CNTY. OF SAN MATEO, https://www.smcgov.org/probation/history-probation [https://perma.cc/T9XX-V5Y2].

163. In the probation category, courts attempt to draw a line between ministerial delegations and substantive delegations. *See, e.g.*, United States v. Ely, 705 F. App'x 779, 782 (11th Cir. 2017) ("To determine if a district court has improperly delegated its judicial authority, we draw a distinction between the delegation to a probation officer of a ministerial act or support service and the ultimate responsibility of imposing the sentence."); United States v. Jenks, 714 F. App'x 894, 898 (10th Cir. 2017) ("Delegations of 'ministerial acts or support services related to the punishment imposed . . . are permissible,' while 'those that allow the officer to decide the nature or extent of the defendant's punishment' are not." (quoting United States v. Mike, 632 F.3d 686, 695 (10th Cir. 2011))). The case law outcomes, however, are not consistent with the existence of such a distinction. *See infra* notes 164–183 and accompanying text.

need for a uniform principle to govern judicial delegations of power. To that end, this Subpart will briefly contrast three pairs of cases. Each pair contains cases from the same court of appeals, decided in close proximity, with nearly identical facts, that reached opposing conclusions—one holding the delegation constitutional and one holding it unconstitutional.

To begin, in the 2018 case of *United States v. Hull*, the Tenth Circuit assessed the constitutionality of a probation order containing the following provision:

> If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.[164]

In upholding the order as a valid delegation, the court found that this provision provided sufficient guidance for a probation officer to "apply[] a common sense approach" in fulfilling the district court's directive.[165]

Less than a year later, the Tenth Circuit was again asked to evaluate the constitutionality of a probation order that contained the same provision.[166] Despite the fact that the language at issue in the two cases was identical, the court of appeals struck down the order as an unconstitutional delegation of judicial power.[167] Notably, the court did not seek to distinguish *Hull* from the present case.[168] In fact, the court ignored the *Hull* decision entirely when analyzing the nondelegation challenge.[169]

Let us move to the next pair of cases, which occurred in the Eighth Circuit. Here, the court of appeals was presented with a question of whether a judge may empower a probation officer to decide if a defendant would undergo psychiatric counseling.[170] In the 2000 case of *U.S. v. Kent*, the court concluded that such a decision was too momentous for a probation officer to make.[171] Specifically, in the court's view, the delegation was "inconsistent with Article III" and conflicted with the rule that only a "*court* may impose special conditions of supervised release."[172]

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164. United States v. Hull, 893 F.3d 1221, 1223 (10th Cir. 2018).

165. *Id.* at 1225.

166. United States v. Cabral, 926 F.3d 687, 691 (10th Cir. 2019).

167. *Id.* at 699.

168. *See id.* at 697–99.

169. The decision to refrain from discussing *Hull* in the context of the nondelegation challenge is even more striking in light of the fact that the court cited *Hull* in the context of an ancillary legal issue. *See id.* at 692–93 nn.3–4.

170. United States v. Kent, 209 F.3d 1073, 1074 (8th Cir. 2000); United States v. Kerr, 472 F.3d 517, 523 (8th Cir. 2006).

171. *Kent*, 209 F.3d at 1078–79.

172. *Id.* at 1079.

Six years later, however, the Eighth Circuit's opinion of this delegation changed.[173] In *United States v. Kerr*, the court of appeals upheld a district court order granting a probation officer the very same authority that was struck down as unconstitutional in *Kent*.[174] The two orders are reproduced for purposes of comparison:

> *United States v. Kent*: The defendant "shall participate in an appropriate psychological/psychiatric counseling program as directed by his probation officer."[175]
>
> *United States v. Kerr*: "The defendant shall participate in a mental health evaluation and/or treatment program, as directed by his probation officer."[176]

To reiterate, the first order was unconstitutional, but the second was legitimate. Puzzling pairs of outcomes like this are all too commonplace in judicial nondelegation challenges.

For a final pair of cases, we move to the First Circuit. Here, the court of appeals was tasked with deciding whether a probation officer could determine the number of drug tests an offender would have to take.[177] In the 2004 case of *United States v. Tulloch*, the district court issued an order directing the defendant to submit to "one drug test within the first 15 days after release and 'at least two periodic drug tests thereafter, as directed by the probation officer.'"[178] The court of appeals struck down this delegation, holding that "the written conditions improperly delegated . . . sentencing authority by allowing the probation officer to determine the maximum number of drug tests . . . [and] essentially 'vest[ed] the probation officer with the discretion to order an unlimited number of drug tests . . . .'"[179]

Fair enough. "[A]t least two" tests is a vague condition.[180] If the probation officer decided to require one hundred tests that would technically meet the condition, despite being far removed from the two tests contemplated. Surely, that's why this order is unconstitutional. The court is mandating that judges give somewhat specific parameters when they make this type of delegation. Well, not so fast.

Two years later, the same court was asked to opine on the constitutionality of an order that required a defendant to "submit to drug testing within fifteen

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173. *Kerr*, 472 F.3d at 523–24.

174. *Id.* (noting that "[a] sentencing judge may delegate limited authority to non-judicial officials as long as the judge retains and exercises ultimate responsibility").

175. *Kent*, 209 F.3d at 1074.

176. *Kerr*, 472 F.3d at 523.

177. United States v. Tulloch, 380 F.3d 8, 10 (1st Cir. 2004); United States v. Morales-Rodriguez, 467 F.3d 1, 16 (1st Cir. 2006).

178. *Tulloch*, 380 F.3d at 10.

179. *Id.*

180. *See id.*

days of release[] [and] [t]hereafter submit to random drug tests not to exceed 104 samples per year, in accordance with the drug after care program policy of the U.S. probation office . . . ."[181] After considering the delegation, the First Circuit ruled that it was constitutional because "the sentencing judge clearly established an upper limit to the number of drug tests that can properly be ordered . . . ."[182] This outcome is unexpected in light of the *Tulloch* case. And the court must have felt the same given that it failed to distinguish—or even cite to—*Tulloch*. Although the cases are distinguishable in a technical sense (judges must set an upper bound—no matter how high—but need not set a lower bound), they are indistinguishable when it comes to the spirit of the law.

No coherent principal can maintain both of the following: (1) a judge may set an absurdly high upper limit on the number of drug tests while delegating discretion to lower the number to zero and, (2) a judge may *not* set a lower limit on the number of drug tests while delegating discretion to increase the number. Either both orders are constitutional or both are unconstitutional. This type of judicial hairsplitting leaves no coherent principle in its wake for future courts to follow.[183]

6. Procedure

The procedural category, unsurprisingly, encompasses cases involving procedural delegations. At first glance, this scope may seem to overlap with the administrative category. However, that is not the case. At a topical level, there is certainly some similarity. Both categories deal with non-substantive decisions that do not determine the legal outcome of a case. But the two categories diverge along an important dimension. Specifically, procedural cases allow for discretion. Two individuals given the same judicial delegation are apt to reach different conclusions. Unlike cases in the administrative category, procedural delegations do not include sufficient specificity to constrain outcomes to a single option. A helpful way to think of this category is that it includes cases

181. *Morales-Rodriguez*, 467 F.3d at 16.

182. *Id.*

183. Examples of these incompatible rulings abound. Consider the following line of Fifth Circuit cases that address whether a court may mandate drug counseling and delegate to a probation officer the decision of whether such counseling will be inpatient or outpatient: United States v. Martinez, 987 F.3d 432, 436 (5th Cir. 2021) ("[T]he court should not have delegated to the probation officer the decision to require inpatient, rather than outpatient, treatment because of the liberty interests at stake . . . ."); United States v. Johnson, 850 F. App'x 279, 280 (5th Cir. 2021) (holding such delegation constitutional); United States v. Medel-Guadalupe, 979 F.3d 1019, 1025 (5th Cir. 2020) (holding such delegation constitutional and observing that "[i]t is not permissible for a district court to delegate the decision of 'whether a defendant will participate in a treatment program,' but 'a district court may properly delegate to a probation officer decisions as to the details of a condition of supervised release'" (quoting United States v. Franklin, 838 F.3d 564, 568 (5th Cir. 2016)) (emphasis omitted)), *superseded by* 987 F.3d 424 (5th Cir. 2021); United States v. Martinez, 979 F.3d 271, 276 (5th Cir. 2020) (striking down the delegation on the grounds that "the judge may not delegate to the probation officer the decision to require inpatient, rather than outpatient, treatment because of the liberty interests at stake"), *superseded by* 987 F.3d 432 (5th Cir. 2021).

that delegate process-oriented, but non-ministerial, powers. Some examples will illustrate.

In one case, a Florida appellate court struck down an order delegating control over the court's docket to the Department of Revenue.[184] The court held that such a delegation effectively empowered one party that frequently appeared before the court to act as a gatekeeper.[185] Although this delegation is process-oriented, it is not ministerial. Different delegees would certainly schedule the court's docket in different manners.

In another case, a California appellate court invalidated a delegation to a sheriff authorizing him to determine the number of restricted confinement cells needed to "provide reasonable safety and security to inmates and jail personnel at the current population level."[186] Again, there is a process-oriented—but non-ministerial—delegation. Different sheriffs would likely come to different conclusions regarding the optimal number of cells.

In a third case, a federal judge delegated authority to the Department of Corrections to determine whether a defendant should be shackled while in the courtroom.[187] The Seventh Circuit held that this action constituted an impermissible delegation of judicial authority.[188] The court noted that, although others may opine on the need to shackle the defendant, only a judge may make the final decision.[189]

Lest this Subpart leave the impression that all procedural delegations are invalid, consider one final case. In a Ninth Circuit ruling, the court concluded that judges may entrust their law clerks with authority to identify cases with jurisdictional defects and to file an order to show cause.[190] The court held that, so long as the judge retained authority over the substantive legal decision, such procedural delegations are permissible.[191]

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184. Hatcher v. Davis, 798 So. 2d 765, 766–67 (Fla. Dist. Ct. App. 2007). *But see* Gleason v. Mullen, 204 Misc. 450, 453 (N.Y. 1953) (upholding a delegation that empowered the district attorney to prepare the court's trial calendar on the grounds that such delegations are necessary for the court to function and prevent "the wheels of government becoming clogged, with resulting chaos").

185. *Hatcher*, 798 So. 2d at 767 (observing that "delegating to one party the exclusive ability to prepare notices of hearing effectively gives that party the keys to the courthouse door").

186. Wilson v. Superior Ct., 240 Cal. Rptr. 131, 134 (Ct. App. 1987) (internal quotations omitted).

187. Lemons v. Skidmore, 985 F.2d 354, 358 (7th Cir. 1993).

188. *Id.* (noting that the "delegation was particularly dangerous here where all of the defendants were also Department of Corrections employees, so that the decisionmaker could hardly be called impartial").

189. *Id.* (noting that, "[w]hile he could have consulted the Department of Corrections employees or court security officers, and listened to their opinions and the reasons in support of them, he had to consider all the evidence and ultimately make the decision himself").

190. *In re* Jud. Misconduct, 752 F.3d 1204, 1205 (9th Cir. 2014) ("Judges are free to give such assistants specific or general instructions and trust the assistants to perform the functions they've been assigned. For example, it is not an impermissible delegation of judicial authority for the judge not to draft every word of an order or not to cite-check his own opinions.").

191. *Id.* (observing that "[t]he clerk here did little more than point out possible problems to the parties, and give the party . . . an opportunity to explain why the perceived problem didn't exist . . . . The ultimate decision as to whether the pleading is defective . . . was retained by the judge").

7. Restitution

Restitution cases encompass all civil monetary judgments and comprise a substantial portion (18%) of all judicial nondelegation challenges. Despite that fact, this category is the narrowest in scope. Every case, in some fashion, deals with setting the timing or amount of restitution payments. Specific examples of delegations include assessing the legal expenses that one party owes another,[192] valuing property and adjusting the award amount accordingly,[193] selecting the total amount of restitution owed from within a bounded range set by the judge,[194] and fixing the restitution payment schedule.[195]

The narrowness of delegations in this category notwithstanding, conflicting rulings abound. Sometimes it is constitutional for courts to delegate authority to develop a restitution schedule based on the defendant's particularized needs.[196] But other times, it is not.[197] And sometimes it is constitutional for courts to delegate authority to determine the total amount of restitution owed.[198] But other times, it is not.[199] And sometimes it is constitutional for courts to delegate authority to assess the defendant's ability to pay the restitution amount.[200] But other times, it is not.[201]

As if in a Schrödinger's cat scenario, it is both constitutional and unconstitutional for courts to delegate authority to schedule the amount and

192. *See, e.g.*, Worcester Cnty. Tr. Co. v. Marble, 55 N.E.2d 446, 449 (Mass. 1944) (invalidating a delegation to a trustee to "pay reasonable legal expenses of the parties respondent").

193. *See, e.g.*, S. Oil Co. v. Wilson, 56 S.W. 429, 432 (Tex. App. 1900, no writ) (holding invalid a delegation to a clerk "the power to adjust the rights of the parties pertaining to the oil that might be produced by the wells after the date of the judgment").

194. *See, e.g.*, United States v. Johnson, 48 F.3d 806, 808 (4th Cir. 1995) (finding that a delegation to a probation officer to set the total amount of restitution "would contravene Article III of the United States Constitution and is therefore impermissible").

195. *See, e.g.*, United States v. Spring, 835 F. App'x 986, 990 (11th Cir. 2020) (upholding a delegation to the Bureau of Prisons to schedule the timing and method of restitution payments).

196. *See* Weinberger v. United States, 71 F. Supp. 2d 803, 813 (S.D. Ohio 1999) (upholding a delegation to the Bureau of Prisons "to develop a schedule of payments suitable to the Defendant's means and the needs of his dependents"), *rev'd in part*, 268 F.3d 346 (6th Cir. 2001).

197. *See* United States v. Pandiello, 184 F.3d 682, 688 (7th Cir. 1999) (invalidating a delegation to the Inmate Financial Responsibility Program—part of the Bureau of Prisons—authority to determine the appropriate monthly restitution payment while defendant is incarcerated), *overruled by* United States v. Sawyer, 521 F.3d 792 (7th Cir. 2008).

198. *See In re* J.B., No. COA06-662, 2007 WL 1412457, at *6 (N.C. Ct. App. 2007) (upholding a delegation to the district attorney to determine the amount of restitution owed).

199. *See* Cisneros v. State, 422 So. 2d 1087, 1088 (Fla. Dist. Ct. App. 1982) (invaliding a delegation to a probation officer to determine the amount of restitution owed).

200. *See* United States v. Bollin, 264 F.3d 391, 420 (4th Cir. 2001) (upholding an order mandating that the defendant's "ability to pay restitution will be reassessed by the probation officer after his release from custody"), *overruled by* United States v. Chamberlain, 868 F.3d 290 (4th Cir. 2017); People v. Ryan, 249 Cal. Rptr. 750, 756 (Ct. App. 1988) (upholding an order that instructs the probation officer to assess the defendant's ability to pay and adjust monthly restitution payments accordingly).

201. *See* Lewis v. State, 695 So. 2d 1296, 1297 (Fla. Dist. Ct. App. 1997) (invalidating an order instructing a probation officer to determine the defendant's ability to make restitution payments).

timing of restitution payments.[202] Only when you open the judicial opinion is the constitutionality revealed. But, of course, the revelation only applies to that given case. With the consistent stream of conflicting opinions, little to no guidance is offered for the next judge who may consider delegating power related to restitution payments.

8. Sentencing

The final subject of delegation is sentencing.[203] This category covers all court-imposed criminal punishments[204] that are not probation orders.[205] Examples include delegating whether a convicted offender must serve a jail sentence,[206] whether sentences shall run concurrently or consecutively,[207] whether to suspend a defendant's driver's license,[208] and the determination of the length of a restraining order.[209] Given the weight of a sentencing decision and the liberty interests at stake, it is not surprising that more than half (55%) of delegations in this category were struck down as unconstitutional. That said, despite the greater reluctance of courts to approve sentencing delegations, little common ground can be found among the opinions.

Consider the cases of *People v. Brouhard*[210] and *McCartney v. Commission on Judicial Qualifications*.[211] In the former case, the judge asked the state's attorney

202. *See* United States v. Elwood, 757 F. App'x 731, 735 (10th Cir. 2018) (upholding a delegation to a prison official to schedule the amount and timing of restitution payments); United States v. Moran-Calderon, 780 F.3d 50, 52 (1st Cir. 2015) (holding "that it is improper for a district court to delegate its discretion to set restitution payment schedules to the probation office").

203. According to the Supreme Court, sentencing is a fundamental judicial duty. *See Ex parte* United States, 242 U.S. 27, 41 (1916) ("Indisputably under our constitutional system the right to try offences against the criminal laws and upon conviction to impose the punishment provided by law is judicial . . . .").

204. *See Sentence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The judgment that a court formally pronounces after finding a criminal defendant guilty . . . .").

205. *See Probation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison . . . .").

206. *See, e.g.*, State v. Lee, 467 N.W.2d 661, 662 (Neb. 1991) (striking down such a delegation on the grounds that "the jurisdiction to commit offenders to jail, or to release offenders from jail terms, rests solely with the trial court. Jail time is to be imposed by judges. The trial court may not delegate the authority to impose a jail sentence, or to eliminate a jail sentence, to a nonjudge.").

207. *See, e.g.*, State v. Ford, 539 N.W.2d 214, 230 (Minn. 1995) (holding that "the trial court has discretion with respect to whether multiple sentences should run concurrently or consecutively [but that] [t]his discretion may not be delegated to an administrative body.").

208. *See, e.g.*, Lewis v. Tex. Dep't of Pub. Safety, 407 S.W.2d 855, 856 (Tex. App.—Waco 1966, no writ) (invalidating such a delegation to the Department of Public Safety by holding that "[t]he trial court has no power to delegate its judicial function . . . . The judgment is void on its face.").

209. *See, e.g.*, *In re* Marriage of White, No. G036010, 2006 WL 1454769, at *4 (Cal. Ct. App. 2006) ("By announcing it would grant the order 'for as long as the moving party wants,' the trial court impermissibly delegated its discretion to [victim's] counsel.").

210. People v. Brouhard, 290 N.E.2d 206 (Ill. 1972).

211. McCartney v. Comm'n on Jud. Qualifications, 526 P.2d 268 (Cal. 1974), *overruled by* Spruance v. Comm'n on Jud. Qualifications, 532 P.2d 1209 (Cal. 1975).

to recommend a sentence and subsequently accepted the recommendation and imposed the sentence.[212] The state supreme court held that this was a valid exercise of judicial power because the judge did not relinquish authority to the state's attorney but rather made an informed decision using the recommendation as one piece of evidence.[213] In the latter case, however, a similar delegation whereby a court asked for a sentencing recommendation was declared "willful misconduct."[214]

From perfectly valid to willful misconduct, asking other government officials for sentencing recommendations has a spotty track record. Given the lack of consistency with regard to seeking sentencing recommendation, surely judges must be constitutionally prohibited from delegating away authority to decide the actual sentence itself. But such is not always the case. Consider *United States v. Stover*.[215] Here, the court found valid a judicial delegation that authorized the Internal Revenue Service to decide whether an attorney who made false statements in connection with tax avoidance schemes would be permitted to provide tax programs to future clients.[216]

Part I has covered eight different subjects of delegation and highlighted eight conflicting lines of case law. Part II takes the first step in working towards a reasonable judicial nondelegation doctrine.

II. CONSTRAINING JUDICIAL DELEGATIONS

Everyone is in agreement that "Article III of the United States Constitution imposes limitations on the duties that a court may delegate to nonjudicial officers."[217] The disagreement is over the boundary of those limitations. And as Part I has shown, the disagreements make it impossible to articulate a single principle that undergirds all cases. There are many inconsistencies, conflicts, and incompatibilities in the judicial rulings—even within the same circuits and districts. At best, a general thread can be identified: the more power a judge delegates, the more likely the delegation is to be unconstitutional. But this principle provides little guidance. It is more a statement of the obvious (i.e.,

212. *Brouhard*, 290 N.E.2d at 207.

213. *Id.* at 209 ("Adequate facts had been presented to the court upon which it could base a determination independent of the recommendation of the State's Attorney. The fact that the trial judge was agreeable to accepting the recommendation of the State's Attorney does not indicate that he abdicated his judicial function of sentencing."). For a similar case upholding the delegation, see State v. Sanchez, 2015 UT App 58, ¶ 8–14, 346 P.3d 701 (holding that a court did not improperly delegate its authority when it issued the maximum sentence because the prosecutor failed to recommend a lesser sentence).

214. *McCartney*, 526 P.2d at 282 ("Such delegations of judicial authority to another . . . [constitute] 'willful misconduct.'"). For another case that conflicts with *Brouhard*, see Reaves v. Superior Ct., 99 Cal. Rptr. 156 (Ct. App. 1971).

215. United States v. Stover, 650 F.3d 1099 (8th Cir. 2011).

216. *Id.* at 1113–14.

217. United States v. Golino, 956 F. Supp. 359, 361 (E.D.N.Y. 1997) (citing United States v. Johnson, 48 F.3d 806, 808–09 (4th Cir. 1995)).

more extreme delegations are more likely to be unconstitutional) than a helpful legal standard.

Seeking to provide more guidance, this Part takes a deeper dive into the judicial opinions. Specifically, the focus is on the legal tests that courts have devised in their efforts to constrain judicial delegations. A review of the more than one thousand cases in the dataset reveals two key tests: the core judicial functions test and the ultimate authority test. Whereas the former maintains that certain judicial functions are so important and central to the judiciary that they may not be delegated under any circumstances, the latter welcomes all delegations so long as exercise of the delegated power can be appealed in court. The remainder of this Part will examine both of these tests and highlight how their respective shortcomings outweigh their virtues.

A. Core Judicial Functions

In constructing the core judicial functions test, courts draw a line between powers that are "ministerial" in nature and powers that are inseparable elements of judicial authority. Under this test, the former may be delegated but the latter may not. The central justification is that certain powers are so fundamental to judicial decision-making that delegating them away would "undermine[] the independence and integrity of the judicial branch"[218] and weaken the system of checks and balances that is foundational to the Constitution.[219] Perhaps the best articulation of the core judicial functions test comes from the Utah Supreme Court:

> [C]ore judicial functions include (1) "'the power to hear and determine controversies between adverse parties and questions in litigation,'" (2) "'the authority to hear and determine justiciable controversies,'" (3) "'*the authority to enforce any* valid judgment, decree or *order*,'" and (4) "all powers that are 'necessary to protect the fundamental integrity of the judicial branch.'" Core judicial functions do not include functions that are generally designed to "assist" courts, such as conducting fact finding hearings, holding pretrial conferences, and making recommendations to judges. In these instances, the commissioners' actions are reviewable by a judge; thus, ultimate judicial power remains with the judge.[220]

At first, the test sounds appealing. Courts may delegate away powers that are administrative in nature and ancillary to their work but may not delegate core judicial functions.[221] This distinction promotes efficiency while ensuring that duly appointed judges still make the important decisions. Or at least, it does

218. *See* Smith v. Superior Ct. of Sacramento Cnty, 265 Cal. Rptr. 3d 736, 750 (Ct. App. 2020).

219. *See* Buck v. Robinson, 2008 UT App 28, ¶ 8, 177 P.3d 348.

220. State v. Thomas, 961 P.2d 299, 302 (Utah 1998) (citation omitted) (quoting Salt Lake City v. Ohms, 881 P.2d 844, 851 n.17 (Utah 1994)).

221. *See id.*

in theory. In practice, however, courts are unable to figure out whether something is or is not a core judicial function.[222]

Everyone may be able to agree that leaving the courtroom and appointing someone else to render a judgment would be an abdication of a core judicial function.[223] But what about adopting a prosecutor's recommended order or rubber stamping a magistrate's findings of fact and conclusions of law?[224] Or how about deciding whether a probationer needs to undergo substance abuse treatment?[225] Courts are torn. And they're torn internally, with the very same court often reaching different conclusions on near-identical facts.[226]

This inability—even of individual courts—to identify what counts as a core judicial function speaks to the unworkability of this approach. It also highlights the major failing of the core judicial functions test—namely, the uncertainty of whether a power may be delegated. This lack of certainty encourages litigation (as the surging cases in Figure 1 illustrate) and undermines some of the efficiency gains that arise from delegations. More importantly, though, uncertainty undermines the legitimacy of the judiciary. If attorneys cannot predict—and judges themselves do not even know—whether a given delegation is constitutional, then those individuals subject to the delegations will increasingly feel that the court system is biased and justice is not meted out fairly.

B. Ultimate Authority

The ultimate authority test is far more straightforward. It asks one simple question: Can the delegation be appealed? If so, then the delegation is constitutional. If not, then the delegation is unconstitutional. As the Eighth Circuit put it, a delegation is valid so long as "the district court does not disclaim ultimate responsibility for deciding" a sentence.[227] The Tenth Circuit echoed

222. The Supreme Court has not sought to resolve this confusion other than to note that the "core function of the Judiciary [is] to decide 'cases and controversies properly before them.'" Miller v. French, 530 U.S. 327, 349 (2000) (quoting United States v. Raines, 362 U.S. 17, 20 (1960)).

223. *See Miller*, 530 U.S. at 250 nn.2–3 and accompanying text (Souter, J., concurring).

224. *See In re* Adoption of E.H., 2004 UT App 419, ¶ 17, 103 P.3d 177 ("While a court is prohibited from delegating its 'core judicial function[s],' such as entering final orders and judgments, it is not prohibited from employing individuals to aid the court in its role as decision maker." (quoting *Olms*, 881 P.2d at 848)) (alteration in original).

225. *See* United States v. Russian, 737 F. App'x 360, 368 (10th Cir. 2018) (striking down a delegation authorizing a probation officer to determine whether a defendant must enroll in an outpatient or inpatient drug treatment program on the grounds that such a decision is a core judicial function).

226. *Compare* United States v. Huor, 852 F.3d 392, 398–99 (5th Cir. 2017) (upholding a delegation authorizing a psychiatrist to determine whether the defendant must enroll in a mental health treatment program), *with* United States v. Davila, 689 F. App'x 261, 262 (5th Cir. 2017) (striking down a delegation authorizing a probation officer to determine whether a defendant must enroll in a substance abuse treatment program on the grounds that it is a "core judicial function that may not be delegated" (quoting United States v. Franklin, 838 F.3d 564, 568 (5th Cir. 2016))).

227. United States v. Wynn, 553 F.3d 1114, 1120 (8th Cir. 2009).

this statement, holding that a "court may delegate limited authority to a probation officer as long as the court retains and exercises ultimate authority over all of the supervised release conditions."[228] But the Nebraska Supreme Court provides perhaps the best illustration of the ultimate authority test at work.[229]

In a case involving a custody dispute, a lower court delegated authority to a child's father to determine whether the child's mother would have any visitation rights.[230] In making this delegation, the court provided no guidance or limiting principle to constrain the delegation. The father was vested with full and complete discretion.[231] He could authorize no visitation, daily visitations, or anything in between. Despite the breadth of this delegation, the Nebraska Supreme Court held that the delegation was "neither arbitrary, capricious, nor unreasonable" because the mother retained the right to "apply to the court for a change in guardianship."[232] In other words, a total abdication of judicial decision-making is permissible so long as the judge will entertain a motion to review the delegation.

The deficiencies in this approach are numerous. First, by empowering another party with unfettered decision-making authority, the judge moves judicial power outside the judiciary. This act not only weakens the judiciary but also means that the defendant fails to benefit from any insight or wisdom that a judge has developed from prior experience.

Second, the ultimate authority test rests on a fiction that parties harmed by the delegation will appeal and seek review by the judge. If that were the situation, then indiscriminate delegation would not be quite so nefarious. However, ample evidence suggests most individuals will not appeal.[233] In particular, the vast majority of low-income individuals lack the funds to receive basic legal assistance, much less to hire an attorney to navigate appellate review.[234] For almost all litigants, a decision made via a judicial delegation is a final decision.[235] The judge will never consider the issue again. Although this type of mental offloading may streamline the judicial docket, it does a substantial disservice to parties, particularly those of more modest means.

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228. United States v. Wayne, 591 F.3d 1326, 1336 (10th Cir. 2010) (citing United States v. Davis, 151 F.3d 1304, 1307 (10th Cir. 1998)).

229. *See In re* Guardianship and Conservatorship of Karin P., 716 N.W.2d 681 (Neb. 2006).

230. *Id.* at 690.

231. *See id.*

232. *Id.*

233. *See* Theodore Eisenburg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Explanation of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 659 (2004).

234. *See* LEGAL SERVICES CORPORATION, THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 60 (2022), https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1 [https://perma.cc/6A6J-RR9F] (finding that 86% of low-income Americans failed to receive basic legal assistance for substantial legal problems).

235. *See e.g.*, Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J.L. & PUB. POL'Y 73, 75 (2010).

The third failing of the ultimate authority test is broader and cuts to the very foundation of the court system. Specifically, having non-judicial actors make key judicial decisions undermines the legitimacy of the judiciary on two fronts. First, the mere fact that a non-judge is utilizing judicial power creates a barrier between the judge and litigant. No longer is the judge—an individual imbued with constitutional authority—pronouncing a ruling from a formal courtroom. Instead, a member of the administrative bureaucracy decides one's fate in a government office. Second, it increases the chance that punishments will be unequal, that delegations will be abused, and that individuals will feel wronged by the judicial system. And given the low likelihood of appeal, these concerns should not be downplayed. The judge will rarely be given the chance to correct a wrong course charted by a non-judicial officer.

The downsides of the ultimate authority test are numerous and powerful. But there is, of course, a benefit: efficiency. By handing off power to non-judicial actors, courts can resolve cases more quickly and handle their dockets more easily. This benefit is not insignificant. Courts are overburdened and have been for decades.[236] But the benefit of efficiency is small compensation if it means delegating all decision-making authority to other actors. At that point, the judiciary is no longer playing its role as a central institution in our tripartite system of government.

III. AN INTELLIGIBLE JUDICIAL PRINCIPLE

Although this Article focuses on the judiciary, much can be learned by examining the scope of legislative delegations of power. After all, the Article III Vesting Clause that constrains judicial delegations mirrors the Article I Vesting Clause that constrains legislative delegations.[237] Given the analogous language, it makes sense for a single, uniform test to apply to both legislative and judicial delegations of power. And having seen the failure of the core judicial functions test and the ultimate authority test in the judicial domain, it is reasonable to look to case law on the legislative nondelegation doctrine for a viable solution.

There is reason to be optimistic about finding such a solution. After all, legislative delegations enabled the rise of the administrative state and inspired

236. *See* Griffe Witte & Mark Berman, *Long After the Courts Shut Down for Covid, the Pain of Delayed Justice Lingers*, WASH. POST (Dec. 19, 2021, 6:00 AM), https://www.washingtonpost.com/national/covid-court-backlog-justice-delayed/2021/12/18/212c16bc-5948-11ec-a219-9b4ae96da3b7_story.html (discussing increased backlog from the Covid-19 pandemic and observing that "[d]elays in the U.S. court system are nothing new, of course. Long before the coronavirus, America stood out among its industrialized peers for the extensive wait times from charges filed to verdict delivered."); Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 542 (1969).

237. *Compare* U.S. CONST. art. I, § I ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."), *with* U.S. CONST. art. III, § I ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

an expansive literature on the constitutional limits of delegation. Legislative delegations also led the Supreme Court (in *J. W. Hampton, Jr., & Co. v. United States*) to articulate a test for applying the nondelegation doctrine—the intelligible principle standard.[238]

Over the years, scholars have written dozens of articles on the legislative nondelegation doctrine. Through these pieces, a common narrative has emerged: prior to the New Deal, Congress was held in check by a robust nondelegation doctrine, but following *J. W. Hampton* and the creation of the intelligible principle standard, the doctrine has lost its constitutional force—paving the way for Congress to expand its power.

In a pair of articles, Keith Whittington and I examine the empirical validity of this claim.[239] To do so, we compiled an original dataset of more than three thousand nondelegation cases spanning 1789 to 2015. Upon analyzing the cases, we found that the traditional narrative was incorrect. In the nineteenth and early twentieth centuries, the nondelegation doctrine was, at most, a weak constraint on Congress and state legislatures.[240] So long as legislatures did not wholly abdicate responsibility, courts were more than willing to uphold delegations of power. Following the New Deal, however, the nondelegation doctrine actually grew in strength.[241] Courts, especially those at the state level, became more willing to invoke the principle to invalidate expansive delegations of legislative power. Although many scholars have declared the death of the nondelegation doctrine, our data show that their pronouncements were premature. Throughout the twentieth and early twenty-first century, the nondelegation doctrine has been a persistent feature of the American constitutional system.[242]

As our data on legislative nondelegation challenges revealed,

> Since the end of the New Deal, courts have used the nondelegation doctrine to invalidate approximately 750 statutes (about ten a year). That may not sound like a substantial figure at first, but if you consider what the number represents, it is rather remarkable. Every year, ten statutes that have been duly enacted by a legislature and signed by a chief executive are held to be unconstitutional violations of the nondelegation doctrine. If the doctrine has, indeed, been dead all these years, that number is very hard to explain.[243]

These invalidations in the legislative nondelegation context can provide a useful template for a judicial nondelegation doctrine test. In building that test, let us first return to *J. W. Hampton*. There, the Supreme Court held that

238. *See* J.W. Hampton & Co. v. United States, 276 U.S. 394, 409–10 (1928) (setting forth the "intelligible principle" test).

239. *See* Whittington & Iuliano, *supra* note 11; Iuliano & Whittington, *supra* note 11.

240. *See* Whittington & Iuliano, *supra* note 11, at 419–31.

241. *See* Iuliano & Whittington, *supra* note 11, at 634–45.

242. *See id.*

243. *Id.* at 636.

Congress may delegate power so long as "nothing involving the expediency or just operation of such legislation [is] left to [the delegee's] determination . . . ."[244] The traditional interpretation is that this line provided unfettered discretion to the legislative branch to delegate almost any and all power to the executive branch. But again, that interpretation is not how courts have understood the intelligible principle test and is certainly not in line with the extensive set of nondelegation challenges that have been successful.

The common thread among these successful challenges is that the delegation lacked adequate standards to guide the delegee.[245] That is a principle that should be exported to the judicial context. Whereas the ultimate authority test declares everything delegable and the core judicial functions test declares certain decisions off limits but other aspects delegable without limitation, this test places a bounded constraint on all delegations. A few examples from the legislative context will help illustrate this range-bound principle.

Consider *Florida Dept. of State v. Martin*.[246] This case involves a challenge to a statute that permitted the Florida State Department to allow candidates to withdraw prior to an election.[247] The statute, however, placed no limits on withdrawal nor provided any guidance as to how the State Department should make decisions.[248] For this reason, the Florida Supreme Court ruled that the statute was an unconstitutional delegation of legislative authority to the executive branch.[249]

Or consider *Goudreau v. Maine Dept. of Health and Services*.[250] Here, the Supreme Court of Maine struck down a statute that failed to set a maximum limit on the fine that the Department of Health and Human Services could impose on unlicensed assisted living facilities.[251] By declining to set an upper limit, the legislature abdicated its lawmaking responsibilities and failed to provide adequate guidance to the department.[252] The court's view was clear: when delegating the power to impose fines, the legislature must set a reasonable bounded range regarding the amount of the fine.

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244. J.W. Hampton & Co. v. United States, 276 U.S. 394, 410 (1928).

245. Blue Cross & Blue Shield of Mich. v. Milliken, 367 N.W.2d 1, 51 (Mich. 1985) ("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 . . . exercise of the delegated power." (quoting Osius v. City of St. Clair Shores, 75 N.W.2d 25 (Mich. 1956))).

246. Fla. Dep't of State v. Martin, 916 So. 2d 763 (Fla. 2005).

247. *Id.* at 765.

248. *Id.* at 771–72.

249. *Id.* at 771–75.

250. Goudreau v. Maine Dep't of Health and Services, No. CIV.A. CV-04-226, 2005 WL 2722926 (Me. Superior Ct. Apr. 26, 2005).

251. *Id.* at *5–6.

252. *See id.*

Lastly, take *Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.*[253] Here, a California court held unconstitutional a statute empowering a mediator to set the terms of collective bargaining agreements between unions and agricultural employers.[254] The court found that, although the statute provided several factors to consider, the factors were not sufficiently definite to guide the arbitrator.[255]

Taken together, these cases provide a constraining test that centers on the articulation of a clear set of outcomes and a clear set of factors to help a delegee choose among the possible outcomes. The focus is on providing guidance such that reasonable people will reach similar outcomes. The outcomes need not be identical. But delegees should not be placed into a position with substantial discretion. Doing so is an unconstitutional abdication of authority by the delegating branch of government.

This idea can be converted into a straightforward Intelligible Judicial Principle: for a judicial delegation to be valid, it must provide (1) a reasonable, range-bound set of outcomes and (2) a set of definite factors to guide the delegee. When these two conditions are met, courts should uphold judicial delegations of power.

There are a number of virtues to this test. First, it is consistent with the driving principle identified in Part I—namely, that the more discretion a delegation gives, the more likely the delegation is to be unconstitutional. In other words, the principle gets the easy cases right. For instance, the test will almost always permit administrative delegations because the set of possible outcomes is highly constrained.

A second virtue is that the test keeps the judge in the role of key decision maker. By forcing judges to articulate a reasonable range of outcomes and identify relevant factors, the test ensures that judges think deeply about the results of the delegation and the considerations on which the delegee should make a decision. The delegee is not a decision-maker but rather an applier of the judge's will. The delegee shall merely ascertain the factual circumstances applying to each factor and then choose the outcome that best follows from those facts. This type of delegation increases efficiency without abdicating authority.

A third, and related, virtue is that identical delegations will yield similar outcomes regardless of the delegee. If a judge merely instructs a social worker to "determine a mother's visitation rights," different social workers will set substantially different visitation schedules. Some will determine that no visitation is appropriate. Others will permit monthly, supervised visitation. And yet others might allow weekly unsupervised visitation. And each of these different determinations will be made based upon the social worker's internal

253. Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd., 187 Cal. Rptr. 3d 261 (Ct. App. 2015), *rev'd*, 405 4.3d 1087 (Cal. 2017).

254. *See id.* at 269–99.

255. *See id.*

assessment of appropriate visitation rights. In short, the social worker's job is to make a decision that the judge declined to make.

However, consider an alternative visitation order by a judge to a social worker: "Permit the mother to visit her child weekly subject to mother's continued enrollment and successful progress in a substance abuse treatment program." Here, the social worker's job is merely to carry out the judge's decision. The judge has set the narrow, range-bound set of outcomes and identified the key factor that will help choose among those outcomes. If the mother makes progress in the program, then she may visit her child. If she does not, then visitation is prohibited. Admittedly, the idea of "successful progress" does delegate some discretion to a social worker. But again, the goal is not to remove all discretion but rather to constrain the discretion and make it such that reasonable delegees will reach similar conclusions. Moreover, in the event of an appeal, the order provides a standard by which the judge can determine the legitimacy of the social worker's decision. This is in stark contrast to the preceding vague order that provided no such standard.

CONCLUSION

Each and every day, judges delegate thousands of judicial decisions to non-judicial actors. These officials are empowered to resolve questions of fact, reach conclusions of law, set restitution payments, draft court orders, determine terms of probation, and even render sentences. For the most part, these delegations go unchallenged. In the name of efficiency and an orderly docket, judges pass much of their power to actors outside the judiciary. These are laudable goals, but an emphasis on these gains obscures significant downsides. From a lack of judicial guidance to an unjustified faith in the appellate process to an undercutting of the legitimacy of the judiciary, the current judicial nondelegation tests (core judicial functions and ultimate authority) have irredeemable flaws. A new test is needed.

This Article argues that the intelligible principle standard—as applied to the legislative nondelegation doctrine—provides an excellent template. It illustrates the benefits of a two-pronged delegation test that sets forth a range of acceptable outcomes and identifies factors that are important in deciding among the range of outcomes. By following this Intelligible Judicial Principle, courts can constrain the scope of delegated powers while still gaining the efficiencies associated with delegation.