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Nondelegating Death

ALEXANDRA L. KLEIN*

Most states' method of execution statutes afford broad discretion to executive agencies to create execution protocols. Inmates have challenged this discretion, arguing that these statutes unconstitutionally delegate legislative power to executive agencies, violating the state's nondelegation and separation of powers doctrines. State courts routinely use the nondelegation doctrine, in contrast to the doctrine's historic disfavor in federal courts. Despite its uncertain status, the nondelegation doctrine is a useful analytical tool to examine decision-making in capital punishment.

This Article critically evaluates responsibility for administering capital punishment through the lens of nondelegation. It analyzes state court decisions upholding broad legislative delegations to agencies and identifies common themes in this jurisprudence. This Article positions legislative delegation in parallel with historic and modern execution practices that utilize responsibility-shifting mechanisms to minimize participant responsibility in carrying out capital sentences and argues that legislative delegation serves a similar function of minimizing accountability in state-authorized killing.

The nondelegation doctrine provides useful perspectives on capital punishment because the doctrine emphasizes accountability, transparency, and perceptions of legitimacy, core themes that permeate historic and modern death penalty practices. Creating execution protocols carries a high potential for arbitrary action due to limited procedural constraints, secrecy, and broad statutorily enacted discretion. The decision to authorize capital punishment is a separate policy decision than the decision of how that punishment is carried out. This Article frames a more robust nondelegation analysis for method of execution statutes and argues that legislators determined to utilize the

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penalty should carry greater accountability for investigating and selecting methods of execution and should not be allowed to delegate these decisions.

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“If we feel the need to actually protect the moral misgivings of the people participating, then there is no greater evidence of what we are doing is wrong.”¹

I. INTRODUCTION

The Supreme Court has reshaped the American death penalty by imposing guiding principles that attempted to narrow legislators’ and jurors’ discretion in decisions about who should be sentenced to death and how those decisions are

¹ Brigid Delaney, *Bryan Stevenson: If It’s Not Right to Rape a Rapist, How Can It Be OK to Kill a Killer?*, GUARDIAN (Feb. 16, 2015), <https://www.theguardian.com/world/2015/feb/17/bryan-stevenson-if-its-not-right-to-a-rapist-how-can-it-be-ok-to-kill-a-killer> [https://perma.cc/J3MZ-5BAQ] (quote from an interview with Bryan Stevenson).

made.² Despite these efforts, the death penalty remains vulnerable to criticisms about arbitrariness, inadequate standards, and excessive discretion.³ Execution procedures are equally susceptible to these critiques.⁴

Most states' method of execution statutes grants broad discretion to executive agencies to create execution protocols, including selecting the drugs to be used in lethal injection.⁵ Death row inmates have unsuccessfully challenged these statutes as unconstitutional legislative delegations that violate state constitutions' separation of power doctrines,⁶ with one notable exception.

In *Hobbs v. Jones*,⁷ the Supreme Court of Arkansas held that the Arkansas General Assembly had "abdicated its responsibility" by giving the Arkansas Department of Corrections the "unfettered discretion to determine all protocols

² See, e.g., *Roberts v. Louisiana*, 428 U.S. 325, 334–36 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976); *Jurek v. Texas*, 428 U.S. 262, 271–72 (1976); *Proffitt v. Florida*, 428 U.S. 242, 251–53 (1976); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

³ See *Glossip v. Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting) ("40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, i.e., without the 'reasonable consistency' legally necessary to reconcile its use with the Constitution's commands."); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.") (footnotes omitted); BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* 227 (2017).

⁴ See CORINNA BARRETT LAIN, *LETHAL INJECTION: WHY WE CAN'T GET IT RIGHT AND WHAT IT SAYS ABOUT US* 1–3 (forthcoming) (manuscript at 1–3) (on file with the *Ohio State Law Journal*) [hereinafter LAIN, *LETHAL INJECTION*].

⁵ See, e.g., N.C. DEP'T OF PUB. SAFETY, *EXECUTION PROCEDURE MANUAL FOR SINGLE DRUG PROTOCOL (PENTOBARBITOL)* 17 (Oct. 24, 2013), <https://files.nc.gov/ncdps/documents/files/Protocol.pdf> [<https://perma.cc/RW3H-7VCH>] [hereinafter NORTH CAROLINA PROTOCOL]; see also Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1407 (2014) [hereinafter Berger, *Lethal Injection*].

⁶ See, e.g., *Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, *8 (W.D. Mo. Nov. 16, 2012); *Cook v. State*, 281 P.3d 1053, 1058 (Ariz. Ct. App. 2012); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 309 (Cal. Ct. App. 2018); *State v. Deputy*, 644 A.2d 411, 420–21 (Del. Super. Ct. 1994), *aff'd*, 648 A.2d 423 (Del. 1994); *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006) (per curiam); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000) (per curiam); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011); *Ex parte Granviel*, 561 S.W. 2d 503, 515 (Tex. Crim. App. 1978) (en banc); *Brown v. Vail*, 237 P.3d 263, 270 (Wash. 2010) (en banc).

⁷ *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012).

and procedures, most notably the chemicals to be used, for a state execution.”⁸ This violated the state’s nondelegation doctrine and rendered Arkansas’s method of execution statute⁹ facially unconstitutional.¹⁰

Despite *Jones*’s outlier status,¹¹ the nondelegation doctrine is more relevant to death penalty administration than it seems at first glance. Justice Brennan’s dissent in *McGautha v. California*,¹² which contended that the failure to set standards in capital cases violated the due process clause, relied on, *inter alia*, nondelegation cases to support his argument for the need to eliminate “legislative abdication” that resulted in arbitrary determinations in capital sentencing.¹³ Numerous scholars have examined accountability, discretion, deference, and responsibility in the death penalty for a variety of actors.¹⁴ None, however, have meaningfully considered the application of the nondelegation doctrine to death penalty administration.

The nondelegation doctrine requires branches of government to comply with their constitutionally-prescribed spheres of authority by prohibiting the legislature from delegating pure legislative power to another branch.¹⁵ Although the nondelegation doctrine has not enjoyed robust treatment in federal courts,¹⁶ state courts retain and apply it. Recent events at the Supreme Court have also signaled the possibility of a revival of the federal nondelegation doctrine.¹⁷

⁸ *Id.* at 854.

⁹ ARK. CODE ANN. § 5-4-617 (West 2011), amended by 2013 Ark. Laws Acts 139, 89th Gen. Assemb., Gen. Sess. (Ark. 2013).

¹⁰ *Jones*, 412 S.W.3d at 847; see Lauren E. Murphy, Note, *Third Time’s a Charm: Whether Hobbs v. Jones Inspired a Durable Change to Arkansas’s Method of Execution Act*, 66 ARK. L. REV. 813, 814 (2013).

¹¹ See *Zink v. Lombardi*, No. 2:12-CV-4209-NKL, 2012 WL 12828155, at *7 (W.D. Mo. Nov. 16, 2012) (discussing *Hobbs v. Jones*, 412 S.W.3d 844 (Ark. 2012)).

¹² *McGautha v. California*, 402 U.S. 183, 252 (1971), *reh’g granted, judgment vacated* by *Crampton v. Ohio*, 408 U.S. 941 (1972).

¹³ *Id.* at 251–53, 253 n.2 (Brennan, J., dissenting).

¹⁴ See, e.g., MATTHEW H. KRAMER, *THE ETHICS OF CAPITAL PUNISHMENT: A PHILOSOPHICAL INVESTIGATION OF EVIL AND ITS CONSEQUENCES* 16–18 (2011); Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 17–18, 44–50, 61 (2010); Eric Berger, *The Executioners’ Dilemmas*, 49 U. RICH. L. REV. 731, 746, 750–52 (2015); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 68–69, 100 (2002); Markus Dirk Dubber, *The Pain of Punishment*, 44 BUFF. L. REV. 545, 546, 587 (1996); Joseph L. Hoffman, *Where’s the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1140 (1995); Michael J. Osofsky, Albert Bandura, & Philip G. Zimbardo, *The Role of Moral Disengagement in the Execution Process*, 29 L. & HUM. BEHAV. 371, 373, 385 (2005).

¹⁵ See *infra* Part II (discussing the nondelegation doctrine).

¹⁶ See *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring) (“Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capricious standards.”).

¹⁷ See *infra* notes 172–73 and accompanying text.

In *Gundy v. United States*,¹⁸ although a plurality of the Supreme Court upheld Congress's broad delegation of authority to the Attorney General to determine the applicability of registration requirements for certain sex offenders, three Justices dissented, contending that the nondelegation doctrine should apply.¹⁹ Justice Alito's concurrence in the judgment indicated his willingness to reconsider nondelegation.²⁰

The nondelegation doctrine implicates government accountability, transparency, and perceptions of legitimacy of legislative conduct.²¹ These issues carry great significance in capital punishment. Administrative structures in capital punishment obscure responsibility for, and decision-making in, state-authorized killing in many ways. Legislatures confer substantial discretion on executive agencies or prison officials to establish and implement execution protocols.²² Statutes and execution protocols conceal executioners' identities.²³ Information about execution drugs and processes is often exempted from states' freedom of information acts,²⁴ and corrections agencies usually do not have to comply with state administrative procedure acts when creating execution protocols.²⁵

The decline of capital punishment only increases the urgency of these concerns. As Brandon Garrett points out, only a handful of prosecutors in a few counties are responsible for the continued use of the penalty.²⁶ States have expanded their choices of methods of execution in response to botched executions and lethal injection drug shortages.²⁷ The decline of the death penalty, along with the challenges states face in conducting executions, increases the risk of arbitrariness.²⁸ How decisions about the death penalty are made, and who makes them, matter just as much as what those decisions are.

¹⁸ 139 S. Ct. 2116 (2019).

¹⁹ *Id.* at 2131 (Gorsuch, J., dissenting).

²⁰ *Id.* (Alito, J., concurring).

²¹ *See infra* Part V.A.

²² *See infra* Part II.B.

²³ *See* VA. CODE ANN. § 53.1-233 (West 2020); Sandra Davidson & Michael Barajas, *Masking the Executioner and the Source of Execution Drugs*, 59 ST. LOUIS U. L.J. 45 (2014); *see also infra* Part II.B.

²⁴ *See* ROBIN KONRAD, DEATH PENALTY INFO. CTR., BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES 14–16 (Robert Dunham & Ngozi Ndulue eds.), <https://files.deathpenaltyinfo.org/documents/pdf/SecrecyReport-2.f1560295685.pdf> [<https://perma.cc/9TR3-JZAD>] [hereinafter KONRAD, BEHIND THE CURTAIN] (surveying state secrecy laws).

²⁵ *See infra* note 273 and accompanying text.

²⁶ GARRETT, END OF ITS ROPE, *supra* note 3, at 190–92 (“Even within the largest death penalty states, just a handful of counties produce the death sentences that result in executions.”).

²⁷ *See* Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1361 (2014); *see also* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 63 (2007).

²⁸ *See* *Glossip v. Gross*, 135 S. Ct. 2726, 2755–56 (2015) (Breyer, J., dissenting).

This Article draws upon nondelegation and capital punishment scholarship to examine the nondelegation doctrine in state method of execution statutes and execution protocols. It critically evaluates state court decisions upholding broad legislative delegation to executive agencies to create execution protocols. It illustrates the relationship between these practices and historic and modern execution procedures that delegate responsibility within the executive branch for carrying out state-authorized killing. Legislative delegation is one of many methods to minimize responsibility for carrying out capital punishment.

Part II analyzes modern and historic methods of execution. Executions utilize intra-executive delegation or other methods of spreading responsibility among participants carrying out executions. How the state chooses to kill, and the way that burden is spread, illustrates why the nondelegation doctrine offers a unique perspective on the role of the death penalty in American society.

Part III outlines the nondelegation doctrine, with a primary focus on the way in which states have formulated their nondelegation doctrines. It also discusses the potential for a shift in the application of the doctrine in federal courts after the Supreme Court's decision in *Gundy*. The potential for increased scrutiny could serve to reframe the debate about delegation in method of execution statutes. Part IV examines litigation in which capital defendants challenged a state's method of execution statute on nondelegation grounds and explores the reasoning courts relied on to authorize broad delegations to agencies to create execution protocols with limited guidance. This Part illustrates common themes in nondelegation cases and judicial support of broad legislative delegation.

Part V contends that capital punishment schemes that rely on shifting responsibility and minimizing accountability undermine government accountability, transparency, and perceptions of legitimacy of the death penalty. The justifications for delegation are not met by the reality of capital punishment, particularly because judicial decision-making relies on unjustified assumptions of agency expertise. Inadequate procedural controls, secrecy, and minimal legislative guidance and oversight present a substantial risk of arbitrary action. It concludes by offering a stronger nondelegation analysis for method of execution statutes.

Like executioners, legislatures seek to shift the responsibility for state-authorized killing to other individuals or agencies. Spreading responsibility for killing absolves entities of the need to grapple with the true consequences of capital punishment. This Article contends that the decision to authorize capital punishment is a separate policy decision than the decision of how that punishment is carried out. In light of the stakes of carrying out capital punishment and the potential for extraordinary harm, legislators determined to utilize the penalty should carry greater accountability for investigating and selecting methods of execution and should not be allowed to delegate these decisions.

II. METHODS OF EXECUTION

Deciding how an inmate dies and who kills²⁹ them is a thorny and long-standing issue in capital punishment. A hallmark of the American system of capital punishment is willingness within the executive branch to pass the duty of killing, and the details of that action, to another person or institution.³⁰ Legislative delegation to agencies, discussed *infra*, is properly characterized as one component of the broader system of responsibility-shifting in capital punishment.³¹

Despite the difference between legislative and intra-executive delegation, recourse to responsibility-shifting mechanisms minimizes responsibility for the “machinery of death.”³² Parts A and B explore delegation in historic and modern execution protocols. In historic executions, executive agents responsible for the act of killing attempted, and often succeeded, in delegating killing to others.³³ Modern execution protocols demonstrate similar patterns through mechanical or structural methods of distancing involvement in killing or spreading responsibility through the execution team.³⁴ Each of these elements permits individuals and institutions to disclaim responsibility in killing.

A. *Historic Delegation and Responsibility for Killing*

Historic accounts of executions include startling and disturbing examples of delegation on the part of the executive official responsible for conducting executions. Timothy Kaufman-Osborn describes a practice in medieval England by which some convicts could receive commutations or pardons if they took a turn as an executioner.³⁵ This practice continued in colonial America; condemned prisoners could receive a reprieve in exchange for executing their

²⁹ I use the term “kill” deliberately in this Article. Regardless of one’s opinion about capital punishment, the death penalty is the state-sanctioned act of killing another human being. Using sanitized language will not change that fact and seems inappropriate when discussing responsibility for state-sanctioned killing. *See, e.g.*, Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1622 (1986).

³⁰ *See infra* notes 41–50 and accompanying text.

³¹ *See infra* notes 316–18 and accompanying text.

³² *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (“From this day forward, I shall no longer tinker with the machinery of death.”); *Rumbaugh v. McCotter*, 473 U.S. 919, 920–21 (1985) (Marshall, J., dissenting from denial of certiorari).

³³ *See infra* notes 50–52 and accompanying text.

³⁴ *See infra* notes 73–77 and accompanying text.

³⁵ TIMOTHY V. KAUFMAN-OSBORN, FROM NOOSE TO NEEDLE: CAPITAL PUNISHMENT AND THE LATE LIBERAL STATE 66 (2002).

fellow prisoners.³⁶ Sheriffs typically carried out executions,³⁷ although they “tended to delegate these responsibilities when they could.”³⁸ In addition to seeking prisoners to carry out executions, sheriffs would attempt to hire individuals to carry out executions.³⁹ Prisoners’ participation in executions did not, however, end when hanging did. One of the executioners at the botched execution of Willie Francis in 1946 was an inmate at the Louisiana State Penitentiary named Vincent Venezia.⁴⁰

This “democratized” early American death penalty moved the responsibility for carrying out executions “from a small set of specialists to a diffuse group of amateurs, where it would remain as long as executions were conducted by hanging.”⁴¹ The general public distaste for executioners may explain these delegation practices.⁴² The sheriff could fulfill his executive duties while passing off the unpleasant task to someone else.⁴³

³⁶ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 36 (2002) (“Maryland found it so difficult to appoint an executioner that the colony turned to a succession of criminals, each of whom was reprieved from a death sentence in exchange for agreeing to serve as hangman for a term of years or life.”); *id.* at 37 (describing specific cases in which prisoners facing death sentences hanged other prisoners); JOHN D. BESSLER, *CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS’ EIGHTH AMENDMENT* 262 (2012) [hereinafter BESSLER, *CRUEL & UNUSUAL*].

³⁷ See BANNER, *supra* note 36, at 36; CRAIG BRANDON, *THE ELECTRIC CHAIR: AN UNNATURAL AMERICAN HISTORY* 25 (1999); see also KAUFMAN-OSBORN, *supra* note 35, at 65–66 (discussing the responsibilities of sheriffs in medieval England).

³⁸ BANNER, *supra* note 36, at 36; see AUSTIN SARAT, KATHERINE BLUMSTEIN, AUBREY JONES, HEATHER RICHARD, & MADELINE SPRUNG-KEYSER, *GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY* 40 (2014) [hereinafter SARAT, *GRUESOME SPECTACLES*].

³⁹ BANNER, *supra* note 36, at 36–37 (“[B]ills submitted by sheriffs for reimbursement often included entries for payments to several other people for actually carrying out the hanging.”).

⁴⁰ See Deborah W. Denno, *When Willie Francis Died: The “Disturbing” Story Behind One of the Eighth Amendment’s Most Enduring Standards of Risk*, in *DEATH PENALTY STORIES* 17, 41–43 (John H. Blume & Jordan M. Steiker eds., 2009).

⁴¹ BANNER, *supra* note 36, at 38.

⁴² See BANNER, *supra* note 36, at 36 (“In England and elsewhere in Europe, death sentences were carried out by professional executioners, specialists loathed by the public.”); CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* 70 (Richard Bellamy ed., Richard Davies trans., Cambridge Univ. Press 1995) (1764) (“What are everyone’s feelings about the death penalty? We can read them in the indignation and contempt everyone feels for the hangman, who is after all the innocent executor of the public will”); BESSLER, *CRUEL & UNUSUAL*, *supra* note 36, at 262 (discussing public revulsion for executioners); Dubber, *supra* note 14, at 551 (describing public sentiment towards executioners).

⁴³ See *Gundy v. United States*, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) (discussing delegation as an abdication of responsibility while still receiving credit for having addressed a problem).

The inherent difficulties of hanging triggered other forms of intra-executive delegation. Hanging is often an ineffective and painful way to kill,⁴⁴ despite attempts to use scientific principles to assess the proper length of rope and drop.⁴⁵ A short drop chanced “painful death by slow suffocation.”⁴⁶ In some public hangings, if a prisoner did not die instantly after the drop, family or friends might pull on the hanging prisoner’s legs to ensure that death came more swiftly.⁴⁷ On the other hand, a longer drop or other miscalculation risked decapitation.⁴⁸ As Stuart Banner explains: “In the 1870s, in an effort to make a painless death more likely, local officials in several places that still used the old downward method of hanging began trying longer drops.”⁴⁹ Unfortunately, this led to near or complete decapitations, horrified observers, and sharp public criticism.⁵⁰

When conducting hangings, officials “sought methods of removing their own agency from the process of hanging.”⁵¹ State officials hired professionals to hang inmates.⁵² Alternatively, officials created automated gallows systems

⁴⁴ See *Campbell v. Wood*, 18 F.3d 662, 717 (9th Cir. 1994) (Reinhardt, J., concurring and dissenting, Appendix A) (“The evidence presented on remand clearly showed that hanging creates a significant risk both of decapitation and of slow asphyxiation.”); BANNER, *supra* note 36, at 170–73 (discussing the problem of painless hanging and describing botched hangings); KAUFMAN-OSBORN, *supra* note 35, at 116–20; SARAT, GRUESOME SPECTACLES, *supra* note 38, at 34–35, 39–41 (discussing the complexity of execution by hanging); ELIZA STEELWATER, THE HANGMAN’S KNOT: LYNCHING, LEGAL EXECUTION, AND AMERICA’S STRUGGLE WITH THE DEATH PENALTY 63 (2003) (describing the hanging of James McCaffry in 1851, who remained conscious and struggling for five minutes after the drop); Martin R. Gardner, *Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 120 (1978); Anny Sauvageau, Romano LaHarpe, & Vernon J. Geberth, *Agonal Sequences in Eight Filmed Hangings: Analysis of Respiratory and Movement Responses to Asphyxia by Hanging*, 55 J. FORENSIC SCI. 1278, 1278 (2010); see also Matt Soniak, *Hanging Themselves Was the Only Way to See How Hanging Works*, MENTALFLOSS (Mar. 31, 2012), <http://mentalfloss.com/article/30340/he-wanted-better-understand-hanging-so-he-hanged-himself-12-times> [<https://perma.cc/DW6A-TVY5>] (discussing Nicolas Minovici, who researched hanging by hanging himself and volunteers in the late nineteenth and early twentieth centuries).

⁴⁵ See *Campbell*, 18 F.3d at 717 (Reinhardt, J., concurring and dissenting, Appendix A) (discussing drop tables for hangings); see also KAUFMAN-OSBORN, *supra* note 35, at 122.

⁴⁶ *Campbell*, 18 F.3d at 717 (Reinhardt, J., concurring and dissenting, Appendix A); BRANDON, *supra* note 37, at 35–36.

⁴⁷ See SARAT, GRUESOME SPECTACLES, *supra* note 38, at 32–33.

⁴⁸ *Campbell*, 18 F.3d at 718 (Reinhardt, J., concurring and dissenting, Appendix A) (“[E]very single expert who testified at the evidentiary hearing acknowledged at one point or another that some prisoners who are hanged in Washington may be decapitated.”).

⁴⁹ BANNER, *supra* note 36, at 173.

⁵⁰ See *id.* (describing the executions of Charles Jolly, Henry Hollenscheid, Samuel Frost, Patrick Hartnett, and James Stone); see also *Campbell*, 18 F.3d at 720 (Reinhardt, J., concurring and dissenting, Appendix A) (discussing the execution of Black Jack Ketchum in New Mexico).

⁵¹ BANNER, *supra* note 36, at 173–74.

⁵² *Id.* at 176.

that effectively “allowed condemned criminals to hang themselves.”⁵³ When the prisoner stepped onto the gallows platform, a mechanical reaction would trigger the hanging either by jerking the prisoner up into the air, or dropping the prisoner.⁵⁴ Francis Barker “invented, for his own 1905 execution, an electrical device that allowed him to release the trap door himself by pressing a button strapped to his thigh.”⁵⁵ Automated devices appeared in other execution methods. In 1912, Andrija Mircovich, sentenced to die in Nevada, selected the firing squad as his method of execution.⁵⁶ Confronted with the difficulty of finding anyone to perform the execution, Nevada “constructed a firing squad machine, mounting three rifles on a framework that fired the weapons” when strings were cut or pulled.⁵⁷ One of the rifles was loaded with a blank.⁵⁸

The movement towards technologically driven (and purportedly more humane) methods of killing like the electric chair, the gas chamber, or lethal injection arose in part from public perceptions of the cruelty of botched hangings.⁵⁹ Adopting more “humane”⁶⁰ methods of killing that interposed technology or physical distance between the executioner and the condemned could make the act more impersonal, reducing executioners’ emotional burdens.⁶¹

The gas chamber presented one opportunity to interpose technology or physical distance because the executioner did not come in contact with the condemned.⁶² In California, executioners mixed water and sulfuric acid in the

⁵³ *Id.* at 174.

⁵⁴ *Id.* (describing execution machines in Colorado, Connecticut, and Nebraska).

⁵⁵ *Id.*

⁵⁶ See Christopher Q. Cutler, *Nothing Less than the Dignity of Man: Evolving Standards, Botched Executions and Utah’s Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 400 (2002–03); Deborah W. Denno, *The Firing Squad as “A Known and Available Alternative Method of Execution”* Post-Glossip, 49 U. MICH. J.L. REFORM 749, 790 (2016) [hereinafter, Denno, *The Firing Squad*].

⁵⁷ Cutler, *supra* note 56, at 400; see also Denno, *The Firing Squad*, *supra* note 56, at 790.

⁵⁸ See Denno, *The Firing Squad*, *supra* note 56, at 790; see also Patty Cafferata, *Capital Punishment Nevada Style*, NEV. LAW., June 2010, at 3, 8.

⁵⁹ See BANNER, *supra* note 36, at 176–77 (citing newspaper reports from that era); BRANDON, *supra* note 37, at 25–46 (discussing the shift in public sentiment away from hangings).

⁶⁰ Cf. BANNER, *supra* note 36, at 200–01 (describing errors in lethal gas executions); SARAT, GRUESOME SPECTACLES, *supra* note 38, at 116 (“Five out of every one hundred executions by lethal gas had been botched.”).

⁶¹ See BANNER, *supra* note 36, at 204 (“Clinton Duffy, the warden at San Quentin during many of its gas chamber executions, surveyed the officers under his command and discovered that all of them preferred the gas chamber to the gallows. The men felt less ‘directly responsible for the death of the condemned,’ he explained.”).

⁶² See *id.* at 196–97 (describing gas chamber executions). Michel Foucault makes the same point about the guillotine: “Death was reduced to a visible, but instantaneous event. Contact between the law, or those who carry it out, and the body of the criminal, is reduced to a split second. There is no physical confrontation; the executioner need be no more than a

“Mixing Room,” and a pipe carried the solution to reservoirs under the chair where the condemned would be strapped in to die.⁶³ To kill the inmate, a member of the execution team pushed a lever that lowered a bundle of sodium cyanide crystals into the acid-water solution, producing hydrocyanic gas.⁶⁴

Technological developments also led to professional executioners; the complexity of the electric chair meant that killing was delegated to professionals, usually electricians.⁶⁵ As methods of execution evolved, execution protocols and internal processes continued to adopt methods of responsibility shifting. The next section explores more recent delegation and responsibility-shifting mechanisms.

B. *Minimizing Accountability for Killing*

Modern execution protocols permit, and even encourage, delegation. The official conducting or supervising executions selects the executioner, who may not even work for the department of corrections.⁶⁶ Florida’s executioner is not a prison employee, but “a private citizen who is paid \$150 per execution” and whose identity is kept secret.⁶⁷

Execution protocols and state laws conceal execution procedures and participants’ identities.⁶⁸ State laws prohibit disclosing the identities of

meticulous watchmaker.” MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 13* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) [hereinafter FOUCAULT, *DISCIPLINE AND PUNISH*].

⁶³ *Fiero v. Gomez*, 865 F. Supp. 1387, 1392 (N.D. Cal. 1994), *vacated*, *Fiero v. Terhune*, 147 F.3d 1158 (9th Cir. 1998).

⁶⁴ *Id.*

⁶⁵ See BANNER, *supra* note 36, at 194–95; BRANDON, *supra* note 37, at 208–09, 220–21 (discussing professional executioners).

⁶⁶ See, e.g., FLA. STAT. ANN. § 922.10 (West 2020); UTAH CODE ANN. § 77-19-10(2)–(3) (West 2020) (allowing the executive director of corrections or a “designee” to select people to carry out lethal injection or “peace officers” to compose the firing squad); see also *supra* notes 28–37 and accompanying text (discussing historic internal executive delegation of killing).

⁶⁷ *Death Row*, FLA. DEP’T OF CORR., <http://www.dc.state.fl.us/ci/deathrow.html> [<https://perma.cc/J5MX-DGJ2>].

⁶⁸ See KONRAD, *BEHIND THE CURTAIN*, *supra* note 24, at 14–16; Berger, *Lethal Injection*, *supra* note 5, at 1388–92; Deborah W. Denno, *America’s Experiment with Execution Methods*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 707, 721–24 (James R. Acker, Robert M. Bohm, & Charles S. Lanier eds., 3d ed. 2014).

execution team members⁶⁹ or suppliers,⁷⁰ and may exempt execution procedures from state freedom of information laws.⁷¹ Execution protocols track statutory secrecy and establish procedures to hide the execution team's identities.⁷² Concealing executioners' and suppliers' identities shields them from possible negative consequences in their communities.⁷³ It also serves symbolic functions. It is not the individual executioner who kills, but the embodiment of the state.⁷⁴

Other procedures shield executioners from knowing whether they were responsible for killing. A repealed New Jersey statute required the lethal

⁶⁹ See, e.g., ARIZ. REV. STAT. ANN. § 13-757(C) (2020); VA. CODE ANN. § 53.1-233 (West 2020); TEX. CODE CRIM. PROC. ANN. art. 43.14(b) (West 2019); see also KONRAD, BEHIND THE CURTAIN, *supra* note 24, at 14–16; ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH?: CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 88 (2000) (describing the secrecy surrounding executioners' identities).

⁷⁰ See, e.g., GA. CODE ANN. § 42-5-36(d)(2) (2020); OKLA. STAT. ANN. tit. 22, § 1015(B) (West 2020); VA. CODE ANN. § 53.1-234 (West 2020); see also KONRAD, BEHIND THE CURTAIN, *supra* note 24, at 14–16.

⁷¹ See, e.g., ARK. CODE ANN. § 5-4-617 (West 2020); see also KONRAD, BEHIND THE CURTAIN, *supra* note 24, at 14–16; LAIN, LETHAL INJECTION, *supra* note 4 (manuscript at 42–45).

⁷² See, e.g., FLA. DEP'T OF CORR., EXECUTION BY ELECTROCUTION PROCEDURES 8–9 (Feb. 27, 2019), <http://www.dc.state.fl.us/ci/docs/Electrocution%20Certification%20Ltr%20and%20Procedure%202-27-19%20Final.pdf> [<https://perma.cc/DHD5-45BN>] (describing a separate, secured “executioner’s room”); NORTH CAROLINA PROTOCOL, *supra* note 5, at 16–17; OHIO DEP'T OF REHAB. & CORR., EXECUTION 18 (Oct. 7, 2016), <https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/OhioProtocol10.07.2016.pdf> [<https://perma.cc/RCX5-R69F>] [hereinafter OHIO PROTOCOL]; VA. DEP'T OF CORR., EXECUTION MANUAL 10 (Feb. 7, 2017), <https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/VirginiaProtocol02.07.2017.pdf> [<https://perma.cc/5G6J-4TU3>] [hereinafter VIRGINIA PROTOCOL]; see also Berger, *Lethal Injection Secrecy*, *supra* note 5, at 1388–91.

⁷³ See Motion for Leave to File and Brief for the States of Arizona et al. as Amici Curiae in Support of Applicants at 13, *Barr v. Roane*, No. 19A615 (Dec. 3, 2019) (“Without the assurance of confidentiality, ‘there is a significant risk that persons and entities necessary to the execution would become unwilling to participate.’”) (quoting *Owens v. Hill*, 758 S.E.2d 794, 805 (Ga. 2014)); *supra* note 42 (discussing the historic unpopularity of executioners). There is a difference between legislative accountability and identifying members of an execution team. Nonetheless, the secrecy surrounding execution teams' identities is one component of a multilayered and opaque system of extreme delegation and shifting responsibility. It should also be noted that there does not appear to have been any serious threats to execution teams or supplying pharmacies. See LAIN, LETHAL INJECTION, *supra* note 4 (manuscript at 45–49) (discussing the absence of threats).

⁷⁴ See FOUCAULT, DISCIPLINE & PUNISH, *supra* note 62, at 10 (“Those who carry out the penalty tend to become an autonomous sector; justice is relieved of responsibility for it by a bureaucratic concealment of the penalty itself.”); KAUFMAN-OSBORNE, *supra* note 35, at 200 (describing executions as “another means of validating the state’s monopoly over the means of legitimate violence”); Osofsky et al., *supra* note 14, at 385 (discussing execution participants' tendency to rely on “the societal imperative to use the death penalty as the ultimate punishment for homicidal crimes”).

injection protocol to ensure that the identity of the person who actually carried out the sentence would be concealed even from the executioner themselves.⁷⁵ Utah's current statute requires "two or more persons . . . [to] administer a continuous intravenous injection," but only one of those injections contains the lethal substances.⁷⁶ These procedures may be intended to ameliorate executioners' stress or trauma potentially caused by participation in an execution.⁷⁷

The lethal injection machine Fred Leuchter⁷⁸ developed exemplified this principle.⁷⁹ In *The Execution Protocol*, Stephen Trombley explains, "The basic design requirement . . . is that it should kill quickly and efficiently, and in a way that causes the least pain and distress to the condemned person, the executioners, and the witnesses."⁸⁰ The machine used two modules, one to deliver the drugs

⁷⁵ N.J. STAT. ANN. § 2C:49-3 (West 2006), *repealed by* L. 2007, C. 204, § 7 (effective Dec. 18, 2007) ("[T]he procedures and equipment utilized in imposing the lethal substances shall be designed to insure that the identity of the person actually inflicting the lethal substance is unknown even to the person himself."). The New Jersey Legislature abolished the death penalty in 2007. *See New Jersey*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-jersey> [<https://perma.cc/U3ZF-XLX2>].

⁷⁶ UTAH CODE ANN. § 77-19-10 (West 2020).

⁷⁷ *See, e.g.*, JOHN D. BESSLER, *KISS OF DEATH: AMERICA'S LOVE AFFAIR WITH THE DEATH PENALTY* 115–16 (2003) [hereinafter BESSLER, *KISS OF DEATH*]; LIFTON & MITCHELL, *supra* note 69, at 89–90 (describing the impact on members of execution teams); Allen L. Ault, *The Hidden Victims of the Death Penalty: Correctional Staff*, WASH. POST (July 31, 2019), <https://www.washingtonpost.com/opinions/2019/07/31/hidden-victims-death-penalty-correctional-staff/> [<https://perma.cc/74YW-G48V>]; Jim Dwyer, *Jim Dwyer of Newsday, Long Island, NY*, NEWSDAY (Nov. 21, 1994), <https://www.pulitzer.org/winners/jim-dwyer> [<https://perma.cc/P5YY-93CH>] (click "Living with Those Deaths"); Jerry Givens, *I Was Virginia's Executioner from 1982 to 1999. Any Questions for Me?*, GUARDIAN (Nov. 21, 2013), <https://www.theguardian.com/commentisfree/2013/nov/21/death-penalty-former-executioner-jerry-givens> [<https://perma.cc/NZS6-WPE5>]; Robert T. Muller, *Prison Executioners Face Job-Related Trauma*, PSYCHOL. TODAY (Oct. 11, 2018), <https://www.psychologytoday.com/us/blog/talking-about-trauma/201810/prison-executioners-face-job-related-trauma> [<https://perma.cc/57K4-QT6Z>].

⁷⁸ Fred Leuchter, once nicknamed "Dr. Death," has been described as a "self-proclaimed execution expert and manufacturer of death machinery," despite lacking the qualifications to practice engineering. *See An 'Expert' on Executions Is Charged With Fraud*, N.Y. TIMES (Oct. 24, 1990), <https://www.nytimes.com/1990/10/24/us/an-expert-on-executions-is-charged-with-fraud.html> [<https://perma.cc/6H9E-TSRQ>]; *see also* STEPHEN TROMBLEY, *THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY* 84–86 (1992). Jurisdictions have since stopped using the machine. *See* Malcolm Gay, *Uncomfortably Numb*, RIVERFRONT TIMES (Dec. 15, 2004), <https://www.riverfronttimes.com/stlouis/uncomfortably-numb/Content?oid=2482648> (on file with the *Ohio State Law Journal*).

⁷⁹ *See* KAUFMAN-OSBORN, *supra* note 35, at 181 ("The net result is a system that eliminates virtually all possibility of error while simultaneously perfecting the mechanisms that enable the dispersion and denial of responsibility for dealing death."); *see also* BANNER, *supra* note 36, at 299; Dubber, *supra* note 14, at 563–66.

⁸⁰ TROMBLEY, *supra* note 78, at 78–79.

and one to control the execution.⁸¹ The control module was in a different room than where the execution takes place, and required two members of the execution team to operate it.⁸² The module had “two complete sets of controls.”⁸³ “When it was time for the execution to commence, each of the executioners presses a button. A computer in the machine chooses which executioner has activated the sequence, and the choice is then automatically erased from the computer’s memory.”⁸⁴

This method has both historic roots and modern applications. West Virginia’s electric chair was operated by pressing three buttons, but two were “dummies,” and “no one could be certain which button sent the current to the chair.”⁸⁵ Japan currently uses comparable methods to conduct hangings; prison employees press buttons simultaneously, but “none is told which button is the ‘live one’ that will cause the prisoner’s fall.”⁸⁶

Firing squad procedures also inject some doubt into who kills. Utah’s firing-squad protocol requires a “five-person execution team,” with two alternates and a team leader.⁸⁷ Four .30-caliber rifles are loaded with two rounds each, and the fifth with blanks.⁸⁸ “Care shall be taken to preclude any knowledge by the members of the firing squad of who is issued the weapon with two blank cartridges.”⁸⁹ This is a consistent practice in firing squads.⁹⁰ It allows participants to reasonably claim they do not know if they killed the prisoner,

⁸¹ *Id.* at 79; Dubber, *supra* note 14, at 565–66.

⁸² TROMBLEY, *supra* note 78, at 79.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ BRANDON, *supra* note 37, at 235.

⁸⁶ Miwa Suzuki, *Cruel Yet Popular Punishment: Japan’s Death Penalty*, YAHOO NEWS (Sept. 7, 2018), <https://sg.news.yahoo.com/cruel-yet-popular-punishment-japans-death-penalty-044522392.html> [<https://perma.cc/7QVH-8C5C>].

⁸⁷ UTAH DEPARTMENT OF CORRECTIONS, TECHNICAL MANUAL 54, https://cdn.muckrock.com/foia_files/2017/03/22/3-13-17_MR34278_RES.pdf (on file with the *Ohio State Law Journal*) (revised June 10, 2010) [hereinafter UTAH PROTOCOL]; *see also* Denno, *The Firing Squad*, *supra* note 56, at 782–84 (describing Utah’s firing squad execution protocols).

⁸⁸ UTAH PROTOCOL, *supra* note 87, at 88.

⁸⁹ *Id.* at 88–89.

⁹⁰ The 1959 Procedure for Military Executions requires eight members of a firing squad, and the officer in charge of carrying out the execution is responsible for ensuring that “[A]t least one, but no more than three will be loaded with blank ammunition.” DEP’T OF THE ARMY, PROCEDURE FOR MILITARY EXECUTIONS, AR 633–15, at 4 (Apr. 7, 1959) (rescinded). The officer is required to place the rifles at random in a rack so that the firing squad will not know which one they have selected. *See id.* Mississippi and Oklahoma permit the use of firing squads in executions. *See Methods of Execution*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution> [<https://perma.cc/KB3M-FZAM>]; *see also* BANNER, *supra* note 36, at 203 (discussing historic firing squad protocols in Utah and Nevada that offered executioners the opportunity to disclaim responsibility for killing); *supra* note 57 and accompanying text.

although the odds are not in their favor.⁹¹ Corrections officials conceal the firing squad's identities by placing the squad in a separate room from the prisoner they are about to kill.⁹²

Apart from mechanical interventions, execution protocols are “broken down into several small tasks, each assigned to a different person, to minimize the sense of responsibility felt by each participant.”⁹³ Lethal injection protocols illustrate these processes.⁹⁴ One individual orders the drugs.⁹⁵ Another designated individual or team prepares the syringes.⁹⁶ “Tie-down teams” or other correctional staff escort the condemned to the death chamber and strap him to the gurney.⁹⁷ Montana's protocols describe in detail which member of the tie-down team is responsible for each strap—different officers handle different straps, thus the condemned is tied down by a cohesive group, rather than an individual corrections officer.⁹⁸ Another individual or team places the IVs.⁹⁹ North Carolina's execution team prepares the condemned in a “Preparation Room” by restraining him on the gurney, attaching “cardiac

⁹¹ See LIFTON & MITCHELL, *supra* note 69, at 89 (“This is ‘for the conscience of the executioners, so no one knows for sure who fired the live round,’ a spokesman for the corrections department in Utah has explained.”).

⁹² See UTAH PROTOCOL, *supra* note 87, at 89; *see also* NORMAN MAILER, *THE EXECUTIONER'S SONG* 1011 (1979).

⁹³ BANNER, *supra* note 36, at 299; *see* Osofsky et al., *supra* note 14, at 386; *see also* LIFTON & MITCHELL, *supra* note 69, at 82 (“Individual responsibility also dissolves, as each member of the team is given only a limited task.”).

⁹⁴ See FLA. DEP'T OF CORR., *EXECUTION BY LETHAL INJECTION PROCEDURES 2–3* (Feb. 2019), <http://www.dc.state.fl.us/ci/docs/Lethal%20Injection%20Certification%20Ltr%20and%20Procedure%202-27-19%20Final%20.pdf> [<https://perma.cc/Q5X8-G6GW>] [hereinafter FLORIDA LETHAL INJECTION PROTOCOL] (describing the different tasks the “team warden” assigns to various team members, including: “achieving and monitoring peripheral venous access,” “achieving and monitoring central venous access,” “examining the inmate prior to execution,” and “attaching the leads to the heart monitors and observing the monitors”); *see also* LIFTON & MITCHELL, *supra* note 69, at 81–82, 103–04 (discussing the “task-oriented” nature of executions).

⁹⁵ See FLORIDA LETHAL INJECTION PROTOCOL, *supra* note 94, at 3; OHIO PROTOCOL, *supra* note 72, at 6.

⁹⁶ See FLORIDA LETHAL INJECTION PROTOCOL, *supra* note 94, at 9; MONT. DEP'T OF CORR., *MONTANA STATE PRISON EXECUTION TECHNICAL MANUAL* 24, 50–51 (Jan. 16, 2013) (on file with the *Ohio State Law Journal*) [hereinafter MONTANA PROTOCOL]; OHIO PROTOCOL, *supra* note 72, at 12–13; UTAH PROTOCOL, *supra* note 87, at 77 (“The IV team leader shall prepare each chemical in accordance with the manufacturer's instructions and draw them into the two (2) sets of syringes.”).

⁹⁷ See MONTANA PROTOCOL, *supra* note 96, at 26; NORTH CAROLINA PROTOCOL, *supra* note 5, at 15; OHIO PROTOCOL, *supra* note 72, at 15.

⁹⁸ MONTANA PROTOCOL, *supra* note 96, at 49.

⁹⁹ See MONTANA PROTOCOL, *supra* note 96, at 50–51; NORTH CAROLINA PROTOCOL, *supra* note 5, at 9 (EMT-Paramedic is “responsible for the insertion of the catheters, IV lines, and applying of the leads of the EKG”); OHIO PROTOCOL, *supra* note 72, at 15 (“The Medical Team shall establish one or two viable IV sites[.]”); UTAH PROTOCOL, *supra* note 87, at 52, 79–80 (IV Team).

monitoring electrodes,” inserting the IV, starting the saline solution, and covering the condemned with a sheet.¹⁰⁰ Different team members bring the condemned into the “Death Chamber,” while other team members finalize the rest of the preparations.¹⁰¹

The executioner administers the intravenous injections at the warden’s signal,¹⁰² often in a separate room than the death chamber.¹⁰³ Another member of the execution team performs consciousness checks after an anesthetic is administered.¹⁰⁴ If the condemned is unconscious, then the warden will signal the executioner who then administers the second and third drugs.¹⁰⁵ Different members of the team may be responsible for monitoring different equipment or the prisoner’s bodily functions.¹⁰⁶ Ohio has a “Command Center” keeping a record of the timeline of the prisoner’s death, and a “Drug Administrator”¹⁰⁷ announces “the start and finish times of each injection to the Command Center contact who shall then inform the Command Center for capture on the Execution Timeline.”¹⁰⁸

Compartmentalizing these actions into a series of mechanical, ritualized, and rehearsed steps separates obvious violence from killing.¹⁰⁹ As Markus Dubber explains, because even participants in a system of capital punishment “share the general inhibition against inflicting extreme violence on a particular person, they develop mechanisms to minimize their sense of responsibility for the infliction of the death penalty.”¹¹⁰ If participants are guaranteed anonymity and take small, discreet actions, they can more readily disavow any sense of

¹⁰⁰ NORTH CAROLINA PROTOCOL, *supra* note 5, at 15.

¹⁰¹ *See id.*

¹⁰² *See* MONTANA PROTOCOL, *supra* note 96, at 52; OHIO PROTOCOL, *supra* note 72, at 16–18.

¹⁰³ *See* *Baze v. Rees*, 553 U.S. 35, 45 (2008) (“The execution team administers the drugs remotely from the control room through five feet of IV tubing.”); VIRGINIA PROTOCOL, *supra* note 72, at 10.

¹⁰⁴ *See* MISSISSIPPI DEP’T OF CORRECTIONS, CAPITAL PUNISHMENT PROCEDURES 9 (Nov. 2017), https://files.deathpenaltyinfo.org/legacy/files/pdf/MississippiProtocol_11.15.2017.pdf [<https://perma.cc/H5FT-9GP4>] [hereinafter MISSISSIPPI PROCEDURES]; MONTANA PROTOCOL, *supra* note 96, at 52; VIRGINIA PROTOCOL, *supra* note 72, at 10.

¹⁰⁵ *See* MONTANA PROTOCOL, *supra* note 96, at 52. This is in a state that uses a three-drug protocol. *See id.* at 50–51. Some jurisdictions use single-drug execution protocols. *See State by State Lethal Injection Protocols*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/lethal-injection/state-by-state-lethal-injection-protocols> [<https://perma.cc/ULV9-9YBA>] (illustrating six states that have recently used single-drug executions protocol).

¹⁰⁶ *See* NORTH CAROLINA PROTOCOL, *supra* note 5, at 17–18; OHIO PROTOCOL, *supra* note 72, at 18.

¹⁰⁷ Ohio’s protocols refer to the executioner as a “Drug Administrator.” *See* OHIO PROTOCOL, *supra* note 72, at 16–17.

¹⁰⁸ *Id.* at 16, 18.

¹⁰⁹ *See supra* notes 82–83 and accompanying text.

¹¹⁰ Dubber, *supra* note 14, at 562.

personal responsibility for killing another human being.¹¹¹ External and retrospective sources of authority help maintain this façade: the state established the penalty, the jury sentenced him to death, the courts heard his appeals, and the warden gave the order.¹¹²

Redirecting decisions about killing shifts accountability between individuals and entities. These practices echo legislative delegation to executive agencies. Nondelegation fits into this framework because it recognizes the inherent harms in shifting responsibility for consequential decisions. The next Part of this article discusses the role of the nondelegation doctrine in state and federal courts before turning in Part IV to a detailed discussion of inmates' challenges to method of execution statutes.

III. THE NONDELEGATION DOCTRINE

The separation of powers is a core value in American governance. In *Federalist No. 47*, James Madison asserted that, to prevent tyranny, legislative, executive, and judicial powers must be divided, rather than accumulated by a branch, individual, or group.¹¹³ The nondelegation doctrine derives in part from this principle.¹¹⁴ Under the doctrine, a legislature may not delegate its “essential legislative functions” to other governmental bodies, such as administrative agencies.¹¹⁵ This Part begins with an examination of state nondelegation doctrines, followed by a discussion of *Gundy v. United States*,¹¹⁶ and the significance of the potential for a renewed federal nondelegation doctrine.

A. State Nondelegation Doctrines

The last time the Supreme Court found a legislative delegation impermissible under the nondelegation doctrine was in 1935.¹¹⁷ Since that time,

¹¹¹ See *supra* note 82 and accompanying text; see also Osofsky et al., *supra* note 14, at 386 (“After lethal activities become routinized into separate sub-functions, participants shift their attention from the morality of their activity to the operational details and efficiency of their specific job.”).

¹¹² See BRANDON, *supra* note 37, at 209; LIFTON & MITCHELL, *supra* note 69, at 79, 105; Dubber, *supra* note 14, at 573.

¹¹³ James Madison, *The Federalist No. 47*, in ALEXANDER HAMILTON, JAMES MADISON, & JOHN JAY, *THE FEDERALIST PAPERS* 245, 245 (Ian Shapiro ed., Yale Univ. Press 2009); see also *Loving v. United States*, 517 U.S. 748, 756 (1996).

¹¹⁴ See *Mistretta v. United States*, 488 U.S. 361, 371 (1989); KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 2.6, at 1–2 (6th ed. supp. 2020).

¹¹⁵ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935); see also *Loving*, 517 U.S. at 757; *Field v. Clark*, 143 U.S. 649, 692–94 (1892); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1553–54 (1991).

¹¹⁶ *Gundy v. United States*, 139 S. Ct. 2116 (2019).

¹¹⁷ See *id.* at 2129; see also *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 541–42 (“In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting

the Supreme Court has consistently permitted Congress to make substantial delegations of powers to agencies and executive officials provided that Congress supplied an “intelligible principle” to guide the legislature’s discretion.¹¹⁸ For that reason, many scholars concluded that the nondelegation doctrine was mostly, if not completely dead.¹¹⁹ Others have suggested that courts could resurrect the nondelegation doctrine, even if in a slightly different form than it took in 1935.¹²⁰ Still other scholarship points to interpretive canons

laws for the government of trade and industry throughout the country, is virtually unfettered.”); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (“Congress has declared no policy, has established no standard, has laid down no rule.”); HICKMAN & PIERCE, *supra* note 114, at 5–6; William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, in *SUPREME COURT REVIEW 2018–2019*, at 211, 216–17 (Steven D. Schwinn ed., 3d ed. 2019).

¹¹⁸ See *Gundy*, 139 S. Ct. at 2129 (listing cases in which the Supreme Court permitted “very broad delegations”); see also ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 153 (1987); HICKMAN & PIERCE, *supra* note 114, at 139, 143–46; DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 40 (1993). A few lower courts have found unconstitutional delegations. See *Am. Trucking Ass’n, Inc. v. U.S. EPA*, 175 F.3d 1027, 1037–38 (D.C. Cir. 1999); *South Dakota v. United States Dep’t of Interior*, 69 F.3d 878, 885 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996); see also Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 *VAND. L. REV.* 1167, 1171 (1999) (asserting that the federal system “might be said to endorse a strong prodelegation separation of powers jurisprudence—one that generally favors delegation to administrative agencies, while precluding congressional delegation with strings attached”).

¹¹⁹ See, e.g., Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 *U. PA. L. REV.* 759, 839 (1997); Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 *VA. L. REV.* 765, 780 (2016); Richard D. Cudahy, *The Nondelegation Doctrine: Rumors of Its Resurrection Prove Unfounded*, 16 *ST. JOHN’S J. LEGAL COMMENT.* 1 (2002); Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2364 (2001); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231, 1241 (1994); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 *U. CHI. L. REV.* 1721, 1723 (2002); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 *VA. L. REV.* 93, 145 (2005); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 *HARV. J. L. & PUB. POL’Y* 931, 974 (2014).

¹²⁰ See, e.g., SCHOENBROD, *supra* note 118, at 14; Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 *U. CHI. L. REV.* 1297, 1328–29 (2003); Araiza, *supra* note 117, at 217; Peter H. Aranson, Ernest Gelhorn, & Glen O. Robinson, *A Theory of Delegation*, 68 *CORNELL L. REV.* 1, 63 (1982); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 *HARV. J. L. & PUB. POL’Y* 147, 198 (2017); Cary Coglianese, *Dimensions of Delegation*, 167 *U. PA. L. REV.* 1849, 1889 (2019); Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 *NOTRE DAME L. REV.* 619, 645 (2017); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, The Laws, and Delegations of Power*, 72 *NW. U. L. REV.* 443, 459–60 (1977).

or reliance on other legal doctrines to apply nondelegation principles in federal cases.¹²¹

Unlike the uncertainty in the viability of the federal nondelegation doctrine, as Jim Rossi has explained, in state courts, “the nondelegation doctrine is alive and well”¹²² Conceptually, state nondelegation doctrines are fairly similar to the federal nondelegation doctrine in that they stem from constitutional separation of powers principles. State systems of government parallel the tripartite federal system.¹²³ Some state constitutions, like the U.S. Constitution, provide that each branch of government is vested with specific powers.¹²⁴ Others also have an express separation of powers clause and vesting clauses.¹²⁵ A handful of state constitutions, while preserving the division of powers, expressly permit delegation of “regulatory” authority in certain

¹²¹ HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 137–38 (2006) (asserting that courts have relied on the nondelegation doctrine “to justify narrowly construing a statute”); Aditya Bamzai, Comment, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 174 (2019) (discussing *Gundy v. United States*); Lisa Schultz Bressman, Essay, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1409 (2000); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 699 (1997); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000); Cass R. Sunstein, Forward, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1197, 1203 (2018).

¹²² Rossi, *supra* note 118, at 1189. *But see* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 417 (2017) (observing that state courts are “surpris[ingly]” willing to defer to legislative delegation).

¹²³ See, e.g., *Brown v. Heymann*, 297 A.2d 572, 577 (N.J. 1972) (“There is no indication that our State Constitution was intended, with respect to the delegation of legislative power, to depart from the basic concept of distribution of the powers of government embodied in the Federal Constitution.”).

¹²⁴ See, e.g., ALASKA CONST. art. 2, § 1, art. 3, § 1, art. 4, § 1; DEL. CONST. art. 2, § 1, art. 3, § 1; art. 4, § 1; HAW. CONST. art. 3, § 1, art. 5, § 1, art. 6, § 1; KAN. CONST. art. 1, § 3, art. 2, § 1, art. 3, § 1; N.C. CONST. art. II, § 1, art. III, § 1, art. IV, § 4; N.H. CONST. pt. 2, art. 2, pts. 41–45, *see* pt. 2 art. 69; N.Y. CONST. art. 3, § 1, art. 4, § 1; OHIO CONST. art. II, § 1, art. III, § 5, art. IV, § 1; PA. CONST. ch. 2, § 2, ch. 2, § 3, ch. 2, § 4; S.D. CONST. art. 3, § 1, art. 4, § 1, art. 5, § 1; WASH. CONST. art. II, § 1, art. III, § 2, art. IV, § 1; WIS. CONST. art. IV, § 1, art. V, § 1, art. VII, § 2.

¹²⁵ See ALA. CONST. art. III, § 42; ARIZ. CONST. art. III; ARK. CONST. art. 4, §§ 1–2; CAL. CONST. art. III, § 3; COLO. CONST. art. III; FLA. CONST. art. II, § 3; GA. CONST. art. 1, § 2, ¶ 3; IDAHO CONST. art. II, § 1; ILL. CONST. art. 2, § 1; IND. CONST. art. 3, § 1; IOWA CONST. art. 3, § 1; KY. CONST. §§ 27–28; LA. CONST. art. 2, §§ 1–2; MASS. CONST. pt. 1, art. XXX; MD. CONST. art. 8; ME. CONST. art. 3, §§ 1–2; MICH. CONST. art. 3, § 2; MINN. CONST. art. 3, § 1; MISS. CONST. art. 1, §§ 1–2; MO. CONST. art. 2, § 1; MONT. CONST. art. IV, § 1; N.D. CONST. art. XI, § 26; NEB. CONST. art. II, § 1, cl. 1; NEV. CONST. art. 3, § 1, cl. 1; N.J. CONST. art. 3, § 1; N.M. CONST. art. 3, § 1; OKLA. CONST. art. 4, § 1; OR. CONST. art. III, § 1; R.I. CONST. art. V; S.C. CONST. art. I, § 26; S.D. CONST. art. II; TENN. CONST. art. 2, §§ 1–2; TEX. CONST. art. II, § 1; UTAH CONST. art. 5, § 1; VA. CONST. art. 3, § 1; VT. CONST. ch. II, §§ 2–5; W. VA. CONST. art. 5, § 1; WYO. CONST. art. 2, § 1.

circumstances.¹²⁶ There is, as Keith Whittington and Jason Iuliano have observed, significant textual support in state constitutions delineating the responsibilities of each branch and limiting legislative delegation.¹²⁷

Despite permitting substantial delegation, state courts do apply the doctrine.¹²⁸ This may be because state governmental structure, needs, and policies are sufficiently distinct from the sprawling federal system that a more robust nondelegation inquiry is viable.¹²⁹ Likewise, state systems may be “better equipped” to tackle excessive delegation.¹³⁰ Internal mechanisms within states may provide for comprehensive judicial review, increased legislative oversight, or administrative review processes.¹³¹ Similarly, state constitutions are more amenable to change than the federal constitution, potentially altering separation of powers analyses.¹³²

State nondelegation cases emphasize the importance of adhering to separation of powers principles in decision-making.¹³³ The federal nondelegation doctrine permits Congress to direct others to “fill up the details” in a statute provided Congress has “[a]id] down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”¹³⁴ State nondelegation doctrines rely on similar analyses. In evaluating

¹²⁶ See CONN. CONST. art. 2, amended by Art. XVIII; NEV. CONST. art. 3, § 1, cl. 2; VA. CONST. art. 3, § 1; see also OR. CONST. art. III, § 2 (providing the legislature can establish an agency for budgetary control).

¹²⁷ Whittington & Iuliano, *The Myth of the Nondelegation Doctrine*, *supra* note 122, at 416.

¹²⁸ See 1 FRANK E. COOPER, *STATE ADMINISTRATIVE LAW* 17 (1965) (discussing state courts’ willingness to strike down statutes with excessively broad delegations); ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW* 571–72 (2d ed. 1993); Rossi, *supra* note 118, at 1193; Whittington & Iuliano, *The Myth of the Nondelegation Doctrine*, *supra* note 122, at 417; see also *Brown v. Heymann*, 297 A.2d 572, 577 (N.J. 1972) (“[I]n our State the judiciary has accepted delegations of legislative power which probably exceed federal experience.”).

¹²⁹ See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 238–39 (2009) (“Each of the states has its own, virtually unique, arrangements concerning the distribution of powers among and within the branches.”); Rossi, *supra* note 118, at 1170 (“State courts sometimes reach different results than their federal counterparts in deciding issues of constitutional law because states are distinct institutions of governance, in terms of their sizes, decisionmaking structures, populations, and histories.”).

¹³⁰ See COOPER, *supra* note 128, at 17–18 (discussing the difference between federal and state courts in checking administrative agencies).

¹³¹ See *id.* at 19.

¹³² See WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS*, *supra* note 129, at 239–40; see also Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1670–71 (2014).

¹³³ See *Dep’t of Bus. Regulation v. Nat’l Manufactured Hous. Fed’n, Inc.* 370 So. 2d 1132, 1135 (Fla. 1979); *Askew v. Cross Key Waterways*, 372 So.2d 913, 924 (Fla. 1978).

¹³⁴ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (quoting *Cincinnati, Wilmington & Zanesville, R.R. Co. v. Comm’rs of Clinton Cty.*, 1 Ohio St. 77,

whether delegation is consonant with state separation of powers principles, state courts, while acknowledging pragmatic governance concerns, draw the line at allowing agencies to create policy.¹³⁵ “Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society, but flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy.”¹³⁶

Separation of powers jurisprudence may be classified as either “formalist” or “functionalist.”¹³⁷ A formalist approach relies on “bright-line rules designed to keep each branch within its sphere of power.”¹³⁸ A functionalist approach centers on “whether an action of one branch interferes with one of the core functions of another.”¹³⁹ States, as in the federal system, use both formalist and functionalist approaches in separation of powers questions.¹⁴⁰ Rossi offers a helpful taxonomy of the various states’ separation of powers constitutional provisions and state approaches to nondelegation: “weak,” “strong,” and “moderate.”¹⁴¹

“Strong” jurisdictions evaluating nondelegation cases analyze the legislature’s freedom to set policy and delegate against whether the agency’s actions are consistent with the underlying statutory policies and commands.¹⁴²

88 (Ohio 1852)); *see also* *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

¹³⁵ *See* *Clean Air Constituency v. Cal. State Air Res. Bd.*, 523 P.2d 617, 626 (Cal. 1974) (“An unconstitutional delegation of power occurs when the Legislature confers upon an administrative agency the unrestricted authority to make fundamental policy determinations.”); *CEED v. Cal. Coastal Zone Conservation Comm’n*, 118 Cal. Rptr. 315, 329 (Cal. Dist. Ct. App. 1974) (“Consequently, where the Legislature makes the fundamental policy decision and delegates to some other body the task of implementing that policy under adequate safeguards, there is no violation of the doctrine.”); *Askew v. Cross Key Waterways*, 372 So. 2d 913, 920 (Fla. 1978) (exploring the difference between setting policy and “fleshing out” an existing policy through regulation); *Chapel v. Commonwealth*, 89 S.E.2d 337, 342 (Va. 1955) (concluding that legislative failure to declare “specific policy” or “fix any standard to direct and guide” an agency in making rules was an “invalid” delegation of legislative power); *Thompson v. Smith*, 154 S.E. 579, 584 (Va. 1930) (“Government could not be efficiently carried on if something could not be left to the judgment and discretion of administrative officers to accomplish in detail what is authorized or required by law in general terms.”).

¹³⁶ *Askew*, 372 So. 2d at 924.

¹³⁷ *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 997 (2006) [hereinafter Barkow, *Separation of Powers*]; Brown, *supra* note 115, at 1522–23.

¹³⁸ Barkow, *Separation of Powers*, *supra* note 137, at 997.

¹³⁹ Brown, *supra* note 115, at 1527.

¹⁴⁰ *See* WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS, *supra* note 129, at 238.

¹⁴¹ *See* Rossi, *supra* note 118, at 1190–1201.

¹⁴² *See* *Clean Air Constituency v. Cal. State Air Res. Bd.*, 523 P.2d 617, 628 (Cal. 1974) (concluding that there was no separation of powers problem because the agency could exercise its discretion on “reasons relating to the three primary goals” of the legislation); *see*

Virginia, for example, has defined “[c]onstitutionally sufficient policies” in delegation cases as “those ‘where the terms or phrases employed have a well understood meaning, and prescribe sufficient standards to guide the administrator.’”¹⁴³ A key component of this analysis is the guidelines limiting agency discretion.¹⁴⁴ Provided legislatures have set policies and sufficient guidelines by which agencies exercise their discretion, the legislatures can delegate to agencies the “power to ascertain the facts and conditions to which the policy and principles apply.”¹⁴⁵

State courts prefer substantial guidelines from legislatures to facilitate judicial review of nondelegation challenges because courts are more readily able to assess whether the agency has complied with the will of the legislature.¹⁴⁶

“Weak” jurisdictions generally uphold broad delegations as long as adequate procedural safeguards are in place, and concentrate their analysis on administrative standards.¹⁴⁷ Courts may conclude that judicial review or compliance with the state’s Administrative Procedure Act (APA) are sufficient

also Rossi, *supra* note 118, at 1224 (“[S]tate courts adhering to a strong nondelegation doctrine trade off the potential efficiencies associated with delegation to guard against faction and ensure that the legislature, rather than agencies, makes key policy decisions.”).

¹⁴³ Elizabeth River Crossings OpCo, LLC v. Meeks, 749 S.E.2d 176, 192 (Va. 2013) (quoting Bell v. Dorey Elec. Co., 448 S.E.2d 622, 624 (Va. 1994)).

¹⁴⁴ See *Clean Air Constituency*, 523 P.2d at 626–27 (“To avoid such delegation, the Legislature must provide an adequate yardstick for the guidance of the administrative body empowered to execute the law.”); *Cottrell v. City & Cty. of Denver*, 636 P.2d 703, 709–10 (Colo. 1981) (en banc); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011) (“[W]here the Legislature has provided reasonable limitations and standards for carrying out the delegated duties, there is no unconstitutional delegation of legislative authority.”); *Brown v. Vail*, 237 P.3d 263, 269 (Wash. 2010) (en banc) (“The second requirement for proper legislative delegation is that adequate procedural safeguards be present for the promulgation of rules and to test their constitutionality once promulgated.”).

¹⁴⁵ *Thompson v. Smith*, 154 S.E. 579, 584 (Va. 1930) (quoting *Mutual Film Corp. v. Ohio Indus. Comm’n*, 236 U.S. 239, 245 (1915)); see also *Hous. Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 87 (Tex. 1940) (“The legislature may validly delegate the authority to find facts from the basis of which there is determined the applicability of the law; that is, an administrative body may be given the authority to ascertain conditions upon which an existing law may operate”); *Volkswagen of Am., Inc. v. Smit*, 689 S.E.2d 679, 687 (Va. 2010) (explaining that legislatures need not set out minutiae, but can delegate authority to create procedures for general standards).

¹⁴⁶ See *Askew v. Cross Key Waterways*, 372 So. 2d 913, 918–19 (Fla. 1978) (“When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.”); see also *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972) (comparing claimed authority of the Texas Secretary of State over state elections with what the Texas General Assembly had actually authorized).

¹⁴⁷ Rossi, *supra* note 118, at 1191–92.

to check administrative discretion.¹⁴⁸ For instance, in *Brown v. Vail*,¹⁴⁹ discussed in greater detail *infra*, the Washington Supreme Court identified compliance with Washington’s APA with an agency appeals process or judicial review as a necessary limitation on administrative discretion when assessing agency rules that may subject a person to “criminal sanctions.”¹⁵⁰

The final category in Rossi’s taxonomy, “moderate,” describes jurisdictions that “vary the degree of standards necessary depending on the subject matter of the statute or the scope of the statutory directive.”¹⁵¹ This approach appears to be more consistent with that taken by courts in evaluating nondelegation challenges to capital punishment statutes. As discussed *infra*, courts rely substantially on the presumption of agency expertise and the impracticality of requiring legislatures to develop detailed protocols.¹⁵²

B. Recent Developments in the Federal Nondelegation Doctrine

Although the federal nondelegation doctrine is of limited utility in evaluating state constitutional law,¹⁵³ recent developments merit some discussion. The Supreme Court’s current approach to legislative delegation tracks a functionalist approach, allowing Congress significant freedom in delegation, provided it has set out an intelligible principle.¹⁵⁴ Administrative agencies exercise substantial discretion in implementing and enforcing laws.¹⁵⁵

While the Supreme Court has eschewed the nondelegation doctrine since 1935, the nondelegation doctrine may be “slightly alive.”¹⁵⁶ In *Gundy v. United*

¹⁴⁸ See COOPER, *supra* note 128, at 17 (“[S]tate courts have inclined to the view that combination of legislative, prosecutory, and adjudicatory functions in a single agency will be countenanced where a practical necessity therefor exists, but only so long as workable checks and balances . . . exist to guard against abuses of administrative discretion.”). *But see* Rossi, *supra* note 118, at 1227 (observing that state judicial review of agency rulemaking is generally weaker than federal APA review).

¹⁴⁹ *Brown v. Vail*, 237 P.3d 263 (Wash. 2010) (en banc).

¹⁵⁰ *Id.* at 269–70.

¹⁵¹ Rossi, *supra* note 118, at 1198.

¹⁵² See *infra* Part IV.B.

¹⁵³ See Whittington & Iuliano, *supra* note 122, at 417.

¹⁵⁴ See *Brown*, *supra* note 115, at 1553–54.

¹⁵⁵ *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019); *Mistretta v. United States*, 488 U.S. 361, 372 (1989); see also *Field v. Clark*, 143 U.S. 649, 693–94 (1892).

The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Cincinnati, Wilmington & Zanesville, R.R. Co. v. Comm’rs of Clinton Cty., 1 Ohio St. 77, 88–89 (Ohio 1852).

¹⁵⁶ See THE PRINCESS BRIDE (Act III Communications 1987) (Miracle Max: “Well, it just so happens that your friend here is only mostly dead. There’s a big difference between mostly dead and all dead. . . . mostly dead is slightly alive”).

States, the Court held that the federal Sex Offender Registration and Notification Act (SORNA) did not violate the nondelegation doctrine by granting the Attorney General discretion to apply SORNA's sex offender registration requirements to individuals convicted of sex offenses before SORNA was enacted.¹⁵⁷ Nonetheless, two separate opinions for four members of the Court signaled a potential shift in the Court's approach to nondelegation.¹⁵⁸ Justice Alito concurred only in the judgment, and expressed his willingness to reevaluate the nondelegation doctrine.¹⁵⁹ Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented on the ground that SORNA effectively permitted the Attorney General to write the law that would apply to individuals convicted before SORNA was enacted.¹⁶⁰

Justice Gorsuch asserted that the "intelligible principle misadventure"¹⁶¹ had obscured "guiding principles" the Court had previously set forth to channel courts' analyses of separation of powers cases.¹⁶² First, Congress may direct another branch of government to "fill up the details" provided that "Congress makes the policy decisions . . ."¹⁶³ This required Congress to identify "standards 'sufficiently definite and precise'" to permit Congress, the people, and the judicial branch to determine whether the branch authorized to "fill up the details" had complied with Congress's directives.¹⁶⁴ Second, Congress is permitted to make application of a rule contingent on specific fact-finding by the executive.¹⁶⁵ Third, in examining whether a statute impermissibly delegates legislative power, a court must consider whether there is an overlap between Congress's exclusive legislative authority and a power the Constitution has vested in another branch of government.¹⁶⁶

Justice Gorsuch reframed the intelligible principle inquiry against these principles:

¹⁵⁷ *Gundy*, 139 S. Ct. at 2129–30.

¹⁵⁸ See Bamzai, *supra* note 121, at 166.

¹⁵⁹ *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.")

¹⁶⁰ *Id.* at 2131 (Gorsuch, J., dissenting).

¹⁶¹ *Id.* at 2141.

¹⁶² *Id.* at 2136–39.

¹⁶³ *Id.* at 2136 (citing *Wayman v. Southard*, 23 U.S. 1, 31, 43 (1825)).

¹⁶⁴ *Id.*; see also *Yakus v. United States*, 321 U.S. 414, 426 (1944); *In re Kollock*, 165 U.S. 526, 532 (1897); *Wayman v. Southard*, 23 U.S. 1, 31 (1825).

¹⁶⁵ *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (citing *Cargo of Brig Aurora v. United States*, 11 U.S. 382, 388 (1813), and *Miller v. Mayor of New York*, 109 U.S. 385, 393 (1883)). The absence of controlled (or indeed any) fact-finding was one of the factors that proved fatal to the relevant provision of the NIRA in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415 (1935) ("It does not require any finding by the President as a condition of his action.")

¹⁶⁶ See *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting); *Loving v. United States*, 517 U.S. 748, 772 (1996) (discussing an overlap between a delegation of authority to set aggravating factors in a capital trial for the military and the President's role as Commander in Chief); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.¹⁶⁷

He characterized the separation of powers doctrine as a “procedural guarantee that requires Congress to assemble a social consensus before choosing our nation’s course on policy questions”¹⁶⁸ Respecting these limitations protects individual rights,¹⁶⁹ and promotes legislative accountability.¹⁷⁰

In evaluating the distinctions between Justice Kagan’s majority opinion and Justice Gorsuch’s dissent, Aditya Bamzai asserts that this analysis measures the same factors in the Court’s traditional “intelligible principle” analysis; thus the “real difference” is the level of scrutiny the Court might apply to that analysis.¹⁷¹ Although there is similarity between the analyses, the potential for increased scrutiny is a significant development in reevaluating the doctrine.¹⁷²

Justice Kavanaugh did not participate in *Gundy*, and the Court recently denied *Gundy*’s petition for rehearing.¹⁷³ Even so, the Court can likely count five members who are willing to reconsider the scope of legislative delegation. In a statement regarding denial of certiorari in a case that raised the same issues as *Gundy*, Justice Kavanaugh signaled his willingness to reevaluate the scope of the nondelegation doctrine, particularly Congress’s authority to delegate “major policy questions” to agencies.¹⁷⁴ A significant alteration of the federal nondelegation doctrine, therefore, may be in the cards.¹⁷⁵

¹⁶⁷ *Gundy*, 139 S. Ct. at 2141.

¹⁶⁸ *Id.* at 2145.

¹⁶⁹ *See id.* at 2131.

¹⁷⁰ *See id.* at 2134.

¹⁷¹ Bamzai, *supra* note 121, at 185; *see also* Coglianese, *supra* note 120, at 1883 (asserting that Justice Gorsuch’s dissent does not offer more meaningful guidance than the intelligible principle test).

¹⁷² *See, e.g.,* Araiza, *supra* note 117, at 231–34; Coglianese, *supra* note 120, at 1883; Aaron Gordon, *Nondelegation*, 12 N.Y.U. J. L. & LIBERTY 718, 817 (2019); Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism From the Founding to the Present*, 167 U. PA. L. REV. 1699, 1747 (2019); Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 912 (2020); F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. (forthcoming 2020) (manuscript at 6) (on file with the *Ohio State Law Journal*).

¹⁷³ *Gundy v. United States*, 140 S.Ct. 579 (mem.) (2019).

¹⁷⁴ *Paul v. United States*, 718 Fed.App’x. 360 (6th Cir. 2017) (Statement of Kavanaugh, J., respecting the denial of certiorari), *cert denied*, 140 S. Ct. 342 (Nov. 25, 2019) (No. 17–8330).

¹⁷⁵ *See, e.g.,* Gary Lawson, “*I’m Leavin’ It (All) Up To You*”: *Gundy and the (Sort-Of) Resurrection of the Subdelegation Doctrine*, 2018 CATO SUP. CT. REV. 31, 33 (2018–19); *supra* note 161.

This development is significant insofar as it informs the application of state nondelegation doctrines and provides a possible way to reframe the debate over delegation in capital punishment.¹⁷⁶ Regardless of the strength or weakness of a state's approach to delegation, state courts generally reject inmates' claims that states' highly generalized method of execution statutes violate the nondelegation doctrine.

IV. NONDELEGATION CHALLENGES TO METHOD OF EXECUTION STATUTES

All twenty-eight states that retain the death penalty use lethal injection as their primary method of execution.¹⁷⁷ Although some states only use lethal injection,¹⁷⁸ others offer prisoners a choice between two or even three

¹⁷⁶In *Wisconsin Legislature v. Palm*, 942 N.W.2d 900, 935-37 (Wis. 2020), Justice Kelly's concurrence expressly discussed Justice Gorsuch's *Gundy* dissent in state separation of powers questions along with Wisconsin precedent. *Id.* (Kelly, J., concurring). *Gundy* could potentially support states' decisions to apply a more skeptical evaluation of state legislative delegation.

¹⁷⁷See ALA. CODE § 15-18-82.1(a) (2020); ARIZ. REV. STAT. ANN. § 13-757(A) (2020); ARK. CODE ANN. § 5-4-617(a), (c) (2020); CAL. PENAL CODE § 3604(a) (West 2020); FLA. STAT. ANN. § 922.105(1) (West 2020); GA. CODE ANN. § 17-10-38(a) (West 2020); IDAHO CODE ANN. § 19-2716 (West 2020); IND. CODE ANN. § 35-38-6-1(a) (West 2020); KAN. STAT. ANN. § 22-4001(a) (West 2020); KY. REV. STAT. ANN. § 431.220(1)(a) (West 2020); LA. STAT. ANN. § 15:569(B) (2019); MISS. CODE ANN. § 99-19-51(1) (West 2020); MO. ANN. STAT. § 546.720(1) (West 2020); MONT. CODE ANN. § 46-19-103(3) (West 2019); NEB. REV. STAT. ANN. § 83-964 (West 2020); NEV. REV. STAT. ANN. § 176.355(1) (West 2020); N.C. GEN. STAT. ANN. § 15-188 (West 2020); OHIO REV. CODE ANN. § 2949.22(A) (West 2020); OKLA. STAT. ANN. tit. 22, § 1014(A) (West 2020); OR. REV. STAT. ANN. § 137.473(1) (West 2020); 61 PA. STAT. AND CONS. STAT. ANN. § 4304(a)(1) (West 2010); S.D. CODIFIED LAWS § 23A-27A-32 (2020); TENN. CODE ANN. § 40-23-114(a) (West 2020); TEX. CODE CRIM. PROC. ANN. art. 43.14(a) (West 2019); UTAH CODE ANN. § 77-18-5.5(1)(a) (West 2020); VA. CODE ANN. § 53.1-234 (West 2020); WYO. STAT. ANN. § 7-13-904(a) (West 2020). Pennsylvania, California, and Oregon all have governor-imposed moratoriums. See Mark Berman, *Pennsylvania's Governor Suspends the Death Penalty*, WASH. POST (Feb. 13, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/02/13/pennsylvania-suspends-the-death-penalty/> [<https://perma.cc/BYW5-3MXN>]; J. Cooper, *Oregon's New Governor Plans to Continue Death Penalty Moratorium*, DEATH PENALTY INFO. CTR. (Feb. 23, 2015), <https://deathpenaltyinfo.org/news/oregons-new-governor-plans-to-continue-death-penalty-moratorium> [<https://perma.cc/T22A-KTH3>]; Innocence Staff, *California Governor Imposes Death Penalty Moratorium*, INNOCENCE PROJECT (Mar. 13, 2019), <https://www.innocenceproject.org/ca-gov-imposes-death-penalty-moratorium/> [<https://perma.cc/4L3Z-9MQX>].

¹⁷⁸See GA. CODE ANN. § 17-10-38(a); IDAHO CODE ANN. § 19-2716; IND. CODE ANN. § 35-38-6-1(a); KAN. STAT. ANN. § 22-4001(a); MONT. CODE ANN. § 46-19-103(3); NEB. REV. STAT. ANN. § 83-964; NEV. REV. STAT. ANN. § 176.355(1); N.C. GEN. STAT. ANN. § 15-188; OHIO REV. CODE ANN. § 2949.22(A); OR. REV. STAT. ANN. § 137.473(1); PA. STAT. AND CONS. STAT. ANN. § 4304(a)(1); S.D. CODIFIED LAWS § 23A-27A-32; TEX. CODE CRIM. PROC. ANN. art. 43.14(a).

methods.¹⁷⁹ Inmates in Alabama can choose between lethal injection, electrocution, or nitrogen hypoxia.¹⁸⁰ In Virginia and Florida, inmates may select electrocution or lethal injection; lethal injection is the default if a prisoner refuses to choose.¹⁸¹ California grants inmates a choice of lethal injection or gas.¹⁸² Some jurisdictions, like Tennessee and Arizona, only give inmates whose offenses were committed before a certain date a choice between two methods.¹⁸³ Some states have authorized alternative methods of execution in the event that lethal injection is unavailable due to drug shortages or court rulings.¹⁸⁴ Mississippi, Oklahoma, and Utah have authorized the firing squad as

¹⁷⁹ See, e.g., ALA. CODE § 15-18-82.1(a); ARIZ. REV. STAT. ANN. § 13-757(B); CAL. PENAL CODE § 3604(b); FLA. STAT. ANN. § 922.105(1); S.C. CODE ANN. § 24-3-530 (2020); VA. CODE ANN. § 53.1-234. Three states, Washington, New Hampshire, and Delaware all authorize hanging, but none of those jurisdictions retain the death penalty. See *Rauf v. State*, 145 A.3d 430, 433–34 (Del. 2016) (concluding that Delaware’s death penalty was unconstitutional because it permitted a judge to determine the facts necessary to impose a death sentence and did not require juror unanimity); *State v. Gregory*, 427 P.3d 621, 621–22 (Wash. 2018) (holding that Washington’s death penalty was unconstitutional under Washington’s Constitution because it was administered in an arbitrary and racially biased manner); Kate Taylor & Richard A. Oppel Jr., *New Hampshire, with a Death Row of 1, Ends Capital Punishment*, N.Y. TIMES (Apr. 11, 2019), <https://www.nytimes.com/2019/04/11/us/death-penalty-new-hampshire.html> [<https://perma.cc/SYY2-ATDH>].

¹⁸⁰ ALA. CODE § 15-18-82.1(a)–(b).

¹⁸¹ FLA. STAT. ANN. § 922.105(1); VA. CODE ANN. § 53.1-234.

¹⁸² CAL. PENAL CODE § 3604(a).

¹⁸³ See ARIZ. REV. STAT. ANN. § 13-757(B) (2020) (“A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date.”); KY. REV. STAT. ANN. § 431.220(1)(a) (West 2020) (giving prisoners who were sentenced to death before March 31, 1998 a choice between lethal injection or electrocution); TENN. CODE ANN. § 40-23-114(b) (West 2020) (“Any person who commits an offense prior to January 1, 1999, for which the person is sentenced to the punishment of death may elect to be executed by electrocution by signing a written waiver waiving the right to be executed by lethal injection.”). If an inmate refuses to choose, statutes identify a “default” method, which is usually lethal injection. See ARIZ. REV. STAT. ANN. § 13-757; TENN. CODE ANN. § 40-23-114; VA. CODE ANN. § 53.1-234.

¹⁸⁴ See ALA. CODE § 15-18-82.1(c); FLA. STAT. ANN. § 922.105(3); MISS. CODE ANN. § 99-19-51(1) (West 2020); OKLA. STAT. ANN. tit. 22 § 1014(C) (West 2020); S.C. CODE ANN. § 24-3-530; TENN. CODE ANN. § 40-23-114(d). States have complained about difficulties in sourcing lethal injection drugs due to anti-death penalty activists and pharmaceutical companies’ unwillingness to allow their products to be used in executions. See, e.g., Ty Alper, *The United States Execution Drug Shortage: A Consequence of Our Values*, 21 BROWN J. WORLD AFF. 27, 29–31, 33–35 (2014); Lincoln Caplan, *The End of the Open Market for Lethal-Injection Drugs*, NEW YORKER (May 21, 2016), <https://www.newyorker.com/news/news-desk/the-end-of-the-open-market-for-lethal-injection-drugs> [<https://perma.cc/5R86-VZYK>]; Jolie McCullough, *How Many Doses of Lethal Injection Drugs Does Texas Have?*, TEX. TRIB., <https://apps.texastribune.org/execution-drugs/> [<https://perma.cc/NA2T-9FE9>] (last updated July 3, 2020).

a method of execution.¹⁸⁵ Some statutes have a “catch-all” clause permitting Departments of Corrections to choose *any* constitutional method if all the legislatively-authorized methods are found unconstitutional or are otherwise unavailable.¹⁸⁶

Most of these statutes do not contain substantial detail beyond the method of execution the legislature selected. Lethal injection statutes rely on general reference to “lethal injection,”¹⁸⁷ or “the administration of a lethal quantity of a drug or drugs”¹⁸⁸ “by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death.”¹⁸⁹ Legislatures usually leave it to the state’s department of corrections to develop protocols and make critical decisions.¹⁹⁰ A handful of jurisdictions have designated classes of drugs, or specific drugs, to be used in lethal injections, such as anesthetics, barbiturates, chemical paralytic agents, potassium chloride, or sodium thiopental.¹⁹¹ Statutes designating other methods of execution are similarly general, referring to “electrocution,”¹⁹² “firing squad,”¹⁹³ “lethal gas,”¹⁹⁴ or “hanging,” and granting the state’s department of corrections substantial decision-making authority.¹⁹⁵

Most method of execution statutes rarely address pain in the execution process. The few statutes that do refer to pain typically offer general statements

¹⁸⁵ See OKLA. STAT. ANN. tit. 22, § 1014(D) (providing that if lethal injection, nitrogen hypoxia, and electrocution are unconstitutional or “otherwise unavailable, then the sentence of death shall be carried out by firing squad”); MISS. CODE ANN. § 99-19-51(4) (alternative if lethal injection, nitrogen hypoxia, and electrocution are unconstitutional or unavailable); UTAH CODE ANN. § 77-18-5.5(3) (West 2012).

¹⁸⁶ See, e.g., ALA. CODE § 15-18-82.1(c); FLA. STAT. ANN. § 922.105(3); OHIO REV. CODE ANN. § 2949.22(C) (West 2020); TENN. CODE ANN. § 40-23-114(d).

¹⁸⁷ See ALA. CODE § 15-18-82.1(a).

¹⁸⁸ OKLA. STAT. ANN. tit. 22, § 1014(A).

¹⁸⁹ See ARIZ. REV. STAT. ANN. § 13-757(A) (2020); see also CAL. PENAL CODE § 3604(a) (West 2020); KAN. STAT. ANN. § 22-4001(a) (West 2020); TEX. CODE CRIM. PROC. ANN. art. 43.14(a) (West 2019).

¹⁹⁰ See KAN. STAT. ANN. § 22-4001(c); NEB. REV. STAT. § 83-964 (West 2020); NEV. REV. STAT. ANN. § 176.355 (West 2020); TEX. CODE CRIM. PROC. ANN. art. 43.14(a); VA. CODE ANN. § 53.1-234 (West 2020); see also Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL’Y REV. 259, 303 (2009) (discussing state statutes that direct substantial discretion to agencies).

¹⁹¹ ARK. CODE ANN. § 5-4-617(c) (2020); MISS. CODE ANN. § 99-19-51(1) (West 2020); OR. REV. STAT. § 137.473(1) (West 2020); PA. STAT. AND CONS. STAT. ANN. § 4304(a)(1) (West 2010); UTAH CODE ANN. § 77-19-10(2) (West 2020); WYO. STAT. ANN. § 7-13-904(a) (West 2020); see also *infra* note 222 and accompanying text.

¹⁹² See *supra* note 183 and accompanying text.

¹⁹³ UTAH CODE ANN. § 77-18-5.5(3).

¹⁹⁴ See ARIZ. REV. STAT. ANN. § 13-757(B); CAL. PENAL CODE § 3604(a). Alabama, Oklahoma, and Mississippi specifically identify “nitrogen hypoxia” as the method of execution for gas. See ALA. CODE § 15-18-82.1(a) (2020); MISS. CODE ANN. § 99-19-51(2); OKLA. STAT. ANN. tit. 22, § 1014(B) (West 2020).

¹⁹⁵ See, e.g., MO. ANN. STAT. § 546.720 (West 2020); S.C. CODE ANN. § 24-3-530 (2020).

that drugs should “quickly and painlessly cause death,”¹⁹⁶ or “cause death in a swift and humane manner.”¹⁹⁷

Inmates’ nondelegation challenges to state method of execution statutes contend that the grant of broad discretion to the department of corrections to create execution protocols lacks a sufficient intelligible principle or policy determination and represents an unconstitutional delegation of pure legislative power.¹⁹⁸ Even states using “strong” nondelegation approaches, such as Florida and Texas,¹⁹⁹ have rejected these arguments.²⁰⁰ Arkansas is the sole jurisdiction to have concluded that its method of execution statute represented an unconstitutional delegation of legislative power.²⁰¹

This Part recounts previous nondelegation challenges to death penalty litigation. Part A centers on the litigation in Arkansas in *Jones* that found a separation of powers violation. Part B examines litigation in other jurisdictions that upheld broad delegation to correctional agencies to create protocols.

A. *The Arkansas Method of Execution Act and Nondelegation*

In 2010, a group of death row inmates in Arkansas challenged the constitutionality of the Arkansas Method of Execution Act (AMEA).²⁰² They asserted that the AMEA violated the Arkansas Constitution’s separation of powers doctrine because it unconstitutionally delegated the Arkansas Department of Correction (ADC) “unfettered discretion” to select lethal injection chemicals and other execution-related policies.²⁰³ The AMEA selected “intravenous lethal injection” of “one . . . or more chemicals, as determined in kind and amount in the discretion of the Director of the Department of Correction” as the state’s method of execution.²⁰⁴ It provided a list the director could choose from, including “ultra-short-acting barbiturates,” “chemical paralytic agents,” “[p]otassium chloride,” as well as “[a]ny other chemical or chemicals”²⁰⁵ The circuit court found the AMEA unconstitutional and struck the catch-all phrase.²⁰⁶

¹⁹⁶ OHIO REV. CODE ANN. §2949.22(A) (2020).

¹⁹⁷ See KAN. STAT. ANN. § 22-4001(a) (2020); see also MISS. CODE ANN. § 99-19-51(1).

¹⁹⁸ *Hobbs v. Jones*, 412 S.W.3d 844, 854 (Ark. 2012).

¹⁹⁹ See Rossi, *supra* note 118, at 1193–95.

²⁰⁰ See *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006), *abrogated on other grounds by* *Darling v. State*, 45 So.3d 444 (Fla. 2010); see also *Ex parte Granviel*, 561 S.W.3d 503, 514 (Tex. Crim. App. 1978) (en banc).

²⁰¹ See *Hobbs*, 412 S.W.3d at 854; see also *infra* Part III.A.

²⁰² *Hobbs*, 412 S.W.3d at 847.

²⁰³ *Id.* at 847–50.

²⁰⁴ ARK. CODE ANN. § 5–4–617(a)(1) (West 2011).

²⁰⁵ *Id.* § 5–4–617(a)(2).

²⁰⁶ *Hobbs*, 412 S.W.3d at 849.

The Arkansas Supreme Court affirmed and struck the entire statute as facially unconstitutional because it was not severable.²⁰⁷ Arkansas's legislature may delegate discretionary authority to other branches, such as the power to determine facts or to act in response to a contingency the statute identifies.²⁰⁸ Provided the law was "mandatory in all it requires and all it determines,"²⁰⁹ it did not violate separation of powers principles if the legislature designated certain state officials or agencies to put the law into operation.²¹⁰ The legislature had to enact "appropriate standards by which the administrative body is to exercise th[e delegated] power" before delegating discretionary power to an agency or official.²¹¹ But, the court cautioned, "[a] statute that, in effect, reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers."²¹²

The court concluded that the AMEA gave ADC the "absolute discretion" to determine the kind and amount of chemicals to be used for lethal injection, without offering any guidance in selecting the chemicals.²¹³ The AMEA did not create a mandatory directive—ADC could choose (or decline) to use any of the listed drugs.²¹⁴ While the legislature could give ADC the power to make factual determinations or decisions in contingencies, the AMEA "g[ave] the ADC the power to decide all the facts and all the contingencies with no reasonable guidance given absent the generally permissive use of one or more chemicals."²¹⁵ Coupled with ADC's unlimited discretion to set *all* policies and procedures to conduct executions, there was "no guidance and no general policy with regard to the procedures for the ADC to implement lethal injections."²¹⁶

²⁰⁷ *Id.* at 855. The circuit court apparently reasoned that the reference to "any other chemical or chemicals" would eliminate much of the uncertainty in the statute. *Id.* at 849. The Arkansas Supreme Court concluded that the language the circuit court struck did not have a "practical effect" on the statute because the remainder of the statute gave the ADC "absolute discretion." *Id.* at 855.

²⁰⁸ *Id.* at 851 (citing *State v. Davis*, 10 S.W.2d 513, 514 (Ark. 1928)).

²⁰⁹ *State v. Davis*, 10 S.W.2d 513, 514 (Ark. 1928).

²¹⁰ *Hobbs v. Jones*, 412 S.W.3d 844, 851 (Ark. 2012) (quoting *State v. Davis*, 10 S.W.2d 513, 514 (Ark. 1928)); *see also* *Ark. Sav. & Loans Ass'n Bd. v. West Helena Sav. & Loan Ass'n*, 538 S.W.2d 560, 564–67 (Ark. 1976)).

²¹¹ *Hobbs*, 412 S.W.3d at 852.

²¹² *Id.*

²¹³ *Id.* at 853–54 (noting that "may" is discretionary and observing that "the list of chemicals is not exhaustive and includes, as an option, broad language that 'any other chemical or chemicals' may be used" (quoting ARK. CODE ANN. § 5-4-617(a)(2)(D) (Supp. 2011))). Before the 2009 amendments, the AMEA provided that "[t]he punishment of death is to be administered by a continuous intravenous injection of a lethal quality of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant's death is pronounced according to accepted standards of medical practice." ARK. CODE ANN. § 5-4-617 (repealed 2009).

²¹⁴ *Hobbs*, 412 S.W.3d at 854.

²¹⁵ *Id.* at 854.

²¹⁶ *Id.*

The court also declined to read the prohibitions on cruel and unusual punishment in the Arkansas and U.S. Constitutions as “reasonable guidance” for ADC.²¹⁷ The General Assembly’s failure to provide specific guidance in statutes violated the separation of powers “and other constitutional provisions cannot provide a cure.”²¹⁸

The *Jones* dissent grounded its objection in majoritarian perspectives: every other nondelegation case had reached the opposite conclusion, and many other states’ method of execution statutes gave departments of corrections even broader discretion to select lethal injection drugs and carry out executions.²¹⁹ Like other states, discussed *infra*, the dissent concluded it was sufficient for the AMEA to define the punishment and express the legislature’s intent to impose that punishment.²²⁰ Granting ADC the discretion to figure out the methodology and chemicals was appropriate because ADC was “better qualified” to make the decision and it was “impracticable” for the General Assembly to do it.²²¹

After *Jones*, the Arkansas Legislature amended the AMEA in 2013, adopting a single-drug barbiturate protocol that also required ADC to administer a benzodiazepine²²² to the inmate before initiating the execution.²²³ Inmates again brought nondelegation claims, including allegations that the amended AMEA did not constrain ADC’s discretion in drug administration, selection, and training members of the execution team.²²⁴ When that case, *Hobbs v.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ See *id.* at 858–60 (Baker, J., dissenting). The dissent also relied on the Eighth Circuit’s conclusion in *Nooner v. Norris*, 594 F.3d 592 (8th Cir. 2010), that Arkansas’s lethal-injection protocol did not violate the Eighth Amendment in part because it was consistent with the three-drug protocol that other states used. See *Hobbs*, 412 S.W.3d at 861 (Baker, J., dissenting); see also *Nooner*, 594 F.3d at 601, 608.

²²⁰ *Hobbs*, 412 S.W.3d at 861 (Baker, J., dissenting).

²²¹ *Id.* (“The execution of this law is precisely the type of delegation of ‘details with which it is impracticable for the legislature to deal directly.’”) (quoting *Leathers v. Gulf Rice Ark., Inc.*, 994 S.W.2d 481, 483 (Ark. 1999)).

²²² Benzodiazepines are a class of “[C]entral [N]ervous [S]ystem depressants that . . . [have] sedative, and muscle-relaxing properties.” *What Are Central Nervous System Depressants?*, ADDICTION CTR., <https://www.addictioncenter.com/drugs/drug-classifications/central-nervous-system-depressants/#:~:text=Sometimes%20called%20E2%80%9Cbenzos%2C%20Xanax%2C%20and%20Ativan> [<https://perma.cc/MUQ5-424W>]. The ADC described benzodiazepines as “a class of drugs known for their anti-anxiety and anticonvulsant properties.” *Hobbs v. McGehee*, 458 S.W.3d 707, 716 n.5 (Ark. 2015).

²²³ See ARK. CODE ANN. § 5-4-617(b) (West 2013); S.B. 237, 89th Gen. Assemb., Reg. Sess. § 1 (Ark. 2013). The Arkansas General Assembly has amended the statute two more times since then. See S.B. 464, 92d Gen. Assemb., Reg. Sess. § 3 (Ark. 2019); H.B. 1751, 90th Gen. Assemb., Reg. Sess. §§ 1–2 (Ark. 2015). The amendments changed the type of drugs that could be used in an execution but require ADC to choose between a single-drug or three-drug protocol based on drug availability. ARK. CODE ANN. § 5-4-617(c).

²²⁴ *McGehee*, 458 S.W.3d at 710.

McGehee,²²⁵ reached the Arkansas Supreme Court, the court reversed course from *Jones*.²²⁶

Designating barbiturates as the lethal agent channeled ADC's discretion because the legislature could constitutionally grant an agency the power to select from "specific legislatively approved options."²²⁷ The legislature had crafted a more precise set of directives for executions and given ADC a targeted mandate to develop regulations surrounding capital punishment.²²⁸ The court relied on *Baze v. Rees*,²²⁹ to conclude that the amended AMEA did not need to set training and qualifications for execution teams.²³⁰ In *Baze*, inmates contended that inadequate facilities and training created a risk that execution teams would improperly administer thiopental, causing severe pain.²³¹ The Supreme Court relied on the trial court's factual findings that it was easy to follow directions to prepare the drug, and that the execution protocol set qualifications for executioners in concluding that Kentucky's protocol did not risk severe pain.²³² *McGehee*'s willingness to mix Eighth Amendment holdings with separation of powers analyses may be explained by the authoring justice, who had dissented in *Jones* in part because she thought constitutional principles prohibiting cruel and unusual punishments narrowed agency discretion.²³³

The transition from *Jones* to *McGehee* can be explained in part by the amendments to the AMEA, which addressed some of the court's criticisms in *Jones* by setting mandatory standards and more specific criteria for execution protocols.²³⁴ But the *McGehee* dissent contended that identifying classes of drugs alone did not provide reasonable guidelines because of variability in drug onset and length of effect.²³⁵ The *McGehee* majority, by contrast, was more willing to credit agency expertise and resume a majoritarian position in the context of the death penalty and nondelegation.²³⁶

²²⁵ 458 S.W.3d 707 (Ark. 2015).

²²⁶ *Id.* at 718.

²²⁷ *Id.* at 716–17 (“Here, the legislature has afforded reasonable guidelines by limiting the ADC’s discretion to barbiturates, rather than permitting the ADC to consider any drug of any class.”).

²²⁸ *Id.* at 717.

²²⁹ *Id.* at 718 (citing *Baze v. Rees*, 553 U.S. 35, 45 (2008)).

²³⁰ *McGehee*, 458 S.W.3d at 718 (citing *Hooker v. Parkin*, 357 S.W.2d 534, 538 (Ark. 1962)).

²³¹ *Baze v. Rees*, 553 U.S. 35, 54 (2008).

²³² *Id.* at 54–55.

²³³ See *Hobbs v. Jones*, 412 S.W.3d 844, 861 (Ark. 2012) (Baker, J., dissenting) (“[A]ppellants’ discretion is not ‘unfettered’ because they are at all times bound by the constraints of our federal and state constitutions against cruel and unusual punishment.”).

²³⁴ See *supra* note 223 (discussing amendments to the AMEA).

²³⁵ *McGehee*, 458 S.W.3d at 721 (Wynne, J., concurring in part and dissenting in part) (“Ultra-short-acting barbiturates can cause a person to lose consciousness within seconds, while a long-acting barbiturate may take considerably longer to take effect.”).

²³⁶ See Berger, *In Search of a Theory of Deference*, *supra* note 14, at 17; Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards”*, 57 UCLA L. REV. 365, 413–14 (2009).

B. Nondelegation Challenges to Method of Execution Statutes

Ex parte Granviel, decided in 1978, is the earliest case in which an inmate raised a nondelegation claim.²³⁷ Texas's lethal injection statute, enacted in 1977, called for execution by "intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead," to be "determined and supervised by the Director of the Department of Corrections."²³⁸ *Granviel* asserted that this broad provision gave the director legislative authority in violation of the Texas Constitution.²³⁹

The Texas Court of Criminal Appeals acknowledged the legislature's responsibility to "declar[e] a policy and fix[] a primary standard" before giving the power to an agency to "establish rules, regulations, or minimum standards reasonably necessary to carry out the expressed purpose of the act."²⁴⁰ It concluded that, by choosing the death penalty, selecting a method and time of execution, and designating someone to set execution procedure, the legislature had sufficiently cabined the director's discretion.²⁴¹ The court afforded significant deference to the legislature's decision to delegate, and the director's presumed expertise in addressing details that the legislature could not "practically or efficiently" do itself.²⁴²

Granviel also connected the regularity of administrative procedures to the question of delegation.²⁴³ Although at that time lethal injection was a brand-new method of execution, the court relied on a vaguely worded affidavit from the director to conclude that his choice of drugs was "informed."²⁴⁴ The director's assertion that he had consulted with "people familiar with lethal substances"²⁴⁵ in making his decision showed his compliance with the "basic principle" of administrative law to "ascertain[] facts to support the final choice of the substance," despite an absence of any real detail on how he had made that choice.²⁴⁶

Granviel became the template for nondelegation claims that followed. Like the *Jones* dissent, courts relied on *Granviel* to conclude nondelegation was not viable.²⁴⁷ For example, in *State v. Osborn*, the Idaho Supreme Court observed,

²³⁷ *Ex parte Granviel*, 561 S.W.2d 503, 507 (Tex. Crim. App. 1978) (en banc).

²³⁸ H.B. No. 945, 65th Gen. Assemb., Reg. Sess. § 1 (Tex. 1977).

²³⁹ *Granviel*, 561 S.W.2d at 514.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 515.

²⁴² *Id.*

²⁴³ *See id.* at 514.

²⁴⁴ *Id.* at 515; *id.* at 507–08 (quoting the complete affidavit); *see also* BANNER, *supra* note 36, at 297.

²⁴⁵ *Granviel*, 561 S.W.2d at 508.

²⁴⁶ *Id.* at 515.

²⁴⁷ *Zink v. Lombardi*, No. 2:12-cv-4209-NKL, 2012 WL 12828155, at *6 (W.D. Mo. Nov. 16, 2012); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308–09 (Cal. Ct. App. 2018); *Sims v. State*, 754 So. 2d 657, 668–69 (Fla. 2000) (per curiam); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981); *State v. Ellis*, 799 N.W.2d 267, 289, 289 nn.51–52 (Neb. 2011).

“This matter was disposed of in *Ex parte Granviel*,” quoted the opinion at length, and concluded it, too, would assume its director of corrections would behave reasonably without analyzing *Idaho*’s separation of powers doctrine.²⁴⁸

Other jurisdictions, including Florida, Nebraska, California, Arizona, and a federal district court in Missouri, have placed heavy reliance on other nondelegation decisions, although they typically offer more legal analysis than *Osborn*.²⁴⁹ This kind of approach is common in state constitutional law and death penalty jurisprudence. Courts rely on statistics on, *inter alia*, judicial decisions in capital sentencing to show “reliable objective evidence of contemporary values” to evaluate whether a punishment comports with “evolving standards of decency.”²⁵⁰ It can also be seen from courts’ reliance on the Supreme Court’s preemptive approval of the *Baze* three-drug protocol for other states’ execution protocols.²⁵¹ If enough states seem to have adopted a particular method, courts tend to accept it—and an accompanying broad delegation—more readily, without assessing particular agencies’ internal decision-making.²⁵² Eric Berger observes that the use of “state counting” in evaluating the permissibility of execution protocols in *Baze* is “exceedingly deferential” without considering whether “state practices should be probative.”²⁵³

When it comes to evaluating the constitutional scope of legislative delegation to agencies, courts, perhaps wary of imposing countermajoritarian decisions on legislative action, do not consider whether state legislatures’ broad delegations undermine important democratic values and instead rely on numbers.²⁵⁴ Rossi criticizes this approach because courts often fail to address distinctions between other jurisdictions’ governmental and constitutional structure and their own.²⁵⁵ Courts’ reliance on the *Granviel* line of precedent

²⁴⁸ *Osborn*, 631 P.2d at 201.

²⁴⁹ See, e.g., *Zink*, 2012 WL 12828155, at *6–8; *Ellis*, 799 N.W.2d at 289, 289 nn.51–52; *Cook v. State*, 281 P.3d 1053, 1056 n.4 (Ariz. Ct. App. 2012); *Kernan*, 241 Cal. Rptr. 3d at 308–09; *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006) (per curiam); *Sims*, 754 So. 2d at 668–69 (per curiam).

²⁵⁰ *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989), *abrogated by* *Atkins v. Virginia*, 536 U.S. 304 (2002); see also *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008); *Roper v. Simmons*, 543 U.S. 551, 564–67 (2005); *Atkins v. Virginia*, 536 U.S. 304, 314–16 (2002); *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982); *Coker v. Georgia*, 433 U.S. 584, 593–96 (1977).

²⁵¹ *Baze v. Rees*, 553 U.S. 35, 61 (2008) (“A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.”); see also *Nooner v. Norris*, 594 F.3d 592, 597, 599, 601, 608 (8th Cir. 2010); Berger, *In Search of a Theory of Deference*, *supra* note 14, at 13 (discussing “preemptive deference”).

²⁵² See Berger, *In Search of a Theory of Deference*, *supra* note 14, at 17.

²⁵³ *Id.*

²⁵⁴ See *id.* at 14.

²⁵⁵ See Rossi, *supra* note 118, at 1233 (“In many state cases, separation of powers analysis becomes a counting game—a “me[]-tooism”—where a court simply cites the number of state opinions accepting a certain type of statute and the number rejecting it,

leads them to rapidly dismiss *Jones* without assessing if their separation of powers doctrines are more similar to Arkansas or to other states' doctrines.²⁵⁶

In determining whether legislatures have established sufficient policy, most courts conclude that legislatures have complied by adopting the penalty and picking a general method of execution, and occasionally, by identifying the agency or official to create the protocol or carry out the execution.²⁵⁷ One difficulty with this analysis is that courts sometimes conflate one policy decision (whether a particular crime merits the death penalty) with another (the method of execution).

Sims v. Kernan illustrates this problem. The California Court of Appeals suggested that the legislature had spent sufficient time on policy decisions to guide the corrections agency because it had addressed *other* aspects of the death penalty, such as capital trial procedure; the location of death row; allowing the inmate to choose between lethal gas and lethal injection; identifying witnesses; and voluntary physician attendance.²⁵⁸ *Sims* did not clarify how these decisions set standards an agency could use to evaluate whether it had complied with the legislative policy when it selected lethal drugs or gas for executions—or if these enactments could guide agency decision-making about pain.

To overcome this hurdle, courts have relied on state or federal constitutional requirements to constrain agency discretion.²⁵⁹ In *Cook v. State*, the Arizona

usually as support for siding with the majority of states having previously considered the issue.”) (footnote omitted); see also John P. Frank, Book Review, 63 TEX. L. REV. 1339, 1340 (1985) (reviewing *Developments in State Constitutional Law* (Bradley D. McGraw ed., 1985), and *State Supreme Courts: Policymakers in the Federal System* (Mary Cornelia Porter & G. Alan Tarr eds., 1982)).

²⁵⁶ See, e.g., *Zink v. Lombardi*, No. 2:12-cv-4209-NKL, 2012 WL 12828155, at *7 (W.D. Mo. Nov. 16, 2012); *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 308–9 (Cal. Ct. App. 2018). Only *Zink* evaluated whether Missouri's separation of powers doctrine was consistent with Arkansas's to determine if *Jones* was persuasive. *Id.*

²⁵⁷ See *Zink*, 2012 WL 12828155, at *8 (concluding that Missouri's legislature had established a general policy by identifying the method for executions); *Cook v. State*, 281 P.3d 1053, 1055–56 (Ariz. Ct. App. 2012) (concluding that appointing the Department of Corrections to supervise executions and specifying the method was a sufficient standard to guide the Department); *Kernan*, 241 Cal. Rptr. 3d at 305–06 (identifying the legislative policy as using lethal gas or lethal injection to implement executions); *Diaz v. State*, 945 So. 2d 1136, 1145 (Fla. 2006) (per curiam) (relying on *Sims*); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000) (per curiam) (explaining that the statute “clearly defines the punishment to be imposed” and “makes clear that the legislative purpose is to impose death”); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011) (relying on other jurisdictions' analyses to conclude that the legislature declared a policy and set a “primary standard” by identifying the purpose of the statute, the punishment, and a general means); *Brown v. Vail*, 237 P.3d 263, 269 (Wash. 2010) (en banc) (explaining that the legislature had sufficiently identified policy by identifying the method and place of execution and which officials set execution protocols and supervised executions).

²⁵⁸ *Kernan*, 241 Cal. Rptr. 3d at 307.

²⁵⁹ See *Cook*, 281 P.3d at 1056; *Kernan*, 241 Cal. Rptr. 3d at 305; see also *Ex parte Granviel*, 561 S.W.2d 503, 513 (Tex. Crim. App. 1978) (en banc) (presuming that the

Court of Appeals explained that the federal Constitution “implicitly guides and limits the Department’s discretion” because the Department’s protocols had to comply with a constitutional requirement that execution protocols avoid a substantial risk of serious harm, pain, and suffering.²⁶⁰ This conclusion is questionable. Legislative enactments may not violate constitutions and agencies are *already* required to comply with constitutional limitations on punishment in conducting executions.²⁶¹ Therefore a reliance on constitutional restrictions does not meaningfully limit the discretion legislators confer on agencies.²⁶²

In rejecting nondelegation arguments, courts also rely on the argument that agencies, not legislatures, are better equipped to develop execution protocols.²⁶³ Courts may emphasize the technical nature of execution protocols and the need for continuous decision-making.²⁶⁴ *Cook* asserted that it was “impracticable” for the legislature to create a protocol, pointing to Arizona’s execution protocols, which “span[] 35 pages” and set procedures for a thirty-five day period leading up to the execution and the execution that required coordination with multiple government agencies, law enforcement, and the media.²⁶⁵ These analyses assume that corrections agencies have the requisite expertise to make these determinations.²⁶⁶ Deference to presumed agency expertise in a separation of powers analysis muddies the distinction between constitutionally permissible delegation and administrative competence.²⁶⁷ This deference is also often misplaced. As discussed *infra*, agencies often develop protocols without medical expertise or rely on other states’ protocols without engaging in their own fact-finding.²⁶⁸

Director of the Department of Corrections will comply with constitutional requirements in selecting the drugs to be used in lethal injection).

²⁶⁰ *Cook*, 281 P.3d at 1056 (citing *Dickens v. Brewer*, 631 F.3d 1139, 1144 (9th Cir. 2011)).

²⁶¹ See *Baze v. Rees*, 553 U.S. 35, 38–39 (2008).

²⁶² See *infra* notes 393–426 and accompanying text.

²⁶³ See, e.g., *Zink v. Lombardi*, No. 2:12-cv-4209-NKL, 2012 WL 12828155, at *8 (W.D. Mo. Nov. 16, 2012); *Kernan*, 241 Cal. Rptr. 3d at 307; *Granviel*, 561 S.W.2d at 515; *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006) (per curiam); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000) (per curiam); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011).

²⁶⁴ *Ellis*, 799 N.W.2d at 289.

²⁶⁵ *Cook*, 281 P.3d at 1056 (“It contains detailed instructions on the various chemicals to be used, how they should be administered by Department personnel, and how the execution will be supervised and regulated.”).

²⁶⁶ Berger, *In Search of a Theory of Deference*, *supra* note 14, at 38; Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 969 (1999).

²⁶⁷ Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2057–58 (2011) (asserting that agencies should not receive deference in constitutional inquiries when they operate outside “[a]dministrative law norms”).

²⁶⁸ See *Baze v. Rees*, 553 U.S. 35, 75 (2008) (Stevens, J., concurring) (concluding that protocols are a product of “‘administrative convenience’ . . . rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion”); see also *infra* Part V.B.

Departments of corrections also receive a presumption that the discretion accompanying broad delegation will not lead to arbitrary decision-making.²⁶⁹ Courts' reliance on the existence of procedural safeguards to approve delegation is jarringly inconsistent with reality. Many jurisdictions exempt their execution protocols, or even their department of corrections, from state administrative procedure rules.²⁷⁰ This, as Berger points out, increases the risk that "the officials in charge of the procedure will throw something together haphazardly and without serious reflection on the constitutional issues."²⁷¹ Prisoners have argued that the absence of policy and lack of administrative procedure give agencies unconstitutionally broad discretion, to little avail.²⁷² The Washington Supreme Court acknowledged the importance of adequate procedural safeguards for constitutional legislative delegation in criminal contexts: promulgating rules pursuant to Washington's APA that include either an appeal process before the agency or judicial review, and the "procedural safeguards normally available to a criminal defendant remain."²⁷³

Despite the fact that Washington's Department of Corrections was exempt from the state APA, the court concluded that procedural safeguards for promulgating execution protocols were met because prisoners could seek

²⁶⁹ See *State v. Deputy*, 644 A.2d 411, 420 (Del. Super. Ct. 1994), *aff'd*, 648 A.2d 423 (Del. 1994) (presuming that the Department of Corrections will properly perform its duties); *State v. Osborn*, 631 P.2d 187, 201 (Idaho 1981) ("[W]e will not assume that the director of the department of corrections will act in other than a reasonable manner."); *Ex Parte Granviel*, 561 S.W.2d 503, 513, 515 (Tex. Crim. App. 1978) (en banc) (rejecting the presumption that the Director of the Department of Corrections will act in an "arbitrary" manner).

²⁷⁰ See, e.g., CAL. PENAL CODE § 3604.1(a) (West 2020) ("The Administrative Procedure Act shall not apply to standards, procedures, or regulations promulgated pursuant to Section 3604."); N.C. GEN. STAT. ANN. § 150B-1(d)(6) (West 2020); VA. CODE ANN. § 2.2-4002(B)(9) (West 2020) (exempting agency action relating to "[i]nmates of prisons or other such facilities or parolees therefrom"); WASH. REV. CODE ANN. § 34.05.030(1)(c) (West 2020) (state APA does not apply to the department of corrections with respect to persons in the department's custody or subject to their jurisdictions); *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 142 (D.C. Cir. 2020) (Rao, J., concurring); *Hill v. Owens*, 738 S.E.2d 56, 59–60 (Ga. 2013); *Conner v. N.C. Council of State*, 716 S.E.2d 836, 845–46 (N.C. 2011) (holding that the Council of State's approval of North Carolina's lethal injection protocol is not subject to the APA); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 311–12 (Tenn. 2005) (state corrections department does not have to adopt lethal injection protocol consistently with Tennessee APA); *Porter v. Commonwealth*, 661 S.E.2d 415, 432–33 (Va. 2008). Other courts have held that administrative procedures apply when promulgating execution protocols, but these are the exception, rather than the norm. See *Bowling v. Ky. Dep't of Corr.*, 301 S.W.3d 478, 488 (Ky. 2009); *Evans v. State*, 914 A.2d 25, 34 (Md. 2006).

²⁷¹ Berger, *In Search of a Theory of Deference*, *supra* note 14, at 60.

²⁷² See *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006) (per curiam); *Granviel*, 561 S.W.2d at 515; *Brown v. Vail*, 237 P.3d 263, 269–70 (Wash. 2010) (en banc); see also Coglianese, *supra* note 120, at 1868 (explaining that compliance with administrative procedure may be a component of nondelegation inquiries per *Schechter Poultry*).

²⁷³ *Brown*, 237 P.3d at 270.

judicial review through lawsuits challenging execution methods and because the prisoners had received constitutional process during their trial and death sentence.²⁷⁴ Procedural safeguards attached to criminal convictions bear limited relevance to procedural processes in creating execution policies. Reliance on judicial review is problematic because it reinforces legislative abdication.

Franklin Zimring and Gordon Hawkins have demonstrated that the availability of engaged judicial review in capital punishment post-*Gregg* allowed state legislatures to pass responsibility to the judiciary, and once the trend had shifted, “traditional mechanisms of restraint had been literally abandoned.”²⁷⁵ Courts retain some of the burden that legislators have handed over. In *Diaz v. State*, the Florida Supreme Court brushed aside criticisms that the Department of Corrections was exempt from Florida’s APA. “In light of the exigencies inherent in the execution process,” the court explained, judicial review was “preferable” to administrative review.²⁷⁶ In other words, the *judiciary* would limit the Department’s authority, therefore the discretion the *legislature* had granted was within constitutional bounds.²⁷⁷

But agencies’ wide discretion may interfere with judicial review. In addition to their unsuccessful nondelegation claim, Arizona prisoners argued in *Cook* that the unlimited authority of the Arizona Department of Corrections to set and revise execution protocols interfered with the judicial branch and violated the separation of powers doctrine.²⁷⁸ The Department repeatedly changed its execution protocols shortly before carrying out executions—in one case, *eighteen hours* before a scheduled execution.²⁷⁹ The Arizona Court of Appeals “agree[d]” that the Department’s recent habit of swapping protocols “at the last minute raise[d] constitutional concerns, as well as a separation of powers concern under the Arizona Constitution” by “threaten[ing] to prevent meaningful judicial review.”²⁸⁰ Shifting execution protocols left courts to address complex, fact-intensive constitutional questions in a short period of time, potentially obstructing judicial review and interfering with the duties of the judicial branch.²⁸¹

²⁷⁴ *Id.*

²⁷⁵ FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 100 (1986).

²⁷⁶ *Diaz v. State*, 945 So. 2d 1136, 1143 (Fla. 2006) (per curiam).

²⁷⁷ See *id.* at 1143–44; see also Rachel E. Barkow, Essay, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1356–57 (2008).

²⁷⁸ *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012).

²⁷⁹ *Lopez v. Brewer*, 680 F.3d 1068, 1070–71 (9th Cir. 2012); *Towery v. Brewer*, 672 F.3d 650, 653 (9th Cir. 2012); *Cook*, 281 P.3d at 1056–57 (citing, *inter alia*, *Order, State v. Beatty*, No. CR-85-0211-AP/PC (Ariz. May 25, 2011)).

²⁸⁰ *Cook*, 281 P.3d at 1057 (footnote omitted). Last minute protocol changes “raised serious concerns under the Eighth Amendment’s prohibition of cruel and unusual punishment,” the Equal Protection Clause of the Fourteenth Amendment, as well as that Amendment’s “guarantee of an inmate’s right to in-person visits with counsel” *Id.* at 1057 n.5.

²⁸¹ *Id.* at 1058.

The court ultimately concluded that, although the Department was on thin ice, it “ha[d] not yet violated the Arizona Constitution’s separation of powers doctrine” because courts could provide review (even if rushed).²⁸² The court also assumed the Department’s new protocol, which required seven days’ written notice to the inmate identifying which lethal injection drugs the Department would use in an execution, would solve the problem.²⁸³ Although seven days was “relatively short,” it improved upon the one or two days’ notice the Department had provided in the past.²⁸⁴ The protocol provided that the director of the Department could deviate from the protocols at his or her discretion at any time, likely prompting the court’s warning that if the Department continued its practices in a way that interfered with judicial review, the court might reconsider its holding.²⁸⁵

Courts also appear reluctant to address nondelegation challenges in part because of their novelty. In *Sims v. State*, the Florida Supreme Court rejected a nondelegation challenge to Florida’s lethal-injection statute in part because the previous version of the statute authorizing electrocution as the method of execution had not identified “the precise means, manner or amount of voltage to be applied.”²⁸⁶ Although there are instances in which electrocution statutes may permit delegation challenges,²⁸⁷ the court did not consider significant differences between the two methods of execution. The task of selecting drugs for executions, a quasi-medical procedure, carries significantly more discretion and involves different decision-making processes and factual inquiries than electrocution.

It is certainly possible that the subject matter tilts courts’ decisions—courts that tend to uphold death sentences may be more reticent to apply their states’ nondelegation doctrines or more willing to tolerate broad delegation.²⁸⁸ Florida and Texas, for example, are death penalty strongholds.²⁸⁹ Of course, so is

²⁸² *Id.*

²⁸³ *Id.* (explaining that new notice requirements, “if implemented by the Department, should help ensure meaningful judicial review . . .”).

²⁸⁴ *Id.* at 1058.

²⁸⁵ *Id.*

²⁸⁶ *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000) (per curiam).

²⁸⁷ See Denno, *When Legislatures Delegate Death*, *supra* note 14, at 88 (discussing rulings that Nebraska’s electrocution execution protocols appeared to violate state law).

²⁸⁸ See Dan Levine & Kristina Cooke, *In States with Elected High Court Judges, a Harder Line on Capital Punishment*, REUTERS (Sept. 22, 2015), <https://www.reuters.com/investigates/special-report/usa-deathpenalty-judges/> [<https://perma.cc/3DEA-ABCS>].

²⁸⁹ See GARRETT, *END OF ITS ROPE*, *supra* note 3, at 138–39 (discussing geographic use of the death penalty); JON SORENSEN & ROCKY LEANN PILGRIM, *LETHAL INJECTION: CAPITAL PUNISHMENT IN TEXAS DURING THE MODERN ERA* 16 (2006) (stating that Texas sentenced 925 people to death between 1973 and 2002); *id.* at 18–19 (discussing Texas’s capital punishment system).

Arkansas, rendering *Jones* a particularly intriguing deviation.²⁹⁰ *Jones* embraced a formalist perspective on separation of powers in holding that the legislature had to do more to curb agency discretion in creating execution protocols.²⁹¹ Formalism, or strong nondelegation approaches, evince majoritarian values, favoring legislative power by insisting that elected officials make difficult policy determinations.²⁹² Thus, requiring the Arkansas General Assembly to select the applicable classes of lethal injection drugs forced the legislature to engage more transparently with a fraught and controversial policy issue.²⁹³

Functionalist, weak, or moderate approaches are also majoritarian because a “deferential approach leaves the bulk of the responsibility for structural design to the elected departments of government.”²⁹⁴ Some scholars contend that agencies are accountable and transparent due to their processes,²⁹⁵ but the secrecy and absence of administrative constraints on corrections agencies undercuts those arguments in the capital-sentencing context. *Cook* illustrates this problem quite precisely: agency flexibility created a substantial risk of interference with the judiciary’s ability to carry out its duties.²⁹⁶

The separation of powers serves important functions in our system of government. Allowing agencies to take up the task of making important policy decisions without adequate legislative guidance, such as how the state will kill those it has deemed unworthy of living, destabilizes those values. The lack of legislative accountability and agency transparency undermines perceptions of legitimacy of the punishment. Relevant administrative law norms heighten the problem of broad delegation: agencies often lack expertise in crafting protocols, they rely on other jurisdictions, and are exempt from many procedural safeguards.

V. NONDELEGATING DEATH

As the previous parts of this Article have illustrated, delegating responsibility is a central part of the history of the American death penalty, current method of execution statutes, administrative protocols, and judicial

²⁹⁰ Between 1973 and 2002, Arkansas sentenced ninety-nine people to death. See SORENSON & PILGRIM, *supra* note 293, at 16; see also LIFTON & MITCHELL, *supra* note 69, at 100–01; SARAT, GRUESOME SPECTACLES, *supra* note 38, at 130–36.

²⁹¹ See *supra* Part IV.A; see also Brown, *supra* note 115, at 1523–25.

²⁹² Berger, *In Search of a Theory of Deference*, *supra* note 14, at 38; Brown, *supra* note 115, at 1526.

²⁹³ See Murphy, *supra* note 10, at 837–39.

²⁹⁴ Brown, *supra* note 115, at 1528–29.

²⁹⁵ See, e.g., Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1957 (2008); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 1018 (2000); see also Berger, *In Search of a Theory of Deference*, *supra* note 14, at 43–44.

²⁹⁶ See *Cook v. State*, 281 P.3d 1053, 1058 (Ariz. Ct. App. 2012).

decision-making. Legislatures may initiate the process of broad delegation, but the system of capital punishment is sustainable in part because of continued delegation across juries, judges, departments of corrections, officials, executioners, and the public.²⁹⁷

This Part explores the flaws in legislative delegations as well as courts' analyses of the problem of delegating death. It contends that the nondelegation doctrine offers important considerations such as accountability, transparency, and legitimacy in governance to evaluate capital punishment. It evaluates common problems in judicial review of nondelegation questions in capital punishment, particularly deference to agency expertise. This Part concludes by arguing that legislatures should not be allowed to delegate this significant policy choice and frames out a more robust nondelegation analysis for evaluating method of execution statutes.

A. *Why Nondelegation?*

This Article does not propose that legislatures should write exhaustive execution protocols addressing every possible contingency.²⁹⁸ Some delegation is inevitable and necessary in modern governance.²⁹⁹ Harold Bruff observes that courts struggle with applying the nondelegation doctrine “because no one has successfully articulated neutral principles for deciding how specific a particular delegation should have to be.”³⁰⁰ But, as Justice Gorsuch pointed out in *Gundy*, the Supreme Court has not entirely “abandoned the business of policing improper legislative delegations[,]” but instead applied other doctrines to “rein

²⁹⁷ See BESSLER, *KISS OF DEATH*, *supra* note 77, at 119 (“Only because responsibility for executions is spread so diffusely among the various actors in the criminal justice system do judges and jurors feel permission to disavow responsibility for the sentences they impose.”); LIFTON & MITCHELL, *supra* note 69, at 81–83; Dubber, *supra* note 14, at 547 (discussing the “distribution of responsibility” that is “crucial to the American system of capital punishment”).

²⁹⁸ See BRUFF, *supra* note 121, at 140 (“The courts are properly reluctant to employ the doctrine vigorously, because it involves a constitutional decision that overrides a congressional judgment regarding the amount of discretion that should be accorded to the executive in a particular context.”).

²⁹⁹ See *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting); see also BRUFF, *supra* note 121, at 140 (discussing the difficulties inherent in a “revived” and robust delegation doctrine); Madison, *supra* note 113, at 246 (discussing that the “legislative, executive, and judiciary departments are by no means totally separate and distinct from each other”); Araiza, *supra* note 117, at 236–37; Cass, *supra* note 120, at 155–58 (discussing delegations of authority in early America).

³⁰⁰ See BRUFF, *supra* note 121, at 140; see also *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) (“[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.”); Cass, *supra* note 120, at 181 (“The harder question is the line-drawing question: how do courts distinguish impermissible delegations of legislative power from permitted assignments of legal authority?”); Sunstein, *Nondelegation Canons*, *supra* note 121, at 326–27.

in Congress's efforts to delegate legislative power"³⁰¹ Courts can, and do, keep the balance between legislative and executive power.³⁰² Unconstrained discretion upsets the balance, especially in criminal and capital punishment. Legislative accountability was a significant concern in *Furman* and the reshaping of the American death penalty.³⁰³ The breadth of agencies' discretion to create execution protocols without real legislative guidance is another aspect of the overarching problem of accountability and decision-making in capital punishment.

Rachel Barkow has argued for "criminal law exceptionalism" in separation of powers jurisprudence.³⁰⁴ Her work demonstrates the historical and constitutional underpinnings that support an argument for strict separation of powers in criminal law, including the division of functions in the criminal law among each branch.³⁰⁵ The Framers favored limiting power to prevent abuse of criminal process through the separation of powers.³⁰⁶ Death penalty exceptionalism exists in criminal and constitutional law because "death is a punishment different from all other sanctions in kind rather than degree."³⁰⁷ The state's authority to impose criminal penalties arises from the power the people invested in it. The state's authority to kill flows from the same source. Narrowing a jury's discretion is necessary to ensure that sentences are proportional to the offense.³⁰⁸ Constraining agency discretion ensures that the proper parties are making the right decisions with the right process.³⁰⁹ Without

³⁰¹ *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting); *see also supra* note 120 and accompanying text.

³⁰² *See Gundy*, 139 S. Ct. at 2135–38 (Gorsuch, J., dissenting).

³⁰³ *See Furman v. Georgia*, 408 U.S. 238, 255–57 (1972) (Douglas, J., concurring); *id.* at 309–10 (Potter, J., concurring); *id.* at 313–14 (White, J., concurring); *see also Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) ("North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences."); BANNER, *supra* note 36, at 261–64 (discussing *Furman v. Georgia*). These schemes do not resolve the problem of extreme discretion—they merely shift it elsewhere. *See* BANNER, *supra* note 36, at 273 (discussing the NAACP Legal Defense Fund's briefs in *Gregg v. Georgia*); GARRETT, END OF ITS ROPE, *supra* note 3, at 137–40 (discussing geographic disparity in the death penalty due in part to prosecutorial discretion).

³⁰⁴ Barkow, *Separation of Powers*, *supra* note 137, at 1012.

³⁰⁵ *Id.* at 1012–17.

³⁰⁶ *Id.* at 1017; *see Hessick & Hessick*, *supra* note 172, at 25–26.

³⁰⁷ *Woodson*, 428 U.S. at 303–04; *see also Furman*, 408 U.S. at 286–89 (Brennan, J., concurring).

³⁰⁸ *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

³⁰⁹ *See Sunstein*, *Nondelegation Canons*, *supra* note 121, at 339 (explaining that the "link" between "individual rights and interests" and "institutional design" is preserved

proper constraints at the different points of the capital-punishment process, there is a risk of arbitrarily imposed death sentences,³¹⁰ or arbitrarily selected methods of execution.

Unconstrained agency discretion in the context of figuring out a method of execution implicates three primary problems associated with separation of powers: accountability, transparency, and the perception of legitimacy.³¹¹ Accountability addresses *who* is responsible for making decisions and who receives the credit (or blame).³¹² Transparency relates to preserving democratic values and inmates' access to judicial review. A lack of transparency and unlimited agency discretion in decisions about punishment and killing undermines the legitimacy of government action.³¹³

Accountability is a central value in the legitimacy of criminal punishment, sentencing practices, and the state's power to kill.³¹⁴ As David Schoenbrod points out, delegating allows legislators to claim the credit for purported benefits for a statute and evade blame for burdens or negative consequences.³¹⁵ By authorizing the death penalty, legislators can claim to be tough on crime and then blame the agency for flaws in administering penalty,³¹⁶ or leave the mess

through "a requirement that certain controversial or unusual actions will occur only with respect for the institutional safeguards introduced through the design of Congress").

³¹⁰ *But see* GARRETT, END OF ITS ROPE, *supra* note 3, at 138–54; Jordan M. Steiker, *The Role of Constitutional Facts and Social Science Research in Capital Litigation: Is "Proof" of Arbitrariness or Inaccuracy Relevant to the Constitutional Regulation of the American Death Penalty?*, in THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 23, 23–46 (Charles S. Lanier et al. eds., 2009).

³¹¹ *See* Gundy v. United States, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) (explaining that changing regulations across administrations implicates fair notice and SORNA allowed Congress to "claim credit" for dealing with sex offenders while letting the Attorney General address a complicated problem); SCHOENBROD, *supra* note 118, at 14–19; Whittington & Iuliano, *The Myth of the Nondelegation Doctrine*, *supra* note 122, at 412.

³¹² *See* Hessick & Hessick, *supra* note 172, at 29–30; Sunstein, *Nondelegation Canons*, *supra* note 121, at 319–20.

³¹³ *See* Barkow, *Ascent of the Administrative State*, *supra* note 277, at 1336.

³¹⁴ *See* Andrea Roth, "Spit and Acquit": Prosecutors as Surveillance Entrepreneurs, 107 CALIF. L. REV. 405, 447 (2019) (discussing accountability and legitimacy). Roth emphasizes that accountability also reflects democratic values and community norms. "A practice is more likely to reflect community norms if the community has a chance to debate the practice and, if the practice does not meet its ostensible policy goals, to lobby to change or discontinue it." *Id.*

³¹⁵ SCHOENBROD, *supra* note 118, at 10.

³¹⁶ *See id.* at 14 ("Delegation thus allows members of Congress to function as ministers rather than legislators; they express popular aspirations and tend to their flocks rather than make hard choices."); *see also* Barkow, *Separation of Powers*, *supra* note 137, at 1030–31 (discussing why "the political system is biased in favor of more severe punishments"); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1155 (2008) (discussing the benefits legislators accrue by creating overbroad criminal statutes).

to courts to sort out.³¹⁷ Individuals convicted of capital offenses are a “politically unpopular minority,”³¹⁸ and legislators have little to lose and much to gain by supporting the death penalty, even if its use is infrequent, arbitrary, and riddled with error. Legislatures receive political capital for authorizing the death penalty and accordingly should be accountable for that decision and the inevitable consequences.³¹⁹ To the extent that legislators reevaluate the death penalty and alter a method of execution statute, they do so more frequently, as Deborah Denno argues, “to stay one step ahead of a looming constitutional challenge to that method because the acceptability of the death penalty process itself therefore becomes jeopardized.”³²⁰ Legislative enactments on capital punishment focus on continuing executions by preserving secrecy, accessing tools or drugs for executions, and avoiding litigation, rather than humanitarian and constitutional concerns.³²¹

Broad delegation interferes with transparency and access to justice.³²² Hugo Bedau observes that, due to the secrecy surrounding executions, “the average American literally does not know what is being done when the government, in his name and presumably on his behalf, executes a criminal.”³²³ Secrecy and unconstrained discretion contribute to delays in litigation and repeat litigation. Justice Sotomayor’s dissent in *Bucklew v. Precythe*,³²⁴ refuted the majority opinion’s complaints about litigation delays by pointedly observing that secrecy

³¹⁷ See ZIMRING & HAWKINS, *supra* note 275, at 100 (discussing state legislatures’ freedom to pass “symbolic legislation” and evade responsibility).

³¹⁸ *Gundy v. United States*, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) (noting that sex offenders are a “politically unpopular minority” and Congress could evade the difficult question of what to do under SORNA by passing responsibility to the Attorney General); see also Barkow, *Separation of Powers*, *supra* note 137, at 1029–31; Berger, *In Search of a Theory of Deference*, *supra* note 14, at 61; Corinna Lain, *Deciding Death*, 57 DUKE L.J. 1, 4 (2007).

³¹⁹ See ZIMRING & HAWKINS, *supra* note 275, at 100; Cass, *supra* note 120, at 154 (discussing political benefits to legislators).

³²⁰ Denno, *When Legislatures Delegate Death*, *supra* note 14, at 65.

³²¹ See SARAT, GRUESOME SPECTACLES, *supra* note 38, at 87–88 (discussing Florida’s shift to lethal injection); *id.* at 118–20 (discussing the optics of lethal injection); Deborah W. Denno, *The Lethal Injection Quandary*, *supra* note 27, at 116 (2007); Denno, *When Legislatures Delegate Death*, *supra* note 14, at 125; see also Interim Report No. 14 at 4, In the Matter of the Multicounty Grand Jury, State of Okla., Nos. SCAD-2014-70, GJ-2014-1 (May 19, 2016), <https://files.deathpenaltyinfo.org/legacy/files/pdf/MCGJ-Interim-Report-5-19-16.pdf> [<https://perma.cc/7G2Q-HKN7>] [hereinafter Interim Multicounty Grand Jury Report] (explaining that the Department of Corrections revised its execution protocols after “complications” arising from Clayton Lockett’s execution).

³²² See Berger, *Individual Rights*, *supra* note 267, at 2065–66 (explaining the importance of transparency in judicial review of administrative decision-making); Hessick & Hessick, *supra* note 172, at 34–36 (discussing how delegation exacerbates the “fiction” of “notice to the public of their legal obligations”).

³²³ THE DEATH PENALTY IN AMERICA 14 (Hugo Adam Bedau, 3d ed. 1982).

³²⁴ See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1145–48 (2019) (Sotomayor J., dissenting).

surrounding execution protocols and changes to protocols (due in no small part to agency discretion) leave inmates often unable to challenge protocols or decisions about executions until close in time to executions.³²⁵ *Cook* illustrates this point: the Arizona Department of Corrections' discretion to make last-minute revisions to execution protocols threatened "to 'usurp the powers,' of the Judiciary" by undermining its ability to engage in judicial review.³²⁶ Part of the challenges of rapid judicial review may stem from courts' unwillingness to stay executions, but altering protocols immediately before execution or during litigation unquestionably impacts judicial review, particularly when agencies are not constrained by procedural or fact-finding requirements.

Excessive delegation and limited accountability and transparency undermine the perception of the legitimacy of the death penalty. Delegation "is closely connected both with the rule of law concept and the theory of representative government."³²⁷ Requiring legislation to have defining standards "serves the function of ensuring that fundamental policy decisions will be made, not by some appointed bureaucrats, but by the elected representatives of the people."³²⁸ Ronald Cass emphasizes that the question of legitimacy "goes beyond Locke's declaration that the people have not consented to a grant of legislative power to others."³²⁹ Instead, Cass contends that legitimacy is linked to concerns about accountability: legislators benefit from granting power to others, and that self-interest undermines legitimacy.³³⁰ Legislative enactments, as opposed to agency determinations, may better reflect democratic, as opposed to purely majoritarian, decision-making.³³¹

To be sure, courts have emphasized that the Executive is directly accountable to the people, and so that branch can reasonably make policy determinations to "resolve the competing interests which Congress itself either inadvertently did not resolve or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."³³² But majoritarian reasoning ignores the plight of politically unpopular groups.³³³ Delegating to administrative agencies the task of crafting execution protocols

³²⁵ See *id.* at 1147–48 (Sotomayor, J., dissenting); see also generally KONRAD, *supra* note 24.

³²⁶ *Cook v. State*, 281 P.3d 1053, 1058 (Ariz. Ct. App. 2012); see also *supra* notes 277–84 and accompanying text (discussing *Cook*).

³²⁷ Schwartz, *supra* note 120, at 445; Sunstein, *Nondelegation Canons*, *supra* note 121, at 320.

³²⁸ Schwartz, *supra* note 120, at 445.

³²⁹ Cass, *supra* note 120, at 153 (citing JOHN LOCKE, *Second Treatise of Government* § 141, in *TWO TREATISES OF GOVERNMENT* 363 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)); see *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

³³⁰ See Cass, *supra* note 120, at 153–55.

³³¹ See SCHOENBROD, *supra* note 118, at 110; Berger, *In Search of a Theory of Deference*, *supra* note 14, at 43; Schwartz, *supra* note 120, at 445.

³³² *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

³³³ See SCHOENBROD, *supra* note 118, at 110–12.

without legislative oversight or supervision undermines the legitimacy of the punishment because secrecy and unconstrained discretion blur the lines between legislative and executive power and eliminate checks on the exercise of power.³³⁴ These harms stretch beyond the potential for cruelty and suffering in administration of the death penalty—they also threaten the democratic process.

Although judicial enforcement via the nondelegation doctrine may magnify the role of the judiciary, that branch has taken on an outsized role in part because of legislative delegation and secrecy. The next part evaluates key aspects of judicial inquiry into agency discretion to demonstrate why a more robust nondelegation inquiry into legislative delegation in method of execution statutes is necessary.

B. Agency Expertise and Limits on Discretion

Judicial review in nondelegation cases reveals unwarranted reliance on agency expertise and willingness to gloss over existing separation of powers principles. Courts tend to place too much reliance on the legislative decision to adopt the death penalty, as well as a general choice of a method of execution.³³⁵ In *Sims v. Kernan*, the California Court of Appeals relied substantially on legislative enactments unrelated to carrying out the death penalty to conclude there was a sufficient policy.³³⁶ The court described agency protocols as “subsidiary decisions” to the choice to impose the death penalty and the method, rejecting litigants’ arguments that legislative policy should at a minimum include decisions about “pain, speed, reliability, and transparency.”³³⁷ California’s separation of powers jurisprudence dictated that the legislative body’s representative nature required it to settle contested policy matters and crucial issues when it had the “time, information, and competence” to do so.³³⁸ The court did not disagree that the legislature could make those evaluations, but concluded that lethal injection drug shortages justified institutional flexibility, and the Department of Corrections would be in the “best position” to adjust protocols in response to “lessons learned” from botched executions nationally.³³⁹

This sort of reasoning misses the mark. The legislative decision to authorize capital punishment is a separate policy judgment from how a sentence shall be carried out, and both are legislative decisions. The death penalty, capital trial procedure, or the location of death row do not set out factual inquiries for agencies developing execution protocols to resolve or criteria to evaluate against

³³⁴ See Barkow, *Separation of Powers*, *supra* note 137, at 1023–24.

³³⁵ See Denno, *When Legislatures Delegate Death*, *supra* note 14, at 70–71.

³³⁶ *Sims v. Kernan*, 241 Cal. Rptr. 3d 300, 303, 306 (Cal. Ct. App. 2018); *see supra* notes 257–58 and accompanying text.

³³⁷ *Kernan*, 241 Cal. Rptr. 3d at 306.

³³⁸ *Clean Air Constituency v. Cal. State Air Res. Bd.*, 523 P.2d 617, 627 (Cal. 1974).

³³⁹ *Kernan*, 241 Cal. Rptr. 3d at 307.

facts the agency must consider.³⁴⁰ Capital trial procedures do not resolve procedural concerns about how execution protocols are developed.³⁴¹ Generalized legislative statements about the goals of capital punishment do not provide clear standards.³⁴² These are inadequate substitutes for legislative specificity, factual inquiry, and administrative procedures and guidance.³⁴³

Merely selecting a generic method of execution like lethal injection or lethal gas may not offer sufficient guidance to an agency that develops protocols. “Substance or substances in a lethal quantity sufficient to cause death”³⁴⁴ or “lethal gas” encompass a range of gases and drugs that have varying effects on the human body ranging from swift, slow, possibly painless, or excruciating deaths.³⁴⁵ These methods carry substantial room for discretion and significant potential for arbitrary action if agencies lack policy guidance or criteria from the legislature. Generally worded statutes make it difficult to evaluate whether the agency has complied with the legislature’s directive because it may not be clear what the directive is other than ensuring that the condemned inmate dies.

A weaker approach to nondelegation preserves agency flexibility to respond to developing situations. The Oklahoma legislators who drafted the first lethal injection statute kept “the statutory language vague in order to accommodate the development of new and better drug technologies in the future.”³⁴⁶ The legislators did not include any oversight or specifications and the result was to “delegate ‘to Oklahoma prison officials all critical decisions regarding the implementation of lethal injection.’”³⁴⁷ But building this discretion into the system incentivizes agencies to imitate without engaging in fact-finding or assessments of whether another state’s protocols are actually effective. When Oklahoma sought more recently to revise its protocols following Clayton Lockett’s botched execution in 2014, the director of the Department of Corrections “asked administration members to obtain public[ly] available execution policies from other states, including Arizona, Florida, and Texas, identify these states’ policies, and merge their best and most efficient practices into the Department’s new Execution Protocol.”³⁴⁸

Agency competence is a distinct but interrelated issue from nondelegation because courts substantially rely on agencies’ presumed expertise and position

³⁴⁰ See *Gundy v. United States*, 139 S. Ct 2116, 2141 (2019) (Gorsuch, J., dissenting).

³⁴¹ See *id.* at 2132; see also *Hobbs v. Jones*, 412 S.W.3d 844, 854 (Ark. 2012). But see *Kernan*, 241 Cal. Rptr. 3d at 307; *Brown v. Vail*, 237 P.3d 263, 270 (Wash. 2010) (en banc).

³⁴² See *Araiza*, *supra* note 117, at 236 (“If one accepts such statements as furnishing principles governing every delegation of power the statute accomplishes, then either nearly every statute necessarily satisfies this supposedly-strengthened non-delegation review or we are thrown back into the subjective ‘how intelligible does the principle have to be?’ inquiry.”).

³⁴³ Cf. *Kernan*, 241 Cal. Rptr. 3d at 307; *Brown*, 237 P.3d at 269 (en banc).

³⁴⁴ E.g., TEX. CODE CRIM. PROC. ANN. art. 43.14(a) (West 2019).

³⁴⁵ E.g., CAL. PENAL CODE § 3604(a) (West 2020).

³⁴⁶ SARAT, GRUESOME SPECTACLES, *supra* note 38, at 117.

³⁴⁷ *Id.*

³⁴⁸ Interim Multicounty Grand Jury Report, *supra* note 321, at 5.

in upholding broad legislative delegations.³⁴⁹ This inquiry misses a key step in the analysis—whether the agency actually has the expertise. Denno has demonstrated that the officials who develop execution protocols frequently lack technical or medical expertise.³⁵⁰ This may be due to concerns over the ethics of medical involvement in executions.³⁵¹ Execution methods are not subjected to medical or scientific study before their implementation and may be held to lower standards than those used in animal euthanasia.³⁵² The prevalence of botched executions lends substantial support to the argument that there are deficiencies in agencies’ procedures. Austin Sarat estimates that 7.12% of lethal-injection executions have been botched, lending substantial support to critiques of execution procedures.³⁵³ This may be, as Denno has explained, “partly attributable to the dearth of written procedures provided to the executioners concerning how to perform an execution.”³⁵⁴ Other factors in botched executions may include inadequate training in administering drugs or inserting IVs, particularly for individuals who are in poor health, are obese, or have a history of drug abuse,³⁵⁵ as well as flaws in the drugs used.³⁵⁶

Agencies’ attempts to shift responsibility through the “discrete task” approach discussed *supra*, may also lend itself to errors.³⁵⁷ Oklahoma’s

³⁴⁹ See *supra* notes 262–67 and accompanying text.

³⁵⁰ Denno, *Lethal Injection Chaos Post-Baze*, *supra* note 27, at 1335; Denno, *When Legislatures Delegate Death*, *supra* note 14, at 112, 112 n.345; see Denno, *The Lethal Injection Quandary*, *supra* note 27, at 116.

³⁵¹ See SARAT, GRUESOME SPECTACLES, *supra* note 38, at 119–20; Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 48 (2009); Denno, *The Lethal Injection Quandary*, *supra* note 27, at 113–14; Denno, *When Legislatures Delegate Death*, *supra* note 14, at 90–91, 91 nn.174–75, 112–14, 112–14 nn.349–53.

³⁵² Denno, *When Legislatures Delegate Death*, *supra* note 14, at 86; see also Brief of Sixteen Professors of Pharmacology as Amici Curiae in Support of Neither Party, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955) (discussing the use of midazolam as an anesthetic in executions).

³⁵³ SARAT, GRUESOME SPECTACLES, *supra* note 38, at 177 (Appendix A). Between 1980 and 2010, states botched 17.33% of electrocutions. *Id.*

³⁵⁴ Denno, *When Legislatures Delegate Death*, *supra* note 14, at 111–12.

³⁵⁵ See SARAT, GRUESOME SPECTACLES, *supra* note 38, at 136; Ben Crair, *Photos from a Botched Lethal Injection*, NEW REPUBLIC (May 29, 2014), <https://newrepublic.com/article/117898/lethal-injection-photos-angel-diazs-botched-execution-florida> [<https://perma.cc/6BNA-S4TT>]; Bernard E. Harcourt, *The Barbarism of Alabama’s Botched Executions*, N.Y. REV. BOOKS (Mar. 13, 2018), <https://www.nybooks.com/daily/2018/03/13/the-barbarism-of-alabamas-botched-execution/> [<https://perma.cc/YTA6-9LB8>]; Lynn Waddell & Abby Goodnough, *Florida Executioner Says Procedures Were Followed*, N.Y. TIMES (Feb. 20, 2007), <https://www.nytimes.com/2007/02/20/us/20death.html> [<https://perma.cc/7KV6-DAVE>] (discussing testimony from Florida’s execution team in the botched execution of Angel Diaz); see also *Morales v. Tilton*, 465 F. Supp. 2d 972, 979–80 (N.D. Cal. 2006).

³⁵⁶ See Jon Yorke, *Comity, Finality, and Oklahoma’s Lethal Injection Protocol*, 69 OKLA. L. REV. 545, 578–86 (2017); Teresa A. Zimmers & Leonidas G. Koniaris, *Peer-Reviewed Studies Identifying Problems in the Design and Implementation of Lethal Injection for Execution*, 35 FORDHAM URB. L.J. 919, 926–29 (2008).

³⁵⁷ See *supra* notes 91–106 and accompanying text.

revisions to its execution protocols did not prevent errors in Charles Warner's execution or Richard Glossip's scheduled execution.³⁵⁸ The Interim Grand Jury Report presents a disturbing picture of inattention to detail. The Warner execution team overlooked that they were using the wrong drug—potassium acetate, instead of potassium chloride.³⁵⁹ None could explain how it happened other than that they assumed someone else had approved it, or that they “dropped the ball.”³⁶⁰

Baze's prospective approval of lethal injection protocols only encourages this majoritarian approach in death, delegation, and deference.³⁶¹ *Baze* warned against interfering with state legislatures' roles in determining execution procedures, particularly because states act “with an earnest desire to provide for a progressively more humane manner of death.”³⁶² The difficulty with this assertion is that agencies do far more than legislatures—without oversight. *Baze*'s approach conflates agencies and legislatures, giving one the deference due to the other.³⁶³ Berger asserts that the “lack of legislative input casts serious doubts on the [*Baze*] plurality's insistence that rigorous judicial inquiry ‘would substantially intrude on the role of state legislatures in implementing their execution procedures.’”³⁶⁴ States may serve as laboratories of experimentation, but the freedom to experiment cannot justify weakening important structural protections built into state and federal constitutions.

Changes to execution protocols only highlight agencies' inexpertise and the breadth of agency discretion. Oklahoma's brief experimentation with nitrogen hypoxia as a method of execution that began in 2015 illustrates this problem.³⁶⁵ Oklahoma's legislators relied on a fourteen-page report created over “three hours one evening”³⁶⁶ by three professors who are not medical doctors.³⁶⁷ Oklahoma's legislators also watched YouTube videos of teenagers inhaling

³⁵⁸ See Interim Multicounty Grand Jury Report, *supra* note 321, at 1–2.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 36–37. For further discussion of Oklahoma's execution errors, see Robin C. Konrad, *Lethal Injection: A Horrendous Brutality*, 73 WASH. & LEE L. REV. 1127, 1137–40 (2016).

³⁶¹ SARAT, GRUESOME SPECTACLES, *supra* note 38, at 121.

³⁶² *Baze v. Rees*, 553 U.S. 35, 51 (2008).

³⁶³ Berger, *Individual Rights*, *supra* note 267, at 2039–40.

³⁶⁴ Berger, *In Search of a Theory of Deference*, *supra* note 14, at 60.

³⁶⁵ OKLA. STAT. ANN. tit. 22, § 1014(B) (West 2020); Lauren Gill, *Using Nitrogen Gas for Executions Is Untested and Poorly Understood. Three States Plan To Do It Anyway*, APPEAL (Oct. 25, 2019), <https://theappeal.org/using-nitrogen-gas-for-executions-is-untested-and-poorly-understood-three-states-plan-to-do-it-anyway/> [<https://perma.cc/TY5V-KDKM>].

³⁶⁶ Michael P. Copeland, Thom Parr, & Christine Pappas, *Nitrogen Induced Hypoxia as a Form of Capital Punishment* (unpublished manuscript) (on file with the *Ohio State Law Journal*); Eli Hager, *Why Oklahoma Plans to Execute People With Nitrogen*, MARSHALL PROJECT (Mar. 15, 2018), <https://www.themarshallproject.org/2018/03/15/why-oklahoma-plans-to-execute-people-with-nitrogen> [<https://perma.cc/PM8G-GYPD>].

³⁶⁷ Scott Christianson, *How Oklahoma Came to Embrace the Gas Chamber*, NEW YORKER (June 24, 2015), <https://www.newyorker.com/news/news-desk/how-oklahoma-came-to-embrace-the-gas-chamber> [<https://perma.cc/3RVL-VCAD>]; Hager, *supra* note 366.

helium.³⁶⁸ The bill only authorized nitrogen hypoxia as a method of execution in the event that lethal injection drugs were not available.³⁶⁹ There were no details or guidance for the agency.³⁷⁰ The legislature did not designate who would determine that lethal injection is “otherwise unavailable,” or criteria for making the determination.³⁷¹ In 2018, Oklahoma’s Attorney General determined that, due to a severe shortage of execution drugs, Oklahoma would switch to nitrogen hypoxia as its method of execution.³⁷² After delays in creating the protocol and obtaining necessary equipment,³⁷³ the Attorney General announced in early 2020 that the state had “found a reliable supply of drugs to resume executions by lethal injection[]” and the Department of Corrections would “continue[] to work on a protocol that will allow the state to proceed by execution through nitrogen hypoxia where appropriate.”³⁷⁴

Executive agencies and officials may not comply even when legislatures provide more specific instructions.³⁷⁵ Montana’s execution protocol has been struck down *twice* for violating the Montana Constitution’s separation of powers provision because the protocol was inconsistent with the state’s method of execution statute.³⁷⁶ Montana’s decision to identify the classes of execution drugs made it possible for a court to evaluate the extent to which the agency complied with the will of the legislature, even if the agency had discretion in dosage calculation or other procedures that might need to be modified based on the specific facts and conditions of particular executions.³⁷⁷ While this is a separate administrative law inquiry, it is relevant to a court’s decision to defer to agency expertise.

Inadequate criteria or fact-finding obligations incentivize agencies to take shortcuts. Agencies’ tendency to copycat other jurisdictions’ protocols and statutes concerning the death penalty, coupled with *Baze*’s prospective

³⁶⁸ Hager, *supra* note 366.

³⁶⁹ H.B. 1879, 55th Leg., Reg. Sess. (Okla. 2015).

³⁷⁰ *See id.*

³⁷¹ *See* OKLA. STAT. ANN. tit. 22 § 1014(B) (West 2020).

³⁷² Hager, *supra* note 366.

³⁷³ *See* Nolan Clay, *Executions by Gas Stalled Indefinitely While State Seeks Willing Seller of Device*, OKLAHOMAN (Jan. 27, 2019), <https://oklahoman.com/article/5621219/executions-by-gas-stalled-indefinitely-while-state-seeks-willing-seller-of-device> [<https://perma.cc/NSC3-XYQQ>].

³⁷⁴ *State Officials Announce Plans to Resume Execution by Lethal Injection*, OKLA. ATT’Y GEN. (Feb. 13, 2020) (on file with the *Ohio State Law Journal*).

³⁷⁵ *See* Denno, *When Legislatures Delegate Death*, *supra* note 14, at 88, 102 n.261; *see also* SARAT, GRUESOME SPECTACLES, *supra* note 38, at 90–91.

³⁷⁶ *See* Order on Cross-Motions for Summary Judgment at 22, *Smith v. State*, No. BDV-2008-303 (Mont. 1st Jud. Dist. Sept. 6, 2012) [hereinafter *Smith Order*]; *Montana Judge Puts Executions on Hold*, DEATH PENALTY INFO. CTR. (Oct. 7, 2015), <https://deathpenaltyinfo.org/news/montana-judge-puts-executions-on-hold> [<https://perma.cc/2BTP-MMFC>].

³⁷⁷ *See* *Smith Order*, *supra* note 376, at 21. While this example relates to administrative norms, it illustrates the importance of careful judicial scrutiny on separation of powers questions.

approvals, allows courts to rely on the similarity to other jurisdictions' protocols, rather than the individual agency's research, fact-finding, or procedure. It also undermines claims that agencies have real expertise and demonstrates that the protocols lack what Berger describes as a "democratic pedigree"—the "political authority and epistemic authority underlying the policy."³⁷⁸ Such protocols deserve far less deference than courts accord them.³⁷⁹

Reliance on procedural controls is also misplaced. Agencies' ability to alter execution protocols depends on the extent to which agencies are bound by state procedural rules. Agencies do not usually have to comply with state APA rules to create execution protocols.³⁸⁰ Barkow has observed that, absent oversight or internal controls on matters of charging and plea bargaining, "the potential for arbitrary enforcement is high."³⁸¹ Scholars have contended that delegation in criminal law contexts should be treated differently because such delegations are "inconsistent with foundational criminal law doctrine, . . . present greater threats to the principles underlying the nondelegation doctrine, and . . . are not supported by the ordinary arguments in favor of delegation."³⁸² The same arguments apply in execution protocols. Absent any restraints, there is a risk of arbitrariness in selecting drugs or substances to cause death, and the consequences can be horrifying.³⁸³ Unlimited agency discretion in the death penalty context allows agencies to wield both legislative power and executive power. Internal measures are necessary to protect individual rights when an agency can use the powers of multiple branches.³⁸⁴ Courts addressing nondelegation challenges are too willing to ignore the absence of internal procedural checks as a constraint on agency discretion even when state nondelegation doctrines expressly rely on such checks.³⁸⁵

Vague legislation and a lack of administrative procedure leave courts doing precisely what the *Baze* plurality forecasted: "transform[ing] courts into boards of inquiry charged with determining 'best practices' for executions, with each

³⁷⁸ Berger, *In Search of a Theory of Deference*, *supra* note 14, at 39.

³⁷⁹ See *Baze v. Rees*, 553 U.S. 35, 74–75 (2008) (Stevens, J. concurring); Berger, *Individual Rights*, *supra* note 267, at 2058 ("Administrative law norms teach that agencies deserve less respect when they are unaccountable, unknowable, and procedurally erratic. Given that such agencies would not receive deference in the administrative law context, they should not be afforded blanket deference in constitutional individual rights cases.").

³⁸⁰ See *supra* notes 269–72 and accompanying text; see also Berger, *Individual Rights*, *supra* note 267, at 2081–82 (discussing problems of deference and delegation when legislatures "deliberately insulate[]" agencies from "political pressure" and "administrative law more generally").

³⁸¹ Barkow, *Separation of Powers*, *supra* note 137, at 1026–27.

³⁸² Hessick & Hessick, *supra* note 172, at 6.

³⁸³ See Berger, *In Search of a Theory of Deference*, *supra* note 14, at 17–18, 60–61; Denno, *When Legislatures Delegate Death*, *supra* note 14, at 66, 66 n.21, 99.

³⁸⁴ See Brown, *supra* note 115, at 1555; Barkow, *Separation of Powers*, *supra* note 137, at 1023–24. See generally G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000).

³⁸⁵ See *supra* notes 271–73 and accompanying text.

ruling supplanted by another round of litigation touting a new and improved methodology.”³⁸⁶ Despite criticisms that judicial enforcement of delegation could overexpand the role of the judiciary,³⁸⁷ the judiciary has already taken on an outsized role. A stricter approach arguably better serves separation of powers principles by forcing the legislative branch to become more accountable. To be sure, legislators are not rendered experts by virtue of elected office. Oklahoma’s nitrogen hypoxia experiment aptly illustrates this point.³⁸⁸ But legislators should impose more substantial guidelines, criteria, and procedural controls on agencies than “sufficient to cause death.” And courts can—and should—comply with their constitutional obligation to enforce separation of powers norms.

C. *Why Death is Nondelegable*

As long as states and the federal government intend to continue using the death penalty, they must grapple with decision-making in executions. Who makes decisions, and how they are made, are fundamental concepts underlying our constitutional system.³⁸⁹ Rebecca Brown argues that separation of powers principles under the nondelegation doctrine implicate individual liberties, because “procedural requirements and separated powers are simply different limitations on the exercise of government power, sharing a common goal: to restrict arbitrary government action that is likely to harm the rights of individuals.”³⁹⁰ Unconstrained agency delegation to create execution protocols threatens prisoners’ rights by increasing the risk that capital punishment will be ineptly administered and cause severe pain and suffering. Weakening the separation of powers poses a threat to core democratic systems.

Nondelegation may seem especially counterintuitive because discretion and delegation are essential to continuing state-authorized killing.³⁹¹ Indeed, courts seem to favor delegation as a matter of legislative convenience, potentially for countermajoritarian concerns.³⁹² Berger has highlighted this issue as a false application of countermajoritarian concerns about unelected judges making

³⁸⁶ *Baze v. Rees*, 553 U.S. 35, 51 (2008); *In re Ohio Execution Protocol*, 860 F.3d 881, 886 (6th Cir. 2017) (en banc).

³⁸⁷ See Sunstein, *Nondelegation Canons*, *supra* note 121, at 321.

³⁸⁸ See *supra* notes 367–75 and accompanying text.

³⁸⁹ See *McNabb v. United States*, 318 U.S. 332, 347 (1943).

³⁹⁰ Brown, *supra* note 115, at 1555–56.

³⁹¹ *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012) (“It is both reasonable and . . . acceptable for the Legislature to delegate the details . . . to an agency that is ‘better equipped to undertake the task’ of ensuring that it is implemented as uniformly and humanely as possible.”) (quoting *Griffith Energy, LLC v. Ariz. Dep’t of Revenue*, 108 P.3d 282, 287 (Ariz. Ct. App. 2005)); *Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978) (en banc) (“[T]he Legislature has . . . delegated to the said Director power to determine details so as to carry out the legislative purpose which the Legislature cannot practically or efficiently perform itself.”).

³⁹² See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155–56 (2002).

decisions about “policy decisions made by government officials who answer to the people.”³⁹³ When decisions are made by unelected and unsupervised agencies, “judicial deference to them rests on shakier grounds.”³⁹⁴ Similarly, the countermajoritarian difficulty is not as pronounced when judicial decision-making is aimed at preserving individual rights for disadvantaged groups.³⁹⁵

Death penalty exceptionalism fits within theories of nondelegation that support heightened inquiry in criminal law contexts. The degree of discretion that is acceptable should vary with the scope of the power that the legislature accords an agency, as well as the executive agency or officer tasked with carrying out the directives.³⁹⁶ The power to kill is an extraordinary one with potential for incurable harm.³⁹⁷ Cass Sunstein has observed that “nondelegation canons” constrain Congress from delegating certain tasks to agencies, particularly when individual rights are implicated.³⁹⁸ A more robust nondelegation inquiry is appropriate in evaluating method of execution statutes because of the impact on individual rights and the potential for mischief in undermining separation of powers in the state’s decision to kill.

In applying this analysis, courts should recognize that a method of execution is a separate policy determination from the decision to use capital punishment and should not import legislative enactments regarding the latter to conclude that agencies have sufficient guidance to carry out the former. Blurring those lines fails to hold legislators to their constitutional responsibility to define crimes and fix punishments.³⁹⁹ Courts should also examine whether statutes assign responsibility for fact-finding in nondelegation inquiries.⁴⁰⁰ Few method of execution statutes contain requirements for agency fact-finding about speed, pain, and drug effectiveness for lethal injection or other methods of

³⁹³ Berger, *Individual Rights*, *supra* note 267, at 2059–60.

³⁹⁴ *Id.* at 2060; *see also* Berger, *In Search of a Theory of Deference*, *supra* note 14, at 42 (“When courts strike down an agency policy adopted in secret with no legislative guidance or oversight, the countermajoritarian concern sharply decreases.”).

³⁹⁵ *See* Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1147–48 (2014).

³⁹⁶ *See* *Whitman v. Am. Trucking Assn.’s*, 531 U.S. 457, 475 (2001); *see also* *Loving v. United States*, 517 U.S. 748, 772–73 (1996); *Coglianesi*, *supra* note 120, at 1872–73.

³⁹⁷ Interim Multicounty Grand Jury Report, *supra* note 321, at 74 (depriving Charles Frederick Warner of his right to contest the method of execution in accordance with Oklahoma regulations); LAIN, LETHAL INJECTION, *supra* note 4 (manuscript at 43–44); Konrad, *Lethal Injection*, *supra* note 360, at 1133–37; *see also* SARAT, GRUESOME SPECTACLES, *supra* note 38, at 177–210 (identifying botched executions).

³⁹⁸ *See* Sunstein, *Nondelegation Canons*, *supra* note 121, at 331–32.

³⁹⁹ *See Ex Parte United States*, 242 U.S. 27, 42 (1916); *see also* *Weems v. United States*, 217 U.S. 349, 378–79 (1910); *Malloroy v. State*, 435 P.2d 254, 255 (Idaho 1967).

⁴⁰⁰ *See* *Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (criticizing the notion that fact-finding functions are sufficient to satisfy the “intelligible principle” requirement, and emphasizing that Congress still must make the policy underlying such fact-finding).

execution.⁴⁰¹ Requiring express directives from legislatures on this issue⁴⁰² fits within the contours of Justice Gorsuch's heightened intelligible principle inquiry in *Gundy*.⁴⁰³ It also requires legislators to "make the policy judgments" about Eighth Amendment punishment by setting out terms of those inquiries.⁴⁰⁴

Aspects of execution protocols may require some agency flexibility, including sourcing drugs and chemicals for executions, the need to identify alternative substances, dosage calculation, or other on-the-spot decisions. But the absence of facts for executives to consider and "criteria against which to measure them"⁴⁰⁵ has proved problematic. A lack of legislative guidance arguably contributed to agencies' behavior in illegally importing drugs for executions.⁴⁰⁶ Despite federal and state laws addressing who may obtain and store controlled substances, agencies still obtain drugs without compliance, explaining sourcing, or how they spend state dollars.⁴⁰⁷ States may prefer a non-specific method of execution statute to permit flexibility in the face of drug

⁴⁰¹ See Brief for the Fordham University School of Law, Louis Stein Center for Law and Ethics as Amicus Curiae in Support of Petitioners at 22–24, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439) (summarizing the historically "unstudied way" lethal injection statutes have been adopted, as derived from Oklahoma's "purposefully vague" 1977 law); see also *supra* notes 176–96 and accompanying text (discussing states' method of execution statutes).

⁴⁰² Denno has proposed that states conduct "in-depth study of the proper implementation of lethal injection." This study would assist in fact-finding issues for states in developing procedures that presumably reduce pain or error, as well as identifying and responding to botched executions. Denno, *Lethal Injection Quandary*, *supra* note 321, at 118–21.

⁴⁰³ See *Gundy*, 139 S. Ct. at 2141.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ See KONRAD, BEHIND THE CURTAIN, *supra* note 24, at 24, 32; LAIN, LETHAL INJECTION, *supra* note 4, at 14–22; *Federal Authorities Seize Execution Drugs Imported for Arizona and Texas*, CBS NEWS (Oct. 23, 2015), <https://www.cbsnews.com/news/federal-authorities-seize-execution-drugs-imported-for-arizona-and-texas/> [<https://perma.cc/47R9-PYWA>]; Madlin Mekelburg, *FDA Blocks Texas Import of Execution Drug*, TEX. TRIB. (Apr. 19, 2016), <https://www.texastribune.org/2016/04/19/fda-blocks-texas-import-execution-drug/> [<https://perma.cc/ECL3-F5LB>]. See also generally *Cook v. FDA*, 733 F.3d 1, 12 (D.C. Cir. 2013). The DOJ recently issued an opinion concluding that the FDA lacks jurisdiction in this arena. See *Whether the Food and Drug Administration Has Jurisdiction over Articles Intended for Use in Lawful Executions*, 43 Op. O.L.C. 1, 1 (2019), <https://www.justice.gov/olc/opinion/file/1162686/download> [<https://perma.cc/DQN3-CE64>].

⁴⁰⁷ See Interim Multicounty Grand Jury Report, *supra* note 321, at 18, 21 ("[T]he Department never obtained [Oklahoma Bureau of Narcotics and Dangerous Drugs] or DEA registration allowing it to possess and/or store execution-related drugs OBND's Deputy General Counsel testified he has no idea how the Department properly obtained the execution drugs"); LAIN, LETHAL INJECTION, *supra* note 4, at 41–45; *Nebraska Supreme Court Orders Release of Lethal-Injection Drug Records*, DEATH PENALTY INFO. CTR. (May 20, 2020), https://deathpenaltyinfo.org/news/nebraska-supreme-court-orders-release-of-lethal-injection-drug-records?utm_source=WeeklyUpdate&utm_campaign=073ea20f52-weekly_update_2017_w41_COPY_01&utm_medium=email&utm_term=0_37cc7e4461-073ea20f52-711075509 [<https://perma.cc/G7PN-4NPN>]; see also Denno, *America's Experiment with Execution Methods*, *supra* note 68, at 717.

shortages. The need for flexibility alone, however, cannot justify unlimited discretion without fact-finding obligations or a set of criteria and obligations for agencies to consider before changing drugs or procedures. Legislatures are quite capable of writing statutes that give agencies the ability to choose between alternatives contingent on fact-finding or provide standards for agencies to use when making decisions.

Take Tennessee. While its default method of execution is lethal injection, it permits electrocution if “[t]he commissioner of correction certifies to the governor that one (1) or more of the ingredients essential to carrying out a sentence of death by lethal injection is unavailable through no fault of the department.”⁴⁰⁸ This provision might not be a model of legislative clarity, but it does set a condition (certification) and imply a requirement of fact-finding (unavailability) before permitting the commissioner to switch methods. A court reviewing such a decision would have some facts and criteria to evaluate.⁴⁰⁹ Arkansas also has offered some helpful specificity. The amended AMEA requires ADC to use FDA-approved drugs obtained from either an FDA-approved facility or nationally accredited compounding pharmacy.⁴¹⁰ Again, this sets measurable criteria for courts, even if there are problems with drug sourcing and pharmacies.⁴¹¹

Methods of execution statutes that require lethal injection be “swift and humane”⁴¹² arguably offer a more identifiable policy to agencies tasked with creating protocols. This standard, however, is not sufficient by itself because it fails to address important concerns about agency expertise, personnel training, and qualifications. Nor does it prevent agencies from shifting protocols without fact-finding or measurable criteria. Giving agencies broad discretion to change execution methods without factual findings or justification for those changes creates a high risk of arbitrary action that may be difficult for courts to review, especially when inmates’ challenges to execution protocols require swift judicial decision-making.⁴¹³

An absence of procedure presents a threat to judicial review and should carry greater weight in nondelegation cases because it interferes with the balance of powers.⁴¹⁴ State nondelegation doctrines’ reliance on procedural

⁴⁰⁸ TENN. CODE CRIM. PROC. ANN. § 40-23-114(e)(2) (West 2020).

⁴⁰⁹ *Cf. Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

⁴¹⁰ ARK. CODE ANN. § 5-4-617(d) (West 2020).

⁴¹¹ *See* LAIN, LETHAL INJECTION, *supra* note 4, at 29–41 (discussing compounding pharmacies).

⁴¹² KAN. STAT. ANN. § 22-4001(a) (West 2020). Kansas also requires certification that the substances must comply with these criteria and any proposed changes require the same certification. *Id.* § 22-4001(c).

⁴¹³ *See* *Cook v. State*, 281 P.3d 1053, 1056–57 (Ariz. Ct. App. 2012).

⁴¹⁴ *See Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting) (“Such an ‘evasive standard’ could threaten the separation of powers if it . . . allowed the agency to make the ‘important policy choices’ that belong to Congress while frustrating ‘meaningful judicial review.’” (quoting *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 676, 685–6 (1980) (Rehnquist, J., concurring))); *Cook*, 281 P.3d at 1058 (“If the Department were to

protections in decision-making is sensible, because compliance with state procedural requirements preserves accountability by requiring agencies to engage with legislatively established processes in reaching decisions.⁴¹⁵ When agencies are free to alter their own protocols for any reason at all, including notice obligations to inmates about execution methods, it threatens to interfere with the judicial branch's responsibilities.⁴¹⁶ Courts' reluctance to hold agencies accountable for interference with judicial review abdicates the court's essential role in preserving the separation of powers as much as a legislative decision that hands over core lawmaking power.⁴¹⁷

The lack of transparency from agencies receiving these delegations should also weigh against deferring to agency judgments.⁴¹⁸ Although the legislature has enacted these statutory provisions, indicating a policy preference for secrecy, such secrecy is concerning, especially when there are few (or no) procedural controls on agencies.⁴¹⁹ Secrecy should be a component of nondelegation inquiries because in the capital punishment context, secrecy corrodes accountability and creates a risk that agencies will improperly wield broad powers, especially because they lack constraints on their discretion.

Courts also err by treating constitutional prohibitions on cruel and unusual punishment as limitations on agency discretion that preserve broad delegations.⁴²⁰ First, these prohibitions address different interests. Rachel

continue [revising execution protocol] in such a way as to unreasonably limit . . . the courts from exercising meaningful judicial review of its actions, then . . . we might be presented with a separation of powers violation.”); *see also* *Brown v. Vail*, 237 P.3d 263, 269–70 (Wash. 2010) (en banc).

⁴¹⁵ *See supra* Part II.A. (discussing states' nondelegation doctrines).

⁴¹⁶ *See Cook*, 281 P.3d at 1056–58; *see also supra* notes 277–84 and accompanying text.

⁴¹⁷ *See Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting) (explaining that leaving executive agencies “free to make all the important policy decisions” makes it difficult for courts to assess whether the agency had exceeded its authority); *see also* *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (“Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.”). *But cf. Cook*, 281 P.3d at 1058 (“This practice [late changes to execution protocol] therefore threatens to ‘usurp the powers,’ of the Judiciary . . . Nevertheless, because Arizona courts have been able to provide review—albeit rushed—of the Department’s changes to its protocol, . . . we hold that the Department has not yet violated the Arizona Constitution’s separation of powers doctrine.”).

⁴¹⁸ *See Berger, Individual Rights, supra* note 267, at 2066; *see also supra* notes 67–72 and accompanying text (discussing secrecy in executions).

⁴¹⁹ *Phillips v. DeWine*, 841 F.3d 405, 421 (6th Cir. 2016) (Stranch, J., dissenting) (“HB 663 [protecting confidentiality for parties to executions] will obstruct scrutiny of Ohio’s execution protocol. . . . [J]ust four years ago . . . we found it necessary ‘to monitor every execution on an ad hoc basis’ because Ohio could not be ‘trusted to fulfill its . . . duty. . . .’”) (quoting *In re Ohio Execution Protocol Litig.*, 671 F.3d 601, 602 (6th Cir. 2012)); *see also supra* note 269 and accompanying text.

⁴²⁰ *See Cook*, 281 P.3d at 1056 (reasoning that the Constitution “implicitly guides and limits” agency decision making by forbidding any “serious pain and suffering,” which would fall under the Eighth Amendment’s prohibition of “cruel and unusual punishment”).

Barkow points out that the Bill of Rights “police[s] government abuse of power to an extent, [but does] . . . not guard against the same structural abuses as the separation of powers.”⁴²¹ To be sure, there is a relationship between an Eighth Amendment claim and a nondelegation claim in the death penalty because arbitrary agency action, insufficient guidance, or expertise can trigger errors in executions that may cause severe pain and suffering.⁴²² Separation of powers implicates process concerns and prevents the aggrandizement of power.⁴²³ The Eighth Amendment prohibits the infliction of cruel and unusual punishments and accordingly does not check the potential for mischief inherent in allowing an agency to wield executive and legislative powers.⁴²⁴

Second, constitutional principles cannot curb agency discretion. Cary Coglianese has evaluated the importance of limits on discretion through the intelligible principle analysis: “A statute will be constitutional as long as an executive officer’s discretion is not unbounded in the same way that Congress’s is.”⁴²⁵ As the Supreme Court pointed out in *Whitman v. American Trucking Associations, Inc.*, agencies cannot restrict overly broad delegations of legislative power by picking their own limiting constructions of statutory authority.⁴²⁶ Courts should not rely on agencies to limit themselves, particularly because agencies cannot construe statutes unconstitutionally so they must already comply with constitutional restrictions on pain and suffering in executions.⁴²⁷ The intelligible principle requirement and parallel state law doctrines dictate that the *legislature* must set the policy in the legislation it enacts.⁴²⁸

In light of the stakes inherent in carrying out death sentences and the horrifying consequences of broad agency discretion and responsibility-shifting mechanisms in capital punishment, legislators should have a greater obligation to define the punishment for a capital sentence. Courts should play their part by protecting separation of powers and administrative law norms to inject greater accountability in a system that, thus far, demands very little.

⁴²¹ Barkow, *Separation of Powers*, *supra* note 137, at 1032.

⁴²² *See, e.g.*, *State v. Deputy*, 644 A.2d 411, 420 (Del. Super. Ct. 1994), *aff’d*, 648 A.2d 423 (Del. 1994); *see also* Hessick & Hessick, *supra* note 172, at 25–26 (discussing the relationship between individual liberties and separation of powers).

⁴²³ Barkow, *Separation of Powers*, *supra* note 137, at 1032–33.

⁴²⁴ U.S. CONST. amend. VIII; *see* Barkow, *Separation of Powers*, *supra* note 137, at 1032–33.

⁴²⁵ Coglianese, *supra* note 120, at 1861.

⁴²⁶ *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001).

⁴²⁷ *See* Sunstein, *Nondelegation Canons*, *supra* note 121, at 331.

⁴²⁸ *Whitman*, 531 U.S. at 472 (“[W]e repeatedly have said that when Congress confers decision-making authority upon agencies *Congress* must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’”) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis and alterations in original)); *see also supra* Part II.A.

VI. CONCLUSION

An argument that principles of nondelegation are viable in evaluating the death penalty may sound like grasping at straws to oppose the death penalty. Why bother asking legislatures to be more specific in considering how prisoners should be executed? Do arguments about how these decisions are made, who makes the decisions, policy, and procedure really just paper over other glaring defects in the death penalty?⁴²⁹ Some may contend that these challenges are attempts to evade a lawfully-imposed sentence by complaining about technical and procedural trivialities.

The separation of powers and compliance with procedure are integral constitutional principles that matter a great deal in a democratic society and are core values in the American system of government.⁴³⁰ As Justice Frankfurter explained, “The history of liberty has largely been the history of observance of procedural safeguards.”⁴³¹ The history of the imposition of the death penalty appears to be one of largely unconstrained delegation by virtually every entity or individual involved in capital punishment.

In making decisions about death, it is tempting to try to find someone else to carry the burden or to be accountable. In *Caldwell v. Mississippi*,⁴³² the Supreme Court held that “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”⁴³³ Nor should it be constitutionally permissible to allow legislatures to shirk their constitutional obligation to set punishments, especially in capital sentencing. The choice to enact the death penalty is a separate policy choice than how the state chooses to kill. Legislatures should not be able to shift the responsibility for determining how the state kills in the name of the people

⁴²⁹ See generally BESSLER, KISS OF DEATH, *supra* note 77; GARRETT, END OF ITS ROPE, *supra* note 3; David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411 (2004); William J. Bowers, Thomas W. Brewer, & Charles S. Lanier, *The Capital Jury Experiment of the Supreme Court*, in THE FUTURE OF AMERICA’S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 199 (Charles S. Lanier et al. eds., 2009); Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825 (2015); J. Michael Martinez, “Freakishly Imposed” or “Fundamentally Fair”? *Legal Arguments Against the Death Penalty*, in THE LEVIATHAN’S CHOICE: CAPITAL PUNISHMENT IN THE TWENTY-FIRST CENTURY 227 (J. Michael Martinez, William D. Richardson & D. Brandon Hornsby eds., 2002).

⁴³⁰ *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (“[T]he greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.”); Cass, *supra* note 120, at 152–53; Madison, *supra* note 113, at 250–51.

⁴³¹ *McNabb v. United States*, 318 U.S. 332, 347 (1943).

⁴³² 472 U.S. 320 (1985).

⁴³³ *Id.* at 328–29.

to agencies, particularly because they systematically remove procedural constraints associated with accountability and transparency. Passing difficult policy decisions to agencies that lack oversight or transparency undermines core democratic values.

Responsibility for death cannot, and should not, be delegated away. Respect for “one of the most vital of the procedural protections of individual liberty found in our Constitution” demands more.⁴³⁴

⁴³⁴Gundy v. United States, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting).