South Dakota Law Review

Volume 69 | Issue 1

2024

The Nondelegation Doctrine in the States: How the Doctrine Has Been Applied in South Dakota

Gabrielle J. Unruh

Patrick M. Garry

THE NONDELEGATION DOCTRINE IN THE STATES: HOW THE DOCTRINE HAS BEEN APPLIED IN SOUTH DAKOTA

GABRIELLE J. UNRUH†

PATRICK M. GARRY††

The United States Constitution's separation of powers doctrine is foundational to the operation of the United States government. In theory, the nondelegation doctrine exists to preserve the separation of powers amongst the three branches of government. The doctrine's purpose is to give sole lawmaking authority to Congress, while yet allowing it to delegate rulemaking authority to an administrative agency, but only if it provides an "intelligible principle" to guide and constrain the agency's rulemaking. While on the surface this appears to be a high standard, the United States Supreme Court has not struck down a law promulgated by an administrative agency for violating the nondelegation doctrine since 1935. Therefore, at the federal level, the nondelegation doctrine is rather dead. Nevertheless, a recent study has suggested that at the state level the nondelegation doctrine is very much alive. This paper analyzes South Dakota caselaw and finds that, since 1935, the South Dakota Supreme Court has struck down numerous administrative rules for violating the nondelegation doctrine. This paper suggests that, if South Dakota is any indication of the viability of the nondelegation doctrine in the other forty-nine states, the nondelegation doctrine is in fact alive and well in the states.

I. INTRODUCTION

At the federal level, the nondelegation doctrine—prohibiting the delegation of legislative power from Congress to the executive branch—is one of the most debated yet least enforced of constitutional principles. Since the early New Deal, the doctrine has never been used by the U.S. Supreme Court to strike down a congressional delegation, no matter how broad and vague that delegation was. The New Deal constitutional revolution, in which the Court relaxed many traditional restraints on executive power, included such separation of powers constraints as the nondelegation doctrine. This revolution is seen as the Court's attempt to accommodate the dramatic expansion of the administrative state during the New Deal.

Once that constitutional accommodation occurred, resulting in the dramatic growth of the administrative state, the Court essentially withdrew from enforcing the nondelegation doctrine. Despite this withdrawal, however, debate on the doctrine continues, primarily because of persistent criticism of the apparent

† J.D. 2023, USD Knudson School of Law; Clerk, Justice Mark E. Salter, South Dakota Supreme Court.

††Professor of Law, University of South Dakota Knudson School of Law.

unenforceability of the doctrine.[1] At the root of this criticism is the fear that, with an unenforceable nondelegation doctrine, unelected administrative agencies can use broad and undefined congressional statutes to promulgate sweeping and complex regulatory schemes.[2]

Although the primary debate involves the nondelegation doctrine at the federal level, based on the separation of powers principle embedded in the U.S. Constitution, another potentially much wider sphere of nondelegation cases exist at the state level, involving the separation of powers provisions in state constitutions.[3] The question becomes whether state courts are following the lead of the U.S. Supreme Court in applying a very lax version of the nondelegation doctrine, or whether state courts are more exacting in enforcing the doctrine. This article explores the nondelegation doctrine as it has been applied by the South Dakota Supreme Court, with the purpose of determining whether the doctrine is more alive and enforceable in the state of South Dakota than it is on the federal level. Ultimately, this article concludes that the nondelegation doctrine is more alive and enforceable in South Dakota than in the federal courts.

II. THE NONDELEGATION DOCTRINE AT THE FEDERAL LEVEL

A. THE SEPARATION OF POWERS PRINCIPLE

The structure of the U.S. Constitution employs the doctrine of separated powers, creating a government of three separate branches, each possessing different powers and functions. The purpose of a government of separated powers is to limit government power and thereby protect individual liberty from government encroachment.[4] Each branch serves functions that allow it to act as a check on the other branches: "To the legislative department has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts."[5] Thus, a government of separated powers is "a self-executing

1. *See generally* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1727 (2002) (arguing that the nondelegation doctrine is all but dead).

2. The recent Court decision in *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022) is illustrative of the criticism of the nondelegation doctrine. There, the EPA used a broadly-worded Clean Air Act to essentially restructure the private electrical power generating industry. *Id.* Although the nondelegation doctrine provided no restraint on the agency, the Court had to use the newly-endorsed major questions doctrine to strike down the EPA action. *Id.*

3. *See, e.g.*, *infra* Section III.B (describing the South Dakota Supreme Court applying nondelegation principles).

4. *See* Bowsher v. Synar, 478 U.S. 714, 721 (1986) (stating that the separation of powers was meant to "diffus[e] power the better to secure liberty") (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)) (alteration in original)); United States v. Brown, 381 U.S. 437, 443 (1965) (opining that the separation of powers is "a bulwark against tyranny").

5. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). Article I of the Constitution places all legislative powers in Congress. U.S. CONST. art. I, § 1. Article II vests executive power in the presidency. U.S. CONST. art. II, § 1, cl. 1. Lastly, Article III places the judicial power in the federal courts. U.S. CONST. art. III, § 1.

safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[6]

The doctrine of separation of powers "is at the core of American ideology," providing a system of checks and balances.[7] It is "part of the essence of American government, as fundamental as the vote or representative government."[8] The doctrine not only separates the three different functions of government—executive, legislative, and judicial—but then also distributes these functions to three different branches—e.g., legislative, executive, or judicial.[9] Consequently, each branch must be limited to the exercise of its own function and not permitted to intrude upon the functions of the other branches.

Montesquieu, an early advocate of the classic concept of separation of powers, wrote that "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."[10] Montesquieu's writings on this subject greatly influenced the Framers of the U.S. Constitution.[11] The Constitutional Convention never wavered in its belief that the new U.S. government should be structured according to the doctrine of separation of powers, as recommended by Montesquieu.[12]

B. THE DECLINE OF SEPARATION OF POWERS IN THE TWENTIETH CENTURY

With the modern federal government assuming responsibility for increasingly broad and complex matters since the 1930s, the executive branch and its administrative agencies now exercise powers that spill over into both the legislative and judicial functions.[13] This blurring of the lines between governmental functions has jeopardized the separation of powers doctrine, but the primary judicial erosion of the doctrine took place during the New Deal.

---

6. Buckley v. Valeo, 424 U.S. 1, 122 (1976).

7. Carl T. Bogus, *The Battle for Separation of Powers in Rhode Island*, 56 ADMIN. L. REV. 77, 78 (2004).

8. *Id.*

9. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 603 (2001). As Madison wrote, "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (emphasis omitted). *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13 (2d ed. 1998).

10. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. XI, ch. 6, at 151 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748).

11. FORREST MCDONALD, NOVOS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 81 (1985) ("American republican ideologues could recite the central points of Montesquieu's doctrine as if it had been a catechism.").

12. *See, e.g.*, THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 51-52 (1993). The Framers view of human nature required the separation of powers in the American republic, as Madison wrote: "If angels were to govern men, neither external nor internal controls on government would be necessary." THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). The Framers "turned to the separation of powers as a fundamental principle of free government." VILE, *supra* note 9, at 139.

13. Cindy G. Buys & William Isasi, *An "Authoritative" Statement of Administrative Action: A Useful Political Invention or a Violation of the Separation of Powers Doctrine?*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 73, 89 (2003).

A substantial expansion in executive power took place during the New Deal as the federal government responded to the Great Depression. Because of the fear, trauma, and uncertainty surrounding the Great Depression, the country quickly acquiesced to a decisive and powerful central governmental response. Contrary to the beliefs of the framing era, a strong central government was considered not as a threat to liberty but as a rescuer of society, and the heroic agents of that rescuing power were the administrative agencies. But to accommodate this new role of the administrative agencies, the Court had to modify the longstanding constitutional restraints on the granting of wide, virtually undefined powers to these agencies.[14]

This judicial accommodation became known as the New Deal constitutional revolution.[15] This revolution cast aside an array of constitutional restraints on federal executive action, including the separation of powers doctrine.[16] And one of the primary separation of powers components cast aside was the nondelegation doctrine. Consequently, with respect to the administrative state, the New Deal "was a self-conscious revision of the original constitutional arrangement of checks and balances."[17] Checks and balances became associated with governmental inaction, and as such needed to be eliminated through a transformation of the original distribution of national powers.[18] Thus, to accommodate the New Deal, the Court gutted the nondelegation doctrine of any real restraining power.[19]

C. THE DEMISE OF THE NONDELEGATION DOCTRINE

The Constitution vests all legislative power in Congress. Article I, Section 7 provides that legislation must pass both houses of Congress and then be presented for the President's approval or veto. Maintaining a constitutionally mandated separation of powers requires that the judiciary make sure that this lawmaking role remains exclusively with Congress. To do this, the Court dramatically modified the nondelegation doctrine.[20] This doctrine, in its pre-New Deal form, was almost

14. VILE, *supra* note 9, at 287.

15. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 214 (1995) (discussing how the New Deal produced a "constitutional revolution").

16. For a detailed discussion on the New Deal constitutional revolution, see PATRICK M. GARRY, AN ENTRENCHED LEGACY: HOW THE NEW DEAL CONSTITUTIONAL REVOLUTION CONTINUES TO SHAPE THE ROLE OF THE SUPREME COURT 11-25 (2008).

17. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 430 (1987).

18. *Id.* at 433.

19. *See* Magill, *supra* note 9, at 636. Modern developments have caused separation of powers norms to be "increasingly fragile and . . . violated as they never have been before . . . ." Saikrishna B. Prakash, *Branches Behaving Badly: The Predictable and Often Desirable Consequences of the Separation of Powers*, 12 CORNELL J.L. & PUB. POL'Y 543, 543 (2003) (arguing that the "wobbly state [of separations of powers] is bad for the nation" (citing Peter M. Shane, *When Interbranch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups*,*"* 12 CORNELL J.L. & PUB. POL'Y 503, 510 (2003)).

20. Magill, *supra* note 9, at 636.

completely incompatible with the modern administrative state.[21] Consequently, the Court has not invalidated any statute under this doctrine since 1935.[22]

In theory, the nondelegation doctrine seeks to prevent any branch other than Congress from making laws.[23] With lawmaking power confined to the legislative branch, Congress can only delegate authority to an administrative agency if, in its authorizing statute, Congress articulates an "intelligible principle" that will guide the agency in "fill[ing] up the details."[24] In *J.W. Hampton, Jr. & Co. v. United States*,[25] the Court outlined this intelligible principle test for determining the scope of the nondelegation doctrine.[26] The Court then used this test in 1935 to strike down several attempted delegations. In *Panama Refining Company v. Ryan*,[27] the Court found that the National Industrial Recovery Act of 1933 (NIRA) set no limitations on executive power to establish policies under the Act.[28] Several months after *Panama*, the Court in *A.L.A. Schechter Poultry Corp. v. United States*[29] struck down an even more sweeping and undefined delegation that authorized the President to approve "codes of fair competition" for "a trade or industry."[30] Since *Schechter Poultry*, however, the Court has never enforced the nondelegation doctrine to invalidate any federal legislation.[31] In applying an increasingly lax doctrine, the Court in every subsequent case found that the delegation contained a sufficiently intelligible standard.[32]

The Court's erosion of the nondelegation doctrine has facilitated the growth of the federal government.[33] Under the current form of the nondelegation doctrine, "virtually anything counts as an 'intelligible principle' . . . ."[34] The Court's resistance to overruling any congressional delegations, no matter how broad, stems from a belief that a strict nondelegation doctrine would hinder effective governance in a vast, complex, and everchanging society.[35]

---

21. Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*. 165 U. PA. L. REV. 379, 430 (2017).

22. *See generally id.* at 388 (stating that despite being given numerous opportunities, the modern Court has declined to rethink its stance on the nondelegation doctrine).

23. John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 899-900 (2004).

24. Wayman v. Southard, 23 U.S. 1, 43 (1825); *see also* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (explaining the intelligible principle test).

25. 276 U.S. 394 (1928).

26. *Id.* at 409.

27. 293 U.S. 388 (1935).

28. *Id*. at 417.

29. 295 U.S. 495 (1935).

30. *Id*. at 521-22.

31. Whittington, *supra* note 21.

32. Ronald Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L. J. 239, 264-65 (2005). "The Rehnquist Court has rejected every opportunity to develop a nondelegation doctrine that actually prohibits the delegation of legislative authority to the executive branch." Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 357 (2004).

33. *See* Sandra Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 947-50 (2000).

34. Manning, *supra* note 23, at 900 (citing Mistretta v. U.S., 488 U.S. 361, 373 (1989)).

35. *See* Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935).

The Court continues to pass up any opportunities to revive the nondelegation doctrine. In 2001, it overruled the D.C. Circuit's holding that the Clean Air Act contained an unconstitutional delegation of legislative power.[36] The D.C. Circuit invalidated certain Environmental Protection Agency regulations because Congress had not articulated an "intelligible principle" to direct the agency in the creation of those regulations.[37] However, the Supreme Court rejected this attempt to reinvigorate the doctrine, even though the D.C. Circuit was the first federal court in nearly seven decades to use the "intelligible principle" test to find that a congressional statute contained an unconstitutional delegation.[38] The Supreme Court ruled that a generalized "public interest" standard contained in the statute itself constituted a sufficient intelligible principle to meet the demands of the nondelegation doctrine.[39]

As a result of the demise of the nondelegation doctrine, agencies with broad policymaking discretion can promulgate rules and regulations which, unlike statutes, do not have to follow the constitutionally prescribed lawmaking procedures of bicameralism and presentment that are required of Congress.[40] For this reason, "the modern administrative state does not fit comfortably within the constitutional structure" of separation of powers.[41]

The common conclusion is that, owing to the inevitability of the administrative state, the Court has retreated from an involvement in separation of powers disputes. Critics of the Court's retreat from this area of constitutional law point to the New Deal constitutional revolution as evidence that the nondelegation doctrine has been completely abandoned.[42] However, this view does not consider the status of the nondelegation doctrine in state constitutional law.

D. CRITICISM OF THE JUDICIAL RETREAT FROM NONDELEGATION

The Court has weakened the doctrine because of several reasons: the practical concerns with implementing it; the difficulty of drawing lines between permissible and impermissible delegations; and the desire to accommodate congressional flexibility in its delegations.[43] For all these reasons, the intelligible principle test

36. Whitman v. Am. Trucking Assn's, Inc., 531 U.S. 457, 472-76 (2001).

37. *See* Am. Trucking Assn's, Inc. v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

38. *See id.* at 1033-34.

39. *Whitman*, 531 U.S. at 472-76.

40. "Executive agencies now administer intricate programs that require the promulgation of regulations to implement the broad legislative programs enacted by Congress. Thus, the Executive branch exercises powers that are both legislative and judicial in nature." Buys & Isasi, *supra* note 13, at 89; *see Whitman*, 531 U.S. at 457. The Court has not shown much interest in enforcing the doctrine in a meaningful way. *See also* I.N.S. v. Chadha, 462 U.S. 919, 951 (1983) (stating that "the bicameral requirement and the Presentment Clauses would serve essential constitutional functions").

41. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1430 (2001).

42. *See* Magill, *supra* note 9, at 636.

43. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting) ("[W]e have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."). The Court's unsympathetic response to nondelegation doctrine challenges is reflected by the fact that "the combined vote in the Supreme Court

has been so watered down that every challenged delegation since *Schechter Poultry* has passed that test.[44]

Notwithstanding all the arguments for flexibility and practicality, many commentators have resisted casting aside the nondelegation doctrine as irrelevant. Some have even argued for a full-scale revitalization of the doctrine.[45] Peter Wallison argues that in the absence of a meaningful nondelegation principle, "we are headed ultimately for a form of government in which a bureaucracy in Washington—and not Congress—will make the major policy decisions for the country."[46] Philip Hamburger asserts that the nondelegation doctrine flows directly out of the Vesting Clauses, which place all legislative power in Congress.[47] Others have argued that a more robust nondelegation doctrine is needed to avoid tyranny and the unprecedented expansion of the administrative state.[48]

III. THE NONDELEGATION DOCTRINE IN THE STATES

A. SUGGESTIONS OF VIBRANCY IN THE STATES

A recent study of nondelegation cases in the states suggests that the states have not gone the way of the federal courts vis a vis their nondelegation jurisprudence. Although recognizing the narrative of the demise of the nondelegation doctrine at the federal level, Professors Jason Iuliano and Keith Whittington argue that, despite the doctrine's decline with the federal judiciary, it is "alive and well" at the state level.[49] Whereas the U.S. Supreme Court may have abandoned the doctrine after 1936, Iuliano and Whittington assert that the nondelegation doctrine in the states has "not only survived the New Deal revolution, but has thrived in the eighty years since."[50] According to empirical research gathered on this subject, the authors conclude that the number of successful nondelegation cases in the states actually increased for more than twenty years after 1936, and that the number of nondelegation cases brought in state courts continued to increase for almost forty years after 1936.[51] If this data

on nondelegation issues from *Mistretta* through *American Trucking* was 53-0." Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002).

44. Whittington, *supra* note 21.

45. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 135–61 (1995); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 13–21 (1993).

46. PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE 114 (2018).

47. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 387 (2014).

48. *See* D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 94 (2017); C. Boyden Gray, *The Nondelegation Canon's Neglected History and Underestimated Legacy*, 22 GEO. MASON L. REV. 619, 646 (2015).

49. Jason Iuliano & Keith Whittington, *The Nondelegation Doctrine: Alive and Well,* 93 NOTRE DAME L. REV. 619, 620 (2017).

50. *Id.* at 626.

51. *Id.* at 632-33.

is accurate, then state courts may be applying a more demanding nondelegation doctrine than is the U.S. Supreme Court.

B. NONDELEGATION IN SOUTH DAKOTA

1. Separation of Powers Principles

Just as in the United States constitutional scheme, the doctrine of separation of powers is embedded in the South Dakota Constitution. However, unlike the U.S. Constitution, the South Dakota Constitution has a specific article (Article II) addressing the separation of powers doctrine.[52]

Although Article II contains the separation of powers doctrine, it is Article III, governing the powers and functions of the legislative branch, out of which the nondelegation primarily arises.[53]

As with the federal nondelegation doctrine, the South Dakota Legislature cannot delegate its essential lawmaking powers to another branch of government. However, again, like the federal nondelegation doctrine, the South Dakota Legislature may delegate power to the executive branch if that delegation is made with an articulation of the broad policy and standards guiding the executive's use of the delegated power.[54] Although purely legislative power can never be delegated to the executive branch, quasi-legislative power can be, but only if accompanied by sufficient standards or intelligible principles to guide the executive branch in its implementation of existing law.[55]

According to the South Dakota Supreme Court's interpretation, the legislature's powers of delegation are "similar to the U.S. Supreme Court's interpretation" of the nondelegation doctrine.[56] Generally, the South Dakota Supreme Court has not placed significant limitations on delegations. However, the court has struck down more delegations since 1936 than the U.S. Supreme Court.

2. Nondelegation Caselaw in South Dakota

Since the U.S. Supreme Court's decision in *A.L.A. Schechter Poultry Corp. v. United States* in 1935, the South Dakota Supreme Court has held numerous acts of delegation to be improper, some of which are mentioned here.

In some of these cases, the court did not find the delegation of power itself to be improper, but rather that the legislature failed to provide clear standards. Two things must be present for the delegation to be constitutional: (1) there must be an expressed legislative will; and (2) there must be a legislative imposition on the

52. S.D. CONST. art. II.
53. PATRICK M. GARRY, THE SOUTH DAKOTA STATE CONSTITUTION 55 (2014).
54. *Id.* at 48.
55. *Id.* at 55.
56. *Id.* at 48.

delegated power.[57] In other words, the legislature must give clear and understandable standards for the administrative agency to follow.[58]

For instance, in *Hogen v. South Dakota State Board of Transportation*,[59] the court held that the legislature's delegation of power to the Board of Transportation was unconstitutional, in part, because there were no clear standards for the Board to follow.[60] At issue was a statute that allowed the Board to enter into agreements with the Secretary of Transportation.[61] Other statutes were intended to be guiding standards.[62] However, the court found that those purported standards were not clear.[63] First, the statute failed to define "unzoned commercial and industrial area."[64] Further, the alleged standards that were intended to help determine its meaning were "as it shall deem appropriate" and "as large as permissible."[65] These "standards" were not clear guidelines.[66] Therefore, the court held the statutes to be improper delegation of legislative power.[67]

Likewise, in *Cary v. City of Rapid City*,[68] a protesting statute was held unconstitutional because of the lack of clear standards.[69] In this case, a zoning ordinance had been adopted by the city, but a minority of neighboring property owners protested the ordinance in accordance with the protesting statute at issue.[70] Based on that statute, the ordinance was not effectuated.[71] However, because the statute did not provide clear standards for protesting an adopted ordinance, the court held the statute unconstitutional.[72]

The South Dakota Supreme Court has also struck down certain acts by delegated parties not for a lack of a clear standard but because the party simply overstepped its bounds. For example, in *Livestock State Bank v. State Banking Commission*,[73] the South Dakota Banking Commission adopted a rule restricting the location of where bank branches could be established.[74] The Commission had been given the power to adopt rules and regulations necessary for the management and administration of South Dakota banks.[75] However, included in South Dakota's statutes were limitations on the location of branch banks.[76] Therefore,

57. Affiliated Distillers Brand Corp. v. Gillis, 130 N.W.2d 597, 599 (S.D. 1964).
58. *Id.*
59. 245 N.W.2d 493 (S.D. 1976).
60. *Id.* at 497-98.
61. *Id.* at 495.
62. *Id.* at 497.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 498.
68. 1997 SD 18, 559 N.W.2d 891.
69. *Id.* ¶ 21, 559 N.W.2d at 895-96.
70. *Id.* ¶ 7, 559 N.W.2d at 892.
71. *Id.*
72. *Id.* ¶ 21, 559 N.W.2d at 895-96.
73. 127 N.W.2d 139 (S.D. 1964).
74. *Id.* at 140.
75. *Id.*
76. *Id.* at 141.

such acts were exclusively within the powers of the legislature.[77] By attempting to promulgate a rule that further restricted the location of branch banks, the Commission had unconstitutionally attempted to enlarge the statutory requirements.[78] The court held that the promulgated rule was an unconstitutional attempt to exercise legislative power.[79]

Another example of a party overstepping its bounds can be found in *Affiliated Distillers Brands Corp. v. Gillis*.[80] In that case, the South Dakota Supreme Court held that the Commissioner of Revenue's amendment to the laws pertaining to the sale of alcoholic beverages was an impermissible delegation of legislative authority.[81] While the court noted that the Commissioner was permitted to promulgate certain rules and regulations, such as those that pertained to the purity of alcohol or advertising of alcohol, he was not permitted to make the amendment that he did—restrict the size of containers which wholesalers could sell to licensees.[82] Regulations pertaining to container sizes were within the legislative scope of authority.[83] Here, the legislature had given the Commissioner specific guidelines by which he could act to promote compliance with the law, but it had not given him specific guidelines that would allow him to amend those laws with which had to be complied.[84] Therefore, the amendment exceeded the scope of properly delegated authority.[85]

The South Dakota Supreme Court has also held that the delegation of power to comply with future federal regulations to be an unconstitutional delegation of legislative power. Such delegation was attempted in *State v. Johnson*,[86] *Hogen*, and *Schryer v. Schirmer*,[87] and all were held to be unconstitutional.[88] The court has said that while delegating power to promulgate rules to ensure compliance with *current* federal laws is permitted, it is impermissible to delegate power to promulgate rules to ensure compliance with *future* federal laws.[89]

In other cases, the South Dakota Supreme Court has held the delegation to a particular party itself to be improper. It has held that the legislature may not delegate municipal functions to a special commission, private corporation, or association, as such delegation is prohibited by Article III Section 26 of the South

77. *Id.*
78. *Id.*
79. *Id.*
80. 130 N.W.2d 597 (S.D. 1964).
81. *Id.* at 600.
82. *Id.* at 599-600.
83. *Id.* at 600.
84. *Id.* at 600-01.
85. *Id.* at 600.
86. 173 N.W.2d 894 (S.D. 1970).
87. 171 N.W.2d 634 (S.D. 1969).
88. *Johnson*, 173 N.W.2d at 895; Hogen v. S.D. State Bd. of Transp., 245 N.W.2d 493, 496 (S.D. 1976); *Schryer*, 171 N.W.2d at 637.
89. *Schryer*, 171 N.W.2d at 636-37.

Dakota Constitution.[90] In *City of Chamberlain v. R.E. Lien, Inc.*,[91] the South Dakota Supreme Court struck down two statutes that attempted to delegate to the American Institutes of Architects the power to bind the city to all provisions of its contract.[92] Because the delegation interfered with municipal function by delegating power to a private association, the court held the statutes unconstitutional.[93]

Likewise, in *Schryer*, the court held the delegation of legislative power to trade unions unconstitutional.[94] At issue was an ordinance that delegated the future determination of salaries to trade unions.[95] The court stated that fixing salaries of municipal officers and employees is a legislative function.[96] Therefore, the attempted delegation of such power to the trade unions was unconstitutional.[97]

And again, in *Specht*, the South Dakota Supreme Court struck down the delegation of a municipal power to a special commission.[98] Here, the South Dakota statutes at issue authorized municipalities to establish their own Emergency Medical Services.[99] The Sioux Falls City Commission thus created the Sioux Falls Regional Emergency Medical Service Authority ("SFREMSA").[100] The Sioux Falls Firefighters Association challenged the statutes authorizing the establishment of the SFRESMA, arguing it was an unlawful delegation of municipal functions to special commissions.[101] Here, the court noted that municipalities are better able to govern emergency medical services since they are in the best position to understand the needs and resources of their communities.[102] The SFRESMA was held to be participating in a municipal function and, therefore, the creation of the special commission was an impermissible delegation of legislative power.[103]

IV. CONCLUSION

Given this examination of the South Dakota Supreme Court's treatment of delegation issues, perhaps the Iuliano and Whittington analysis provides an accurate portrayal of the contrast between state and federal judicial applications

90. Specht v. City of Sioux Falls, 526 N.W.2d 727, 730 (S.D. 1995). The court calls this prohibition the "ripper clause." *Id.*

91. 521 N.W.2d 130 (S.D. 1994).

92. *Id.* at 133.

93. *Id.*

94. *Schryer*, 171 N.W.2d at 637.

95. *Id.* at 634-35.

96. *Id.* at 635.

97. *Id.* at 637.

98. Specht v. City of Sioux Falls, 526 N.W.2d 727, 731 (S.D. 1995).

99. *Id.* at 728.

100. *Id.*

101. *Id.*

102. *Id.* at 730.

103. *Id.* at 731. The court also held the delegation of power to a private party unconstitutional in House of Seagram, Inc. v. Assam Drug Co., 176 N.W.2d 491 (S.D. 1970), and the delegation or power to a public commission unconstitutional in City of Sioux Falls v. Sioux Falls Firefighter, Local 814, 234 N.W.2d 35 (S.D. 1975).

of the nondelegation doctrine. Indeed, the South Dakota Supreme Court appears to be much more scrutinizing of delegation issues under the state constitution than do federal courts under the U.S. Constitution.