COMMENT

DEATHLY DELEGATION: ANALYZING MISSISSIPPI'S EXECUTION STATUTE UNDER THE NONDELEGATION DOCTRINE

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The nondelegation doctrine is a separation of powers principle that limits the legislative branch from delegating its legislative authority to another branch of government. Although this doctrine is more widely known for its federal use, preventing Congress from relinquishing too much of its law-making authority to administrative agencies, most states have adopted similar nondelegation principles. Mississippi's nondelegation doctrine requires that the legislature enact laws that prescribe the basic policy decision, provide adequate boundaries for agency guidance, and do not vest an agency with arbitrary discretion.

On July 1, 2022, Mississippi enacted a new execution statute, permitting the Department of Corrections to select (1) an inmate's method of execution and, in the case of a lethal injection execution, (2) the types and dosages of substances. This Comment explores how Mississippi has analyzed the constitutionality of state laws under nondelegation principles and how other state courts have ruled on the constitutionality of the state execution statute under their nondelegation standards. This Comment argues that Mississippi's execution statute violates the state constitution as an improper delegation of legislative authority. This Comment further argues that, even if the Mississippi law permits a broad

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delegation of authority, delegation in the context of the death penalty should be treated differently because "death is different."

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INTRODUCTION

In 2014, Oklahoma's Department of Corrections (DOC) administered 100 milligrams of midazolam, a sedative, to death row inmate Clayton Lockett during a lethal injection execution.[1] Although

1. Bailey Elise McBride & Sean Murphy, *Oklahoma Inmate Dies After Execution Is Botched*, AP NEWS (Apr. 29, 2014, 11:38 PM), https://apnews.com/article/executions-oklahoma-00a761ac0ea241a4b89f386bfa841d38 [https://perma.cc/U4TR-HYMX].

defense attorneys warned the drug was untested, and despite the fact that other states were prescribing 500 milligrams of midazolam in their executions, the state carried out Lockett's execution using just 100 milligrams of midazolam.[2] The executioner administered the midazolam, which was expected to make Lockett unconscious; however, Lockett was still conscious when the next two drugs, (1) potassium chloride, a heart stopping drug, and (2) a paralytic, were administered.[3] Three minutes after these drugs were administered, Lockett was "writhing [on the gurney], clenching his teeth and straining to lift his head off the pillow."[4] Robert Patton, the Department of Correction's director, stopped the execution after realizing that the drugs were not working as intended and that the executioners did not know how much of the drugs were in Lockett's system.[5]

Clayton Lockett is not the only death row inmate to experience such an agonizing execution. In 2021, vomit spewed from John Marion Grant's mouth as he convulsed after the executioners administered the first drug.[6] Then, there was Frank Coppola, whose body parts caught fire when he was executed in the electric chair, filling the entire death chamber with smoke.[7] The Death Penalty Information Center (DPIC) reports that about 276 of the 8,776 executions conducted in the United States between 1890 to 2010 were botched, with lethal injections having the highest rate of botched executions.[8]

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2. *Id.*; *see* David Kroll, *The Drugs Used in Execution by Lethal Injection*, FORBES (May 1, 2014, 4:59 PM), https://www.forbes.com/sites/davidkroll/2014/05/01/the-pharmacology-and-toxicology-of-execution-by-lethal-injection (addressing the controversy regarding midazolam as not a time-tested drug from a medical perspective, stating that the drug is "an incomplete substitute for a barbiturate").

3. McBride & Murphy, *supra* note 1.

4. *Id.*

5. *Id.*

6. Sean Murphy, *Oklahoma Executes Inmate Who Dies Vomiting and Convulsing*, AP NEWS (Oct. 28, 2021, 9:36 PM), https://apnews.com/article/us-supreme-court-prisons-executions-oklahoma-oklahoma-attorney-generals-office-6e5eedd1956a38f83db96187651f145c.

7. *Botched Executions*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/botched-executions [https://perma.cc/EM2T-ERFB] (last updated Dec. 6, 2022) (detailing a list of executions that were botched between 1982 and 2022).

8. *Id.*; *see also* Austin Sarat, Robert Henry Weaver & Heather Richard, *Lethal Injection Leads to the Most Botched Executions*, DAILY BEAST, https://www.thedailybeast.com/lethal-injection-leads-to-the-most-botched-executions [https://perma.cc/29G6-AG

The DPIC defines botched executions as "a breakdown in, or departure from, the 'protocol' for a particular method of execution."[9] Critics of Mississippi's new execution statute are questioning whether the statute even provides a protocol for the Mississippi Department of Corrections (MDOC) to depart from.[10] On July 1, 2022, Mississippi's new method of execution statute went into effect:

> (1) At the discretion of the Commissioner, the Deputy Commissioner for Finance and Administration and the Deputy Commissioner for Institutions of the Mississippi Department of Corrections, the manner of inflicting the punishment of death shall be by one of the following: (a) intravenous injection of a substance or substances in a lethal quantity into the body; (b) nitrogen hypoxia; (c) electrocution; or (d) firing squad, until death is pronounced by the county coroner where the execution takes place or by a licensed physician according to accepted standards of medical practice. Upon receipt of the warrant of execution from the Mississippi Supreme Court, the Commissioner of Corrections shall, within seven (7) days, provide written notice to the condemned person of the manner of execution. It is the policy of the State of Mississippi that intravenous injection of a substance or substances in a lethal quantity into the body shall be the preferred method of execution.
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> (2) The Commissioner of Corrections has the authority and discretion to select and obtain the substances and the means necessary to carry out an execution, and may adopt and promulgate rules and regulations as the Commissioner deems necessary to administer and implement the provisions of this section.[11]

WN] (last updated July 12, 2017, 2:46 PM) (reporting that the rate of botched executions by lethal injections is 7% more than the botch rate of other execution methods).

9. *Botched Executions*, *supra* note 7.

10. *See* Mina Corpuz, *New Law Gives MDOC Commissioner Choice in How People Are Executed*, MISS. TODAY (June 21, 2022), https://mississippitoday.org/2022/06/21/new-law-mdoc-commissioner-execution-choice [https://perma.cc/9RRV-6WH4] (quoting DPIC deputy director Ngozi Ndulue, who stated that "[t]his statute throws it all into the hands of the Mississippi Department of Corrections without guidance and restrictions"); Wicker Perlis, *New Death Penalty Law Sets Mississippi Apart with More Leeway in Methods of Execution*, CLARION LEDGER (June 14, 2022), https://www.clarionledger.com/story/news/2022/06/15/new-law-puts-mississippi-league-its-own-death-penalty/7568227001 (explaining that Mississippi's new execution law leaves most decisions to the correctional officers, including the discretion to choose the execution method, without any oversight).

11. MISS. CODE ANN. § 99-19-51 (West 2022).

This updated statute removed both the preferential ordering of execution methods for the MDOC to follow and the list of substances to be used in lethal injection executions.[12] The previous version of the statute indicated that the death penalty will be inflicted by lethal injection with the sequential administration of three substances: (1) an appropriate anesthetic or sedative, (2) a chemical paralytic agent, and (3) potassium chloride, or other similarly effective substances.[13] Furthermore, the state's previous statute laid out the preferential order of execution methods that the MDOC should implement; if lethal injection was found unconstitutional or unavailable, then the death sentence was to be carried out by nitrogen hypoxia.[14] The legislature then deemed electrocution the next option, and, lastly, the firing squad.[15]

Pursuant to the 2022 statute, the MDOC can choose the manner of death from the list of authorized execution methods— lethal injection, nitrogen hypoxia, electrocution, or firing squad.[16] The statute does state that it is Mississippi's "policy . . . that [lethal] injection shall be the preferred method of execution."[17] Mississippi Representative Nick Bain, who proposed the new legislation, said that this aforementioned section "gives (the commissioner) the idea that [the legislature] want[s] lethal injection and that should be the way to do it."[18] The state's updated execution protocol is in response to Mississippi's difficulties obtaining the drugs used in lethal injection executions,[19] a problem not unique to Mississippi.[20]

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12. *Compare id.* (allowing the Commissioner of the MDOC, in conjunction with other MDOC officials, to select the manner of execution from a prescribed list of methods that include intravenous injection, nitrogen hypoxia, electrocution, and firing squad), *with* MISS. CODE ANN. § 99-19-51 (West 2017) (imposing lethal injection as the manner of execution that may only be substituted with contingent methods in the case that lethal injection, or one of its sequential alternatives, is "held unconstitutional by a court of competent jurisdiction or is otherwise unavailable").

13. MISS. CODE ANN. § 99-19-51 (West 2017).

14. *Id.*

15. *Id.*

16. MISS. CODE ANN. § 99-19-51 (West 2022).

17. *Id.*

18. Corpuz, *supra* note 10.

19. *See id.* (reporting statements made by a representative regarding the governor and attorney general's offices request for such a change to the legislation).

20. Laurel Wamsley, *With Lethal Injections Harder to Come By, Some States Are Turning to Firing Squads*, NPR (May 19, 2021, 5:00 AM), https://www.npr.org/2021/05/19/

Furthermore, the 2022 statute removed the list of substances for the MDOC to use in lethal injections and rephrased it just to require a "substance or substances in a lethal quantity into the body."[21] Subsection two of the statute clarifies this change by stating that the Commissioner of Corrections has the "authority and discretion to select and obtain the substances . . . to carry out an execution."[22] The Commissioner then has seven days after the state issues the warrant for execution to notify the inmate of the manner of execution.[23] The fear, however, is that the legislature has delegated too much authority over execution methods to the MDOC, especially given the horrific consequences of the department's use of incorrect substances and dosages.[24]

Like the U.S. government, Mississippi requires a separation of powers between the three branches of government: executive, legislative, and judicial.[25] Also similar to the federal government, Mississippi has adopted the nondelegation doctrine to ensure that the powers entrusted to the legislative branch by the Mississippi Constitution are not delegated to another branch or an administrative

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997632625/with-lethal-injections-harder-to-come-by-some-states-are-turning-to-firing-squad [https://perma.cc/TGH9-C8XP] (discussing South Carolina's change in legislature regarding the death penalty due to the recent difficulty in obtaining lethal injection drugs); *Ohio Governor Says State Cannot Obtain Lethal Injection Drugs, Reschedules Upcoming Execution*, DEATH PENALTY INFO. CTR. (Aug. 1, 2019), https://deathpenaltyinfo.org/news/ohio-governor-says-state-cannot-obtain-lethal-injection-drugs-reschedules-upcoming-execution [https://perma.cc/Q5PQ-NMSD] (stating that Ohio's difficulty obtaining execution drugs is due to pharmaceutical manufacturers' unwillingness to sell drugs for purposes of executions).

21. MISS. CODE ANN. § 99-19-51 (West 2022).

22. *Id.*

23. *Id.*

24. *See Mississippi Gives Department of Corrections Unprecedented Discretion over Execution Methods*, DEATH PENALTY INFO. CTR. (June 28, 2022), https://deathpenaltyinfo.org/news/mississippi-gives-department-of-corrections-unprecedented-discretion-over-execution-methods [https://perma.cc/KV4W-9EZA] (describing the new law as authorizing the MDOC with "unprecedented discretion" to choose the execution method); Perlis, *supra* note 10 (reporting DPIC director's statements that the new Mississippi execution law provides only a loose standard for the MDOC, which will inevitably affect transparency from the agency); Corpuz, *supra* note 10 (stating that the Mississippi law fails to provide the MDOC officials with guidelines on selecting an execution method, which likely will create a lot of last-minute litigation).

25. *See* MISS. CONST. ANN. art. I, § 1 (separating the government into legislative, judicial, and executive departments); *id.* § 2 (restricting departments from exercising power that is prescribed to another department).

agency such as the MDOC.[26] However, the state permits some delegation of authority provided that the legislature prescribes certain elements.[27]

This Comment argues that Mississippi's execution statute violates the state constitution as an improper delegation of legislative authority. Part I explores the federal nondelegation doctrine before analyzing the frequency of the state nondelegation doctrine used to strike down statutes. This analysis focuses primarily on Mississippi's requirements for a finding that a statute has violated its nondelegation standards. Next, Part I reviews previous challenges in other states against execution statutes under the nondelegation doctrine. Finally, Part I discusses the "death is different" doctrine utilized by the Supreme Court to require more procedural safeguards and stricter limitations on capital punishment. Part II argues that the Mississippi execution statute is an improper delegation of authority to the MDOC by analyzing Mississippi's nondelegation standards, comparing other states' standards used to confront a challenge against a method of execution statute, and implementing the "death is different" Supreme Court doctrine. This Comment concludes that Mississippi's method of execution statute delegates unconstitutional discretion to its DOC and recommends that the state restructure its statute.

I. BACKGROUND

The nondelegation doctrine prohibits Congress, or a state legislature, from assigning its legislative power to another branch of government or administrative agencies;[28] the legislative branch cannot delegate, without limitations, its authority to make law to others.[29] First, this Part provides a brief history of capital punishment and the use of execution statutes to direct the DOC on the manner and methods to carry out the death penalty. Next, this Part presents an overview of the nondelegation doctrine's origin, explains how it has been adopted and

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26. Abbott v. State, 63 So. 667, 669 (Miss. 1913) (adopting the Supreme Court's decision in *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), that found that Congress cannot delegate its power to make law but can delegate some power to determine facts on which the law depends).

27. *See id.* at 668–69 (permitting the legislature to delegate authority to a sanitary board to create rules and regulations necessary to prevent the spread of disease, provided that the legislature prescribes the general rule).

28. Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (plurality opinion); Touby v. United States, 500 U.S. 160, 165 (1991).

29. *Gundy*, 139 S. Ct. at 2121; *Touby*, 500 U.S. at 165.

utilized by the states, and details Mississippi's principles of the doctrine by laying out the state's body of law surrounding claims of nondelegation violations. This Part then explores challenges in other states against execution statutes under nondelegation standards. Finally, this Part discusses the Supreme Court's repeated holding that "death is different," emphasizing a need for heightened protections in capital cases.

A. Capital Punishment and Execution Statutes

Although there has been a significant decline in capital punishment's use,[30] twenty-seven states and the federal government still authorize executions.[31] The death penalty's constitutionality is most often analyzed under the Eighth Amendment's Cruel and Unusual Punishment Clause,[32] prohibiting the infliction of cruel and unusual punishments.[33] The Supreme Court has derived the "evolving standards of decency" doctrine to determine whether a punishment violates this clause.[34] To discern these decency standards, the Supreme Court "look[s] to objective evidence of how our society views a particular punishment today," with the most reliable evidence of society's values being "the legislation enacted by the country's legislatures."[35]

Most state execution statutes provide the authorized methods and afford executive agencies, usually the DOC, discretion to implement

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30. *See Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf [https://perma.cc/WWM6-L5WL] (last updated Aug. 4, 2023) (illustrating a graph that shows the number of executions each year from 1976 to 2022).

31. *States and Capital Punishment*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx [https://perma.cc/4ESB-WRX5] (last updated Aug. 11, 2021).

32. *See* Lonnie E. Griffith, Jr., *Construction and Application of Eighth Amendment's Prohibition of Cruel and Unusual Punishment—U.S. Supreme Court Cases*, 78 A.L.R. Fed. 2d 1 (2013) (documenting and analyzing cases, including capital punishment, where the Supreme Court has applied the Eighth Amendment Cruel and Unusual Punishment Clause).

33. U.S. CONST. amend. VIII.

34. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

35. Penry v. Lynaugh, 492 U.S. 302, 331 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

execution protocols deemed necessary.[36] States use various execution methods, including electrocution, hanging, firing squad, nitrogen hypoxia, and lethal injection.[37] Although the Supreme Court has yet to find a method of execution unconstitutional,[38] most state legislatures have conformed their execution statutes to reflect society's consensus that lethal injection is a more "humane" method.[39] Initially, most states implemented the "three-drug protocol," a lethal injection protocol that "calls for a barbiturate to render the inmate insensate, followed by a paralytic to induce paralysis, followed by potassium chloride to stop the heart and induce death."[40] Due to difficulty obtaining these drugs, many states have changed their lethal injection procedures.[41] Many statutes now leave drug decisions to the executive agencies by making general statements that lethal injection is to be implemented by "an intravenous injection of a substance or substances in a lethal quantity

36. Alexandra L. Klein, *Nondelegating Death*, 81 OHIO STATE. L.J. 923, 927 (2020).

37. *States and Capital Punishment*, *supra* note 31.

38. Baze v. Rees, 553 U.S. 35, 62 (2008) (plurality opinion) ("This Court has never invalidated a State's chosen procedure for carrying out a sentence of a death as the infliction of cruel and unusual punishment.").

39. *See States and Capital Punishment*, *supra* note 31 (recognizing that twenty-eight of the twenty-nine states that implement the death penalty use lethal injection as the primary method of execution, with many states utilizing only lethal injection). Moreover, in many states, lethal injection is the only method of execution. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 43.14 (West 2021) (stating that death sentences shall be executed by lethal injections); GA. CODE ANN. § 17-10-38 (2022) (requiring that all persons sentenced to death shall suffer execution by lethal injection); MONT. CODE ANN. § 46-19-103 (2021) (stating that the punishment of death is inflicted only by lethal injection "of an ultra-fast-acting barbiturate in combination with a chemical paralytic agent"); NEB. REV. STAT. ANN. § 83-964 (West 2022) (maintaining that death sentences are enforced by lethal injection); NEV. REV. STAT. ANN. § 176.355 (West 2021) ("The judgment of death must be inflicted by an injection of a lethal drug."); KAN. STAT. ANN. § 22-4001 (2022) (providing that executions are carried out by a swift and humane lethal injection); N.C. GEN. STAT. ANN. § 15-188 (2022) (requiring that death sentences are executed by lethal injection in every case).

40. Corinna Barrett Lain, *Death Penalty Exceptionalism and Administrative Law*, 8 BELMONT L. REV. 552, 555 n.9 (2021) (citing Oregon's, Wyoming's, and Mississippi's 2011 execution statutes as examples of states that use the three-drug protocol).

41. *Overview of Lethal Injection Protocols*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-injection-protocols [https://perma.cc/E25X-Y2KM] (listing alternative lethal injection methods to the three-drug protocol that states have implemented due to drug shortages); Klein, *supra* note 36, at 927 ("States have expanded their choices of methods of execution in response to . . . lethal injection drug shortages.").

sufficient to cause death"[42] or by providing that execution is to be carried out by "the administration of a lethal quantity of a drug or drugs."[43] Common substances used in lethal injections include anesthetics, barbiturates, and potassium chloride.[44] These drugs can have very different effects on the human body depending on the quantity of the drug used or the combination in which it is administered.[45]

Some states indicate a secondary method of execution in their execution statutes, meaning that the legislature provides a second preference for execution method should certain conditions be met.[46] For example, Florida's execution statute states that a death sentence should be executed by lethal injection unless the death row inmate elects an execution by electrocution.[47] The Florida statute states that the department may execute by any constitutional method if both these methods are found unconstitutional.[48] Similarly, in Arizona, a death row inmate sentenced for an offense committed before November 23, 1992 can choose lethal gas over lethal injection.[49] Oklahoma designates lethal injection as the primary method, but provides that if it is to be found unconstitutional or otherwise

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42. *E.g.*, N.C. GEN. STAT. ANN. § 15-188 (West 2022); KAN. STAT. ANN. § 22-4001 (2022); TEX. CODE CRIM. PROC. ANN. art. 43.14 (West 2021); IDAHO CODE ANN. § 19-2716 (West 2022).

43. OKLA. STAT. ANN. tit. 22, § 1014 (West 2022).

44. *Overview of Lethal Injection Protocols*, *supra* note 41 (providing a breakdown of the states that have adopted new lethal injection drugs); Kroll, *supra* note 2 (addressing the effects of lethal injections drugs proposed for use in Oklahoma's executions).

45. *Overview of Lethal Injection Protocols*, *supra* note 41 (describing botched executions that occurred while using certain lethal injection drugs); Kroll, *supra* note 2 (discussing the intended effects of commonly used execution drugs).

46. *See, e.g.*, FLA. STAT. ANN. § 922.105 (West 2022) ("A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution."); ARIZ. REV. STAT. ANN. § 13-757 (2022) (stating that the death penalty shall be inflicted by lethal injection, but defendants sentenced before a certain date can opt for lethal gas instead); OKLA. STAT. ANN. tit. 22, § 1014 (West 2022) (declaring nitrogen hypoxia as the method of execution should lethal injection be found unconstitutional or unavailable).

47. FLA. STAT. ANN. § 922.105 (West 2022); *see also* CAL. PENAL CODE § 3604 (West 2022) (providing inmates with the option of lethal gas or lethal injection, and if there is a failure to choose, indicating that lethal injection will be imposed).

48. FLA. STAT. ANN. § 922.105 (West 2022).

49. ARIZ. REV. STAT. ANN. § 13-757 (2022); *see also* KY. REV. STAT. ANN. § 431.220 (West 2022) (stating that inmates sentenced to death prior to a specific date may choose electrocution over lethal injection).

unavailable, the agency can execute by nitrogen hypoxia, then electrocution, and, finally, firing squad.[50] Beyond providing the methods of execution and designating authority to the DOC to perform the execution, some statutes have included provisions that the executioners' identities shall remain confidential[51] or describe the environment where the execution is to take place.[52]

B. The Nondelegation Doctrine

This Part first provides the background of the nondelegation doctrine as used by the federal government. Next, it discusses how States have adopted principles of federal nondelegation into their respective state government structures. Finally, this Part briefly discusses the frequency of state utilization of the doctrine before analyzing specifically Mississippi's nondelegation standards.

1. Federal use of the nondelegation doctrine

The nondelegation doctrine represents the proposition that Congress cannot transfer the legislative power vested in Congress to any other branch of Government or any other actor outside the legislative branch.[53] The doctrine is derived from the principle of separation of powers within the U.S. Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of

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50. OKLA. STAT. ANN. tit. 22, § 1014 (West 2022).

51. *See* ARIZ. REV. STAT. ANN. § 13-757 (2022) ("The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential . . . ."); MONT. CODE ANN. § 46-19-103 (2021) ("The identity of the executioner must remain anonymous. Facts pertaining to the selection and training of the executioner must remain confidential."); NEB. REV. STAT. ANN. § 83-967 (West 2022) ("The identity of all members of the execution team, and any information reasonably calculated to lead to the identity of such members, shall be confidential . . . .").

52. *See, e.g.*, KY. REV. STAT. ANN. § 431.220 (West 2022) (requiring executions to take place within the state penal institution); N.C. GEN. STAT. ANN. § 15-188 (West 2022) (legislating that death sentences shall be carried out within a permanent death chamber in the state's penitentiary); OHIO REV. CODE ANN. § 2949.22 (West 2022) (stating that executions must take place "within the walls of the state correctional institution designated by the director of rehabilitation").

53. Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (plurality opinion); Touby v. United States, 500 U.S. 160, 165 (1991); *see* Loving v. United States, 517 U.S. 748, 758 (1996) (explaining how the nondelegation doctrine "has developed to prevent Congress from forsaking its duties").

the United States . . . ."[54] Prohibiting congressional delegation of legislative power to another branch is "vital to the integrity and maintenance of the system of government ordained by the Constitution."[55]

Congress, however, is permitted to delegate some legislative power to other actors, most commonly administrative agencies,[56] so long as the legislature provides cognizable limitations to the delegated power.[57] This standard is known as the "intelligible principle" doctrine.[58] Under this standard, the Supreme Court will uphold Congress' delegation of its authority so long as Congress articulates some policy or standard in support of its action.[59]

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54. U.S. CONST. art. I § 1; *see* Mistretta v. United States, 488 U.S. 361, 371 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.").

55. Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892); *see Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (arguing that allowing Congress to "announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals" would otherwise "frustrate 'the system of government ordained by the Constitution'" (quoting *Marshall Field*, 143 U.S. at 692)).

56. *See* Ilaria Di Gioia, *A Tale of Transformation: The Non-Delegation Doctrine and Judicial Deference*, 51 U. BALT. L. REV. 155, 158–59 (2022) (noting the expansion of the administrative agencies and their ability to perform legislative functions through Congress's delegation); Daniel E. Walters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect when We're Expecting*, 71 EMORY L.J. 417, 419 (2022) (explaining the prohibition of congressional delegation of legislative power "to any other actor, including the countless administrative agencies that make up our de facto fourth branch of government").

57. *Touby*, 500 U.S. at 165 ("We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches."); *see Marshall Field & Co.*, 143 U.S. at 694 (discussing how prohibiting the legislature from delegating some power "would be to stop the wheels of government"); Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div. of Dep't of Labor, 312 U.S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy.").

58. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (explaining that Congress must "lay down . . . an intelligible principle to which the person or body authorized to [act] . . . is directed to conform"); *Mistretta*, 488 U.S. at 372.

59. *Gundy*, 139 S. Ct. at 2129 (citing *Mistretta*, 488 U.S. at 373) (discussing the Court's willingness to uphold "even very broad delegations" of authority); Meaghan Dunigan, Note, *The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival in Today's Administrative State*, 91 ST. JOHN'S L. REV. 247, 249 (2017).

The intelligible principle standard was first introduced in *J.W. Hampton, Jr., & Co. v. United States*,[60] a case involving a challenge to the flexible tariff provision of the Tariff Act of 1922[61] as an improper delegation of legislative authority.[62] The Act allowed the President to adjust rates of goods to equalize the difference between cost production in the United States and foreign countries.[63] Furthermore, the Act required an investigation by the Tariff Commission and enumerated four criteria the President shall consider to make that determination.[64] In upholding this delegation of authority, the Supreme Court found that the provision provided a clear policy and plan for the executive branch to follow and granted the President the authority only to change the duties when necessary to conform with the Act's policy and plan.[65] The Court emphasized that Congress may delegate authority to executive officers to apply and enforce the legislature's policy, so long as Congress "lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform."[66]

For a short time following the *J.W. Hampton, Jr., & Co.* decision, the Court repeatedly struck down congressional delegations of authority under the nondelegation doctrine for failure to provide an intelligible principle.[67] In one of the last cases where the Supreme Court found delegation unconstitutional, *Panama Refining Co. v. Ryan*,[68] the Court reviewed a challenge against a provision of the National Industrial Recovery Act that authorized the President, in part, to forbid interstate

60. 276 U.S. 394 (1928).
61. Act of Sep. 21, 1922, ch. 356, 42 Stat. 858, 941 (repealed 1930).
62. *J.W. Hampton, Jr.*, 276 U.S. at 400.
63. *Id.* at 401.
64. *Id.* at 401–02.
65. *Id.* at 405.
66. *Id.* at 409.
67. David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 13 (2002) (explaining how the Court struck down provisions under the intelligible principle in 1935 but consistently rejected nondelegation challenges to statutes in subsequent years); *see also, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539–40 (1935) (holding that a statute providing the President power to approve fair competition codes for certain industries failed to provide meaningful guidance on policy questions and therefore violated the nondelegation doctrine); Pan. Refin. Co. v. Ryan, 293 U.S. 388, 430 (1935) (declaring a provision of the National Industrial Recovery Act unconstitutional under the nondelegation doctrine because it declared no standard or rule for the President to abide by).
68. 293 U.S. 388 (1935).

and foreign transportation of petroleum produced in excess of the State law or regulation.[69] The plaintiffs argued that the provision was an unconstitutional delegation of legislative power to the President, and the Court agreed.[70] Recognizing the intelligible principle as laid out in *J.W. Hampton, Jr., & Co.*, the Court found that Congress "declared no policy, has established no standard, [and] has laid down no rule," thereby providing no guidelines directing the President to conform to within the provision.[71]

The nondelegation doctrine serves three purposes.[72] First, it protects the idea that Congress is responsible for representing the popular will and, therefore, should not be able to pass these "important choices of social policy" to another branch that is not responsible to voters.[73] If Congress were permitted to pass this responsibility onto other branches, legislative accountability would suffer because Congress could pass blame when the other branch's or agency's action is deemed a failure.[74] Second, in cases where Congress deems delegation of authority necessary, the "intelligible principle" exists to limit this delegated discretion.[75] Finally, the "intelligible principle" requirement safeguards a court's ability to judicially review the discretionary

69. *Id.* at 406.

70. *Id.* at 429–30.

71. *Id.* at 430; *see also* Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (holding broad delegation constitutionally sufficient so long as Congress "clearly delineates the general policy").

72. Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

73. *Id.*; *see* West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (discussing state adoption of the federal nondelegation doctrine for purposes of ensuring accountability in the state lawmaking processes); Dunigan, *supra* note 59, at 248 (detailing nondelegation doctrine's origin as created by English philosopher John Locke in the *Second Treatise of Government*).

74. *See* Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (arguing that the statute at issue is an unconstitutional grant of authority to the nation's chief prosecutor to write a new criminal code); Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (per curium) ("Sometimes lawmakers may be tempted to delegate power to agencies to 'reduc[e] the degree to which they will be held accountable for unpopular actions.'"(quoting R. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. PUB. POL'Y 147, 154 (2017))).

75. *Indus. Union Dep't*, 448 U.S. at 685–86 (Rehnquist, J., concurring).

decisions of the agencies that exercise the delegated authority.[76] By requiring Congress to create an intelligible principle that guides the delegated actor's discretion, courts have standards to ascertain the discretionary acts.[77] Though the federal use of the nondelegation doctrine has frequently been described as nonexistent,[78] many scholars seem to think there will be a resurgence soon.[79]

2. The vibrancy of the nondelegation doctrine in the states

The nondelegation doctrine is most commonly known for its federal use; however, states have adopted their own versions.[80] Because the Supreme Court has not rejected a federal nondelegation challenge since 1935, many assume that the doctrine is also rarely used in the states.[81] On the contrary, state use of the nondelegation doctrine is much more common than at the federal level.[82] Many state

76. *Id.* at 686; *see* Touby v. United States, 500 U.S. 160, 168–69 (1991) (holding in part that the temporary scheduling provision of the Controlled Substances Act was not an unconstitutional delegation of power because the provision did not bar judicial review).

77. *Indus. Union Dep't*, 448 U.S. at 686 (Rehnquist, J., concurring).

78. *See* Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 619 (2017) (stating that "the nondelegation doctrine is dead" is a "widely accepted legal conclusion"); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 418–19 (2015) (noting that the Supreme Court lacks an interest in the nondelegation doctrine as indicated by its reluctance to invoke it since 1935); Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 839 n.214 (1997) (expanding on the effects of the nondelegation doctrine's infrequent use).

79. *See* Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1212–13 (2022) (discussing the scholarly interpretation of *Gundy v. United States* as indicating a revival of the nondelegation doctrine); Klein, *supra* note 36, at 926 (acknowledging that "[r]ecent events at the Supreme Court have also signaled the possibility of a revival of the federal nondelegation doctrine").

80. Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 267 (2022); Lain, *supra* note 40, at 559–60.

81. Postell & May, *supra* note 80, at 267; Lain, *supra* note 40, at 559–60; *see* Gundy v. United States, 139 S. Ct. 2116, 2120 (2019) (plurality opinion) (noting that the Supreme Court has only found twice in the country's history that Congress has violated the nondelegation doctrine).

82. Silver, *supra* note 79, at 1214; Postell & May, *supra* note 80, at 267 (2022); Randolph J. May, *The Nondelegation Doctrine is Alive and Well in the States*, REGUL. REV. (Oct. 15, 2020), https://www.theregreview.org/2020/10/15/may-nondelegation-doctrine-alive-well-states [https://perma.cc/B3W9-XFLN]; Lain, *supra* note 40, at 559–60; *see* West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (describing state nondelegation doctrines as "robust").

constitutions include a separation of powers provision, and like the federal government, states derive their nondelegation doctrines from historical principles and separation of powers theories.[83] The state nondelegation doctrine applies to all delegations of power between government branches, legislatures, and state agencies.[84]

States typically permit some delegation of authority. In the same sense that the intelligible principle guides Congress, each state has its own standard for determining whether a law violates the nondelegation doctrine.[85] For the most part, state courts determine whether insufficient guidelines from the legislature vest the administrative agency with arbitrary power or invite abuse of discretion.[86] While the Supreme Court permits broad delegations of authority, states have found that statutes violate the nondelegation doctrine if the legislature does not provide an agency with "adequate standards" to guide discretion.[87]

a. Mississippi nondelegation

Mississippi is among the states that have adopted the nondelegation doctrine. Like the U.S. Constitution, the Mississippi Constitution requires separation of powers between the legislative, executive, and

83. *See* Silver, *supra* note 79, at 1228 (articulating how certain states, such as New Jersey and North Dakota, have crafted their nondelegation doctrines); Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 568 (1994) ("Delegation questions arise because state governments, like the federal government, are based on a separation of powers between the three branches of government.").

84. Silver, *supra* note 79, at 1216, 1230.

85. *See, e.g.*, Zink v. Lombardi, No. 12-CV-4209, 2012 WL 12828155, at *6 (W.D. Mo. Nov. 16, 2012) (holding unconstitutional in Missouri "any law 'which attempts to clothe an administrative officer with arbitrary discretion without a definite standard or rule for his guidance'" (quoting Lux v. Milwaukee Mech. Ins. Co., 15 S.W.2d 343, 345 (Mo. 1929) (en banc))); Ex parte Halsted, 182 S.W.2d 479, 482 (Tex. Crim. App. 1944) (holding that any Texas Act "that is so vague, indefinite, and uncertain as to be incapable of being understood, is void and unenforceable"); B.H. v. State, 645 So. 2d 987, 994 (Fla. 1994) (per curium) (holding that the Florida legislature may not delegate unlimited and arbitrary authority).

86. May, *supra* note 82.

87. Greco, *supra* note 83, at 568.

judicial branches.[88] In 1913, in *Abbott v. State*,[89] the Mississippi Supreme Court adopted the federal fundamentals of the nondelegation doctrine to hold that the state legislature cannot delegate its power to make law but recognized that prohibiting it from delegating some power "would be to stop the wheels of government."[90] The Mississippi Supreme Court has since permitted the legislature to designate a delegee to carry out fact-finding duties and to execute the legislature's general purpose by reasonable procedures.[91]

To determine delegation limitations from the legislative branch, Mississippi uses a few general principles. First, the delegation to an administrative agency must "prescribe adequate standards or rules for the agency's guidance," and the agency "cannot be vested with an arbitrary and uncontrolled discretion."[92] Moreover, the legislature must state the basic policy decision supporting the delegation.[93] Finally, the discretion granted to agencies must have a reasonably clear standard created by "statements of objective, policy or purpose, as well as definitions, specifications, requisites and limitations."[94] Thus, similar to the nondelegation doctrine in the federal system, the Mississippi Constitution does not prohibit the legislature from delegating some functions to agencies if they are delegated in this restricted manner.[95]

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88. MISS. CONST. ANN. art. I, § 1 (establishing the three branches of government); MISS. CONST. ANN. art. I, § 2 (stating that "no person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others").

89. 63 So. 667 (Miss. 1913).

90. *Id.* at 669 (quoting Field v. Clark, 143 U.S. 649, 694 (1892)).

91. *See* Clark v. State, 152 So. 820, 822 (Miss. 1934) (finding that the "authorities are abundant" as to "the power of the Legislature to create a board to find facts and to carry out the general purpose of the Legislature by reasonable rules and regulations").

92. Mississippi v. Allstate Ins., 97 So. 2d 372, 375 (Miss. 1957).

93. *See* Broadhead v. Monaghan, 117 So. 2d 881, 892 (Miss. 1960) (stating that "the legislature must ordinarily prescribe a policy, standard, or rule for [the agency's] guidance"); *Allstate*, 97 So. 2d at 376 ("[T]he legislature . . . [must] delineate the general policy, the public agency which is to apply it, and the boundaries of this delegated power.").

94. *Allstate*, 97 So. 2d at 375–76.

95. *Id. But see* Howell v. Mississippi, 300 So. 2d 774, 781 (Miss. 1974) (holding that the power to define crimes and fix punishment remains the exclusive authority of the legislature and, therefore, cannot be delegated in any way), *superseded on other grounds by statute*, MISS. REV. CODE ANN. § 97-1-1(2) (West 2020), *as stated in* Henderson v. State, 2019-KA-01414-SCT (¶ 14) (Miss. 2021), 323 So. 3d 1020; *Broadhead*, 117 So. At 892 (noting that the legislature has given agencies the authority to impose penalties, but it cannot afford agencies the discretion to determine amounts of penalties).

Although Mississippi's execution statute has never been challenged under the nondelegation doctrine, the state has analyzed a number of other statutes under its nondelegation principles.[96]

Mississippi prohibits the legislature from delegating uncontrolled and arbitrary power to an administrative agency.[97] To avoid vesting an agency with this type of discretion, the legislature must limit the agency's power by prescribing adequate standards for the agency's guidance.[98] In *Mississippi v. Allstate Insurance Co.*,[99] an insurance company challenged the constitutionality of code section 5825 under the state constitution, a provision requiring an insurance commissioner to fix the amounts paid to the local agents in commissions.[100] To determine the commission rate Mississippi agents would earn, the Insurance Commission collected written opinions from stock fire insurance companies in the state and compiled the information received in a majority opinion.[101] The rate's purpose was to maintain uniformity regarding the classes of risks throughout the State so that profits of the stock fire insurance companies conducting business in Mississippi could be properly determined.[102] The Mississippi Supreme Court rejected the uniformity requirement for commission rates and held that the statute improperly delegated legislative power and thus was invalid.[103] The court noted that the power prescribed to the commission to fix or regulate the commission "is nebulous,"[104] and while "[t]he constitution does not demand the impossible or the impractical . . . it requires that the legislature . . . delineate the general policy, the public agency which is to apply it, and

96. *See, e.g.*, D.J. Koenig & Assocs. v. Miss. State Tax Comm'n, 2001-CC-01087-SCT (¶¶ 17, 19) (Miss. 2003), 838 So. 2d 246, 253 (legislative grant of power to State Tax Commission's Alcoholic Beverage Control Division); State Oil & Gas Bd. v. Miss. Min. & Royalty Owners Ass'n, 258 So. 2d 767, 792 (Miss. 1971) (Sugg, J., dissenting) (per curium) (State Oil and Gas Board's amendment to its own rules); *Allstate*, 97 So. 2d at 375 (statute fixing commission rates for local insurance agents); *Clark*, 152 So. At 821 (statute regulating barbering profession); Abbott v. State, 63 So. 667, 669 (Miss. 1913) (statute creating and delegating powers to livestock board).

97. *Broadhead*, 117 So. 2d at 891–92; *Allstate*, 97 So. 2d at 375–76.

98. *Allstate*, 97 So. 2d at 375–76.

99. 97 So. 2d 372 (Miss. 1957).

100. *Id.* at 375.

101. *Id.* at 374.

102. *Id.*

103. *Id.* at 376.

104. *Id.*

the boundaries of this delegated power."[105] Because the statute failed to provide boundaries to guide the Commission in its operation, it was an improper delegation of legislative authority and, therefore, unconstitutional.[106]

Under the Mississippi Constitution, the legislature cannot vest administrative agencies with arbitrary discretion. In *Clark v. State*,[107] the Mississippi Supreme Court examined a challenge to a statute that conveyed authority to a board of examiners to determine an individual's fitness to practice barbering by passing a satisfactory examination.[108] The plaintiff argued that the statute failed to define how to measure fitness, therefore "vest[ing] uncontrolled, unlimited, arbitrary, and discriminatory power in the board of barber examiners."[109] The court, however, found that other sections of the statute further limited the board's discretion. For example, section 9 of the act stated that the examination should contain a practical demonstration and a written and oral test on commonly-practiced barbering subjects.[110] Section 17 further defined "what constitutes the practice of barbering."[111] Accordingly, the board was limited in deciding which topics to test individuals (a list of barbering subjects) and how to test these topics (via practical demonstration and written and oral tests) to determine fitness.[112] The court even noted that had it been confined only to the language of section 5, which required "that an applicant . . . pass a satisfactory examination conducted by the board of examiners to determine his fitness to practice barbering," the court would have likely struck down the statute.[113] However, because the examination was limited to certain defined subjects, the court found that the statute did not grant the board arbitrary discretion and, consequently, was a proper delegation of authority.[114]

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105. *Id.*; *see also* Broadhead v. Monaghan, 117 So. 2d 881, 892 (Miss. 1960) (stating that "the legislature must ordinarily prescribe a policy, standard, or rule for [the agency's] guidance").
106. *Allstate*, 97 So. At 376, 378.
107. 152 So. 820 (Miss. 1934).
108. *Id.* at 822.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*

The Mississippi legislature must prescribe a standard or general policy supporting an action before delegating authority to the administrative agency to determine the details necessary to implement the legislature's purpose.[115] In *Hinds-Rankin Metropolitan Water & Sewer Ass'n v. Mississippi Public Service Commission*,[116] the appellant argued that eight sections of Mississippi Code 1942 Annotated constituted an unconstitutional delegation of legislative authority.[117] These provisions, in part, required the Mississippi Public Service Commission to approve the construction of proposed facilities and required reimbursement to landowners for expended costs when such facilities were constructed in a subdivision.[118] Upon analyzing the sections, the Mississippi Supreme Court ruled that the legislature had prescribed a sufficient standard because one of the sections required that the Commission "determine whether 'present or future public convenience and necessity' require or will require the extension" before "requir[ing] a water or sewage utility to extend its service into a particular area."[119] The court found that this provision was sufficiently clear to enable the agency to know its obligations and that it guided the Commission in determining the relevant facts to which the sections applied.[120] Therefore, as provided by Mississippi case law, a violation of the nondelegation doctrine can occur where the legislature (1) vests an agency with arbitrary discretion; (2) does not provide adequate boundaries for the agency's guidance; and (3) fails to prescribe the primary policy decision.

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115. *See* Hinds-Rankin Metro. Water & Sewer Ass'n v. Miss. Pub. Serv. Comm'n, 263 So. 2d 546, 552 (Miss. 1972) (holding that delegation of authority is permitted so long as the legislature sufficiently prescribes a policy and otherwise reasonably limits the delegee's authority); Broadhead v. Monaghan, 117 So. 2d 881, 892 (Miss. 1960) ("[I]n delegating powers to an administrative [agency] . . . , the legislature must ordinarily prescribe a policy, standard, or rule for their guidance."); Mississippi v. Allstate Ins., 97 So. 2d 372, 376 (Miss. 1957) (stating that while the legislature does not need to clarify every detail, it must at least, in part, delineate the general policy).

116. 263 So. 2d 546 (Miss. 1972).

117. *Id.* at 551–52.

118. *Id.* at 547, 550.

119. *Id.* at 552.

120. *Id.*

3. Nondelegation and execution statutes

Inmates commonly challenge state execution statutes under the relevant state's nondelegation doctrine,[121] arguing that the legislature failed to provide guidelines or, more generally, delegated too broad of authority to the state DOC, violating the separation of powers doctrine.[122] The state's nondelegation standards for determining a violation of the doctrine dictate the state's examination of the challenge. Within their decisions to uphold or, in one case, strike down an execution statute under the nondelegation doctrine, courts cite other state decisions for support.[123]

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121. *See, e.g.*, Sims v. Kernan, 241 Cal. Rptr. 3d 300, 303 (Cal. Ct. App. 2018) (arguing that the execution statute violated the state constitution by allowing the state DOC to establish death penalty implementation protocols); Cook v. Arizona, 281 P.3d 1053, 1054 (Ariz. Ct. App. 2012) (finding death row inmates incorrectly asserted that the lethal injection statute violated separation of powers because the statute did not restrain the DOC's discretion); Hobbs v. Jones, 2012 Ark. 293, at 2–3, 412 S.W.3d 844, 847–48 (affirming inmate's claim that the state execution statute unconstitutionally delegated unfettered discretion to the state DOC); Brown v. Vail, 237 P.3d 263, 265–66 (Wash. 2010) (en banc) (holding that the legislature's delegation to the DOC the authority to determine the death penalty protocol was proper because adequate safeguards and judicial review are available); Sims v. Florida, 754 So. 2d 657, 670 (Fla. 2000) (per curiam) (explaining that the Florida lethal injection statute was not an improper delegation of power because, in part, the statute clearly defines death as the punishment, and the DOC is better qualified to determine chemicals and methodology used in an execution); *Ex Parte* Granviel, 561 S.W.2d 503, 506–07 (Tex. Crim. App. 1978) (en banc) (declaring that Texas nondelegation doctrine was not violated where the execution statute failed to specify the substance or substances the DOC must use in a lethal injection execution); *see also* Zink v. Lombardi, No. 12-CV-4209, 2012 WL 12828155, at *8 (W.D. Mo. Nov. 16, 2012) (federal district court in Missouri interpreting Missouri state law);

122. *See, e.g.*, *Zink*, 2012 WL 12828155, at *1, *5 (stating that twenty-one prisoners alleged Missouri's statutory delegation to the DOC in execution processes granted unbounded authority, violating the nondelegation doctrine); *Kernan*, 241 Cal. Rptr. 3d at 303 (declaring that the plaintiffs, who had been sentenced to death, alleged that California's execution statute violated the separation of powers because the DOC was left to decide fundamental policy questions in the execution process); *Cook*, 281 P.3d at 1054 (asserting that plaintiffs argued that Arizona's execution statute unconstitutionally delegated authority to the DOC because it failed to provide standards that restrained the DOC's discretion).

123. *Sims*, 754 So. 2d at 658 (pointing to the decisions of Delaware, Idaho, and Texas courts to indicate a trend of rejections against these types of challenges); *Zink*, 2012 WL 12828155, at *8 (comparing the Missouri separation of powers standard to those of Texas, Florida, Nebraska, and Arizona to conclude that consideration of factors used by these other courts is appropriate in the current case).

Under nondelegation standards, many states require the legislature to prescribe basic policy decisions before delegating any authority to an agency.[124] For example, in California, the nondelegation standard requires the legislative body to determine the fundamental policy issue and to "provide adequate direction for the implementation of that policy."[125] California's execution statute requires that the State administer the death penalty by lethal gas or injection, and the inmate may choose their method of execution by submitting their choice to the warden in writing.[126] In a challenge against the statute, the California Court of Appeals found the state properly delegated legislative authority to the California Department of Corrections and Rehabilitation (CDCR) because the statute specified when the CDCR could impose the death penalty and that the CDCR could impose the death penalty by lethal gas or injection.[127] The court reasoned that the legislature determined the manner of execution and simply asked the DOC to implement this policy.[128]

Other state courts have similarly upheld a delegation of authority when finding that the legislature made the general policy decision.[129] In *Ex Parte Granviel*,[130] the Texas Court of Criminal Appeals held that because the legislature provided that the mode of execution would be lethal injection, among other designations of time, place, and who would conduct the executions, the legislature had laid out the policy.[131] The delegation of power to the DOC's director to fill in the details

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124. *See, e.g.*, *Ex Parte Granviel*, 561 S.W.2d at 514 ("Generally, a legislative body, after declaring a policy and fixing a primary standard, may delegate to the administrative tribunal or officer power to prescribe details."); *Zink*, 2012 WL 12828155, at *6–7 (determining that applying the general policy factor to the Missouri execution statute was appropriate because Missouri had applied the policy requirement in other contexts, and other states analyzed death penalty delegation statutes under similar standards); *Brown*, 237 P.3d at 269 ("[T]he legislature cannot delegate wholesale its obligation to declare public policy within a legislative process containing important procedural safeguards.").

125. *Kernan*, 241 Cal. Rptr. 3d at 304 (quoting Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd., 405 P.3d 1087, 1100 (2017)).

126. CAL. PENAL CODE § 3604 (West 2022).

127. *Kernan*, 241 Cal. Rptr. 3d at 305.

128. *Id.*

129. *See supra* note 124 and accompanying text.

130. 561 S.W.2d 503 (Tex. Crim. App. 1978) (en banc).

131. *Id.* at 515 (noting that "[t]he Legislature placed a time limitation on the date of execution following sentence and provided for the time of day when the execution shall take place and provided the execution procedure was to be determined and then supervised by the Director of the [DOC]").

necessary to carry out the statute's purpose was proper under the nondelegation doctrine.[132] Likewise, in *Cook v. Arizona*,[133] the Arizona Appeals Court held that the statute providing that the infliction of death would be by lethal injection was "'a sufficient basic standard, i.e., a definite policy and rule of action which w[ould] serve as a guide for' the Department."[134] Thus, courts must commonly consider policy when making decisions for state nondelegation standards.

Some courts permit a broad delegation of authority to an administrative agency when adequate procedural safeguards exist "for the promulgation of rules and to test their constitutionality once promulgated."[135] In a challenge against the state's execution statute, the Washington Supreme Court held that the delegation of powers to the DOC was permitted because the protocol was subject to judicial review, and adequate safeguards already surrounded the process of judgment and sentencing.[136] Adequate safeguards include the Administrative Procedure Act[137] (APA), judicial review, and agency appeals processes.[138] Similarly, in *Cook*, the Arizona Court of Appeals highlighted that the U.S. Constitution limits discretion by requiring that execution protocols comply with the Eighth Amendment's Cruel and Unusual Punishment Clause.[139]

Finally, when approaching these challenges, courts have also looked at "whether the agency official is better qualified" to make decisions regarding executions.[140] Some courts have determined that because execution is a complex process, the DOC is better equipped to assess

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132. *Id.* (recognizing that there is a presumption of validity of a statute when the statute is challenged before the court).

133. 281 P.3d 1053 (Ariz. Ct. App. 2012).

134. *Id.* at 1056 (citing Arizona v. Ariz. Mines Supply Co., 484 P.2d 619, 625–26 (Ariz. 1971)).

135. Brown v. Vail, 237 P.3d 263, 269 (Wash. 2010) (en banc); *see also Cook*, 281 P.3d at 1056 (recognizing that the "United States Constitution also implicitly guides and limits the Department's discretion").

136. *Brown*, 237 P.3d at 270.

137. Administrative Procedure Act, 5 U.S.C. §§ 551–59.

138. *Brown*, 237 P.3d at 269.

139. *Cook*, 281 P.3d at 1056.

140. Zink v. Lombardi, No. 12-CV-4209, 2012 WL 12828155, at *8 (W.D. Mo. Nov. 16, 2012); *see also* Nebraska v. Ellis, 799 N.W.2d 267, 289 (Neb. 2011) (agreeing that decisions regarding the details surrounding the implementation of the death penalty are a task that the legislature "cannot practically . . . perform itself"); Sims v. Florida, 754 So. 2d 657, 670 (Fla. 2000) (per curiam) (concluding that the DOC was in a better position to determine details like methodology and chemicals to use in lethal injections because its personnel are better qualified to make those kinds of decisions).

drug selection than the legislature.[141] These courts determine that this broad delegation is reasonable and acceptable under nondelegation standards because the legislature cannot "practically or efficiently" fill in all the details.[142]

As mentioned earlier, there has been one successful challenge against a state execution statute under the nondelegation doctrine: *Hobbs v. Jones*.[143] In *Hobbs*, the Arkansas Supreme Court struck down the state's execution statute for violating the nondelegation doctrine.[144] Arkansas prohibits the legislature from delegating its power to make law but holds that it can delegate some discretionary authority to the other branches if it provides reasonable guidelines.[145] In 2012, Arkansas' method of execution statute required death sentences to be carried out by lethal injection, granting the Director of the DOC the discretion to determine the kind and amount of chemicals to be used.[146] The statute further supplied a list of chemicals that could be used, including a barbiturate, paralytic agent, potassium chloride, or other chemicals.[147]

In a challenge against the execution statute, the Arkansas Supreme Court held that it "repose[d] an absolute, unregulated, and undefined discretion in an administrative agency" because it left "the kind and amount of the chemicals" in lethal injections to the discretion of the DOC without any selection guidance.[148] The court was unconvinced by the list of chemicals provided in the statute that "may" be used because

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141. *See Zink*, 2012 WL 12828155, at *8 (holding Missouri's execution statute constitutional because it delegates highly technical execution decisions, such as complex drug combinations); *Ellis*, 799 N.W.2d at 289 (finding that the execution tasks assigned to Nebraska's DOC director were highly technical, and therefore it was appropriate to delegate them).

142. *Ellis*, 799 N.W.2d at 289. The topic area of agency expertise is beyond the scope of this Comment. For more information, see Lain, *supra* note 40, for a discussion on broad delegation for reasons of agency expertise and an argument that DOCs are not qualified to make such informed decisions about executions, and Ronald J. Krotoszynski Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735 (2002), which discusses nondelegation on the federal level and how agency expertise is often used to merit deference.

143. 2012 Ark. 293, 412 S.W.3d 844.

144. *Id.* at 14–15, 412 S.W.3d at 854; *see* Klein, *supra* note 36, at 925 (describing *Hobbs v. Jones* as the "one notable exception" to the unsuccessful challenges against execution statutes under the separation of powers doctrine).

145. *Hobbs*, 2012 Ark. 293 at 13, 412 S.W.3d at 852.

146. *Id.*

147. *Id.*

148. *Id.* at 10, 16, 412 S.W.3d at 852, 855.

that list was not mandatory, thereby vesting the DOC with absolute discretionary power to select the drugs.[149] The court further held that this gave the Arkansas DOC "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" and "discretion to . . . determine all policies and procedures to administer the sentence of death."[150]

The Arkansas Supreme Court also rejected the argument that the Eighth Amendment provides the DOC with enough reasonable guidance to satisfy nondelegation standards.[151] The DOC argued that the Eighth Amendment and the state's constitution's[152] prohibitions of cruel and unusual punishment provided "reasonable guidance" to the DOC to exercise its discretion to implement execution methods, in accordance with the state's nondelegation standards.[153] In other words, the Eighth Amendment supplemented the statute to limit the DOC's actions.[154] However, the court noted that in analyzing questions of nondelegation, it must weigh whether the legislature has provided sufficient guidance regardless of other constitutional provisions.[155] In this case, the method of execution statute failed to provide reasonable guidelines for the DOC's chemical selection decision, violating the state constitution under the nondelegation doctrine.[156]

C. The Supreme Court Principle that "Death is Different"

The Supreme Court looks to societal trends when analyzing the constitutionality of capital punishment sentencing and procedures.[157] The Court also looks for arbitrary application and operates on the

149. *Id.* at 13–14, 412 S.W.3d at 852–54.
150. *Id.* at 14, 412 S.W.3d at 854.
151. *Id. But see* Cook v. Arizona, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012) (finding the Cruel and Unusual Punishment Clause of the Eighth Amendment limited the DOC's discretion, thereby providing sufficient standards to guide the DOC under the nondelegation doctrine).
152. ARK. CONST. art. II, § 9 (prohibiting cruel or unusual punishments).
153. *Hobbs*, 2012 Ark. 293 at 14, 412 S.W.3d at 854.
154. *Id.*
155. *Id.*
156. *Id.*
157. *See supra* notes 34–35 and accompanying text.

notion that "death is different" in the death penalty context.[158] Though the Court maintains the constitutionality of the death penalty, it recognizes the "severity and finality" of death as a punishment[159] and, consequently, requires that every procedural safeguard be met when executing capital punishment.[160] As the Court has explained, "due process is flexible and calls for such procedural protections as the particular situation demands."[161] In other words, the government must ensure it gets it right when life and death are on the line.[162]

The Supreme Court has regulated capital punishment in an effort to bar arbitrary applications. The landmark case, *Gregg v. Georgia*,[163] ended the four-year moratorium on the death penalty's imposition created by the decision in *Furman v. Georgia*.[164] In *Furman*, the Supreme Court found that the death penalty statutes prescribed juries with unrestricted discretion, and therefore the arbitrary imposition of the death penalty violated the Eighth and Fourteenth Amendments.[165] In *Gregg*, the Supreme Court noted that the concerns of arbitrary or capricious imposition of the death penalty can be resolved by "a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."[166] While the Court stated that each capital punishment state system should be examined individually, it noted that, generally, statutes that provide sentencing

158. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality) (noting that because death is different, a state may not impose capital punishment unless "every safeguard is observed"); Beck v. Alabama, 447 U.S. 625, 637 (1980) ("[D]eath is a different kind of punishment from any other which may be imposed in this country." (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977)) (alteration in original)).

159. *Beck*, 447 U.S. at 637 ("From the point of view of the defendant, it is different in both its severity and its finality.").

160. *Gregg*, 428 U.S. at 187.

161. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

162. Lain, *supra* note 40, at 553.

163. 428 U.S. 153 (1976).

164. 408 U.S. 238, 239–40 (1972) (per curiam); *Gregg*, 428 U.S. at 179, 206–07; *see* Kim Bellware, *Death Penalty's 50-Year Rise and Fall Since Supreme Court Struck It Down*, WASH. POST (July 6, 2022, 7:00 AM) https://www.washingtonpost.com/history/2022/07/06/furman-georgia-supreme-court-death [https://perma.cc/75CL-WSC4] (discussing how the *Furman* decision "led to an immediate de facto moratorium on capital punishment across the United States" before the Court began a trend of upholding most new capital punishment laws in 1976 following *Gregg*).

165. *Furman*, 408 U.S. at 253 (Douglas, J., concurring).

166. *Gregg*, 428 U.S. at 195.

authorities (juries or judges) with relevant information and standards that guide using this information can combat arbitrariness concerns.[167]

The Mississippi Supreme Court has also emphatically upheld that death is different.[168] For the same reasons the Supreme Court upholds the doctrine, Mississippi recognizes the severity and irreversibility of the punishment.[169] Because death is different from other criminal punishments, the Mississippi courts take heightened precautions in procedures, such as "resolv[ing] serious doubts in favor of the accused," "afford[ing] heightened scrutiny on appeal," and "apply[ing] [the] plain error rule with less stringency."[170] Mississippi provides these extra precautions because its courts acknowledge that harmless errors in other cases become irreversible errors in death penalty cases.[171]

II. ANALYSIS

Mississippi's execution statute is unconstitutional on the basis of separation of powers because it violates the state's nondelegation doctrine. This Part applies Mississippi's nondelegation standards as outlined in the state's case law to its new method of execution statute. This Part also analyzes the statute by comparing other state decisions regarding nondelegation challenges against execution statutes and focuses on factors these courts deem paramount in deciding whether there is a violation. Finally, this Part recognizes the Supreme Court

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167. *Id.*

168. *See, e.g.*, Hansen v. Mississippi, 592 So. 2d 114, 142 (Miss. 1991) (en banc) (holding that the court will apply heightened scrutiny on appeal "because death undeniably is different"); Pruett v. Mississippi, 574 So. 2d 1342, 1345 (Miss. 1990) (en banc) ("This Court also has emphasized and reiterated the fact that 'the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.'" (quoting Jackson v. State, 337 So. 2d 1242, 1252 (Miss. 1976))); Cole v. Mississippi, 525 So. 2d 365, 385 (Miss. 1987) (en banc) (recognizing that Mississippi's principle of heightened appellate scrutiny in capital punishment trials stems from the U.S. Supreme Court's principle that death is different).

169. *See Pruett*, 574 So. 2d at 1344 (noting that capital punishment is the only punishment involving "the conscious infliction of physical pain"); Evans v. Mississippi, 441 So. 2d 520, 531 (Miss. 1983) (en banc) (pointing out how the irrevocability of death makes capital punishment unique).

170. *Hansen*, 592 So. 2d at 142.

171. Irving v. Mississippi, 361 So. 2d 1360, 1363 (Miss. 1978) (en banc) ("What may be harmless error in a case with less at stake becomes reversible error when the penalty is death.").

principle that "death is different"; a principle that should be extended to drafting statutes regarding execution protocols.

A. Mississippi's Execution Statute Under Their Nondelegation Standards

Mississippi case law has established that a violation of the nondelegation doctrine occurs when the legislature vests an agency with arbitrary discretion, fails to prescribe the basic policy decision, and does not provide adequate boundaries for the agency's guidance.[172] In passing the new execution statute, the legislature failed to provide the MDOC with guidelines that meet this standard.

1. The Mississippi execution statute vests the MDOC with arbitrary discretion

Mississippi's nondelegation doctrine prohibits a statute from vesting the agency with arbitrary discretion.[173] In *Clark*, the Mississippi Supreme Court held that a barbering statute did not violate the nondelegation doctrine because, when read in conjunction with other parts of the statute, it distinctly limited the board of examiners' discretion to create an exam by restricting it to barbering subjects.[174] The court also noted that no arbitrary discretion was left to the board in part because another section of the statute further defined what barbering practices are.[175] Moreover, the court in *Clark* rejected the arbitrary discretion argument because the exam was limited to specific subjects, *and* the statute further defined those subjects.[176] Mississippi's execution statute limits the lethal injection protocol to "substances in a lethal quantity into the body."[177] However, it fails to define what these lethal substances, and their quantities, are in any other section.[178] States have historically used various drugs in executions, with various combinations of the substances,[179] all of which can produce different

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172. *See supra* note 115 and accompanying text.

173. *See* Broadhead v. Monaghan, 117 So. 2d 881, 892 (Miss. 1960) (holding that "the legislature . . . must not vest [the administrative body] with an arbitrary and uncontrolled discretion with regard" to the administration of statutes); Mississippi v. Allstate Ins., 97 So. 2d 372, 375 (Miss. 1957) (concluding that the legislature cannot vest an agency with "arbitrary and uncontrolled discretion").

174. Clark v. State, 152 So. 820, 822 (Miss. 1934).

175. *Id.*

176. *Id.*

177. MISS. CODE ANN. § 99-19-51 (West 2022).

178. *Id.*

179. *See Overview of Lethal Injection Protocols*, *supra* note 41 (providing a breakdown of the types of drugs and popular drug combinations, also known as drug protocols, used in states that perform executions).

effects on the human body.[180] Giving the MDOC the power to define "substances" as written in the statute and the power to create the drug-protocol used in each execution vests the MDOC with arbitrary discretion just as the failure to define barbering subjects would have vested the board of examiners with arbitrary discretion in *Clark*.[181] Furthermore, the new execution statute identifies the authorized execution methods, but fails to define further guidelines for how the MDOC must select an execution method and how the MDOC should implement the method.[182] Thus, the MDOC is assigned uncontrolled discretion to make these decisions. In both *Broadhead* and *Allstate*, the Mississippi Supreme Court stated that a statute that vests the agency with arbitrary and uncontrolled discretion violates the nondelegation doctrine.[183]

2. The Mississippi execution statute fails to prescribe the basic policy decisions

Mississippi's nondelegation principles require that a statute prescribe the general policy before the legislature delegates any authority to an agency.[184] The Mississippi Supreme Court has repeatedly held that "fact-finding" duties in the legislature can be left to the agency,[185] but laying down the general policy is the Mississippi legislature's function.[186] In *Hinds-Rankin Metropolitan*, the Mississippi Supreme Court ruled that a provision permitting the Public Service Commission to require utility extensions was constitutional.[187] The court held that the section of the statute instructing the Commission

180. *See* Kroll, *supra* note 2 (discussing the biological effects of common lethal injection drugs if used on their own or administered in a combination).

181. *Clark*, 152 So. at 822.

182. MISS. CODE ANN. § 99-19-51 (West 2022) (stating that "[a]t the discretion of the [MDOC], the manner of inflicting the punishment of death shall be by [lethal injection, nitrogen hypoxia, electrocution, or firing squad]").

183. *See supra* note 173 and accompanying text.

184. *See supra* note 115 and accompanying text.

185. *See* Howell v. Mississippi, 300 So. 2d 774, 779 (Miss. 1974) (citing Field v. Clark, 143 U.S. 649, 694 (1982)) ("The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."); Mississippi v. Allstate Ins., 97 So. 2d 372, 375 (Miss. 1957) ("[T]he legislature . . . may delegate power to determine facts on which the law makes its own action depend.").

186. *Allstate*, 97 So. 2d at 376 ("The constitution . . . requires that the legislature, with such clarity as is reasonably practical, delineate the general policy . . .").

187. Hinds-Rankin Metro. Water & Sewer Ass'n v. Miss. Pub. Serv. Comm'n, 263 So. 2d 546, 552 (Miss. 1972).

to determine the necessity and convenience of extending utility services enabled the agency to know its obligations and guided the Commission in deciding which facts to ascertain.[188] This provision requiring a finding of "present or future public convenience and necessity" prescribed a general policy or standard because it provided the Commission with a way to determine whether to grant an extension.[189] The Mississippi execution statute, however, does not provide any provision that includes how the MDOC should determine the execution method of a particular death row inmate.[190] Unlike *Hinds-Rankin Metropolitan*, the new Mississippi execution statute does not include limitations that control or guide the MDOC in determining which facts to ascertain in deciding on an execution method or in choosing the substances to use in the case of a lethal injection execution.[191] The failure to prescribe this standard thus violates the nondelegation doctrine.

Other states' nondelegation standards share Mississippi's requirement that the legislature fix the general policy, which has been analyzed during challenges against state execution statutes.[192] In Texas, the nondelegation doctrine requires the legislative body to declare "a policy and fix[] a primary standard" before delegating the agency the power to fill in other details necessary to carry out the act's purpose.[193] The Texas Court of Criminal Appeals held that because the legislature provided that the mode of execution would be lethal injection, among other designations of time, place, and who would conduct the executions, there was no violation of the separation of powers because there was a policy and a fixed primary standard.[194] Arizona and Washington indicated that because the legislature prescribed the method of execution as lethal injection under a one-drug protocol, the legislature declared the general public policy.[195]

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188. *Id.* at 552.
189. *Id.*
190. MISS. CODE ANN. § 99-19-51 (West 2022).
191. *Id.*
192. *See supra* notes 124–39 and accompanying text.
193. *Ex Parte* Granviel, 561 S.W.2d 503, 514 (Tex. Crim. App. 1978) (en banc).
194. *Id.*
195. *E.g.*, Cook v. Arizona, 281 P.3d 1053, 1055–56 (Ariz. Ct. App. 2012) (holding that because the legislature "appointed the [Arizona DOC] to supervise [lethal injection]," the statute "accordingly provide[d] 'a sufficient basic standard, i.e., a definite policy and rule of action which will serve as a guide for' the Department"

Contrary to the Texas, Arizona, and Washington execution statutes, Mississippi's execution legislation does not provide the MDOC with the specific execution method to be authorized.[196] The Mississippi statute limits the MDOC's choice of execution to four methods and does not explicitly prescribe the MDOC with the execution method.[197] Texas, on the other hand, requires the execution method to be lethal injection, leaving no discretion to the agency to decide the method.[198] The Mississippi legislature attempted to safeguard itself by providing that it is the policy to use lethal injection; however, the statute contains no provision that the MDOC must show that lethal injection was unavailable or deemed unconstitutional before resorting to another method.[199] Thus, the statute merely recommends that the MDOC choose lethal injection first, but case law indicates that the legislature must actually prescribe the policy, not just recommend it.[200]

In *Hobbs*, the Arkansas Supreme Court similarly ruled that a subsection of the statute providing a list of chemicals that the Arkansas DOC *may* use did not meet nondelegation standards as reasonable

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(quoting Arizona v. Ariz. Mines Supply Co., 484 P.2d 619, 625–26 (Ariz. 1971) (en banc))); Brown v. Vail, 237 P.3d 263, 269 (Wash. 2010) (en banc) (approving the legislature's delegation of authority to the DOC under a statute that specifies the method of execution shall be the one-drug lethal injection protocol or hanging if elected by the defendant).

196. *See* MISS. CODE ANN. § 99-19-51 (West 2022).

197. *Id.* (authorizing the MDOC the discretion to choose the execution method from options of lethal injection, firing squad, nitrogen hypoxia, or electrocution).

198. *Ex Parte* Granviel, 561 S.W.2d 503, 507 (Tex. Crim. App. 1978) (en banc) (stating that Texas's amended statute determined that the "sentence of death . . . shall be executed . . . by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death").

199. MISS. CODE ANN. § 99-19-51 (West 2022); *see also* Corpuz, *supra* note 10 (discussing Representative Nick Bain's comments on the reasoning behind the new legislation change).

200. *See* Hinds-Rankin Metro. Water & Sewer Ass'n v. Miss. Pub. Serv. Comm'n, 263 So. 2d 546, 552 (Miss. 1972) (stating that authority can be delegated to administrative bodies when the legislature adequately dictates the policy, standard, or rule to apply or reasonably limits the given power); Broadhead v. Monaghan, 117 So. 2d 881, 892 (Miss. 1960) (clarifying that while the legislature can delegate to administrative officers the power to impose penalties for violations under revenue laws, the legislature does not have the power under the Constitution to give total discretion to administrative officers in determining the penalty amounts); Mississippi v. Allstate Ins., 97 So. 2d 372, 376 (Miss. 1957) (explaining that the Constitution requires the legislature to set forth reasonably clear standards that govern, and limit, the agency's discretion).

guidelines because that list was not mandatory.[201] Therefore, although the Mississippi execution statute indicates that lethal injection is the preferred method of execution, it does not provide that this must be the first-choice method or provide guidelines for when the MDOC should move to use another method.[202] Failing to provide the general policy violates the state constitution under the nondelegation doctrine.[203]

3. The Mississippi execution statute fails to define the boundaries of delegated power

Even if it is argued that the legislature has prescribed a general policy by setting forth the options of execution methods (lethal injection, nitrogen hypoxia, electrocution, or firing squad) for the MDOC to choose from, the Mississippi nondelegation standards require something more.[204] In *Allstate*, the Mississippi Supreme Court not only required that the legislature set forth the general policy and dictate the agency that is to apply the policy for agency delegation to be proper, but also that the legislature defines "the boundaries of this delegated power."[205] In this case, the Mississippi Supreme Court found that the delegation of power to the Insurance Commission to fix the rate of the commissions failed to provide adequate standards or boundaries and therefore was an improper delegation to the agency.[206] Adequate standards must include "statements of objective, policy or purpose, as well as definitions, specifications, requisites and limitations."[207] Mississippi's execution statute grants the MDOC the power to "select and obtain the substances and the means necessary to carry out an execution" without providing further definitions, specifications, or limitations as to the substances or the amount of the

201. Hobbs v. Jones, 2012 Ark. 293, at 14, 412 S.W.3d 844, 854.

202. MISS. CODE ANN. § 99-19-51 (West 2022).

203. *See Allstate*, 97 So. 2d at 376 (explaining legislatures must reasonably describe the policy and boundaries of a power delineated to an agency); *Hinds-Rankin Metro.*, 263 So. 2d at 552 (clarifying power can be delegated to administrative agencies when that power is sufficiently described or is reasonably confined); *Broadhead*, 117 So. 2d at 892 (explaining that legislatures, under the Constitution, may not give total discretion to administrative agencies to determine penalty amounts).

204. *Allstate*, 97 So. 2d at 376 ("The constitution . . . requires that the legislature, with such clarity as is reasonably practical, delineate the general policy, the public agency which is to apply it, and the boundaries of this delegated power.").

205. *Id.* at 376.

206. *Id.*

207. *Id.* at 375–76.

substances to be administered to death row inmates.[208] Therefore, leaving the MDOC this authority to choose lethal injection substances and their quantities fails to provide the agency with boundaries of the delegated power.

Arkansas' nondelegation doctrine similarly requires reasonable guidelines for delegated discretion. However, the state's supreme court found its statute, which provided even more direction for the DOC than Mississippi's execution statute does, violated this nondelegation standard.[209] Though *Hobbs* is considered an outlier case, it should not be dismissed; *Hobbs* may better reflect the new life of the nondelegation doctrine as the Supreme Court is expected to interpret the "intelligible principle" more strictly in the future.[210] The Arkansas statute required that the DOC carry out the death sentence by lethal injection, and clarified a list of chemicals that may be used.[211] Nevertheless, the Arkansas Court found that leaving "the kind and amount of the chemicals to be injected" left too much discretion to the agency, thus violating the nondelegation doctrine.[212] Likewise, Mississippi's statute leaves the MDOC with the power to choose the substances in lethal injections by failing to provide any guidelines on choosing the chemicals other than that it must be a lethal quantity.[213] As similarly concluded by the Arkansas court, this discretionary power fails to provide adequate standards of guidance for the MDOC, thus violating a fundamental principle of the nondelegation doctrine and making the statute unconstitutional.[214]

4. Procedural safeguards

Though the Mississippi courts have not considered procedural safeguards in a nondelegation challenge, this factor should be addressed because many other states have utilized the presence of

208. MISS. CODE ANN. § 99-19-51 (West 2022).

209. Hobbs v. Jones, 2012 Ark. 293, at 15, 412 S.W.3d 844, 854–55 (holding that failing to identify the type and amount of substances to be used in lethal injections violated the nondelegation principle of guided discretion).

210. Silver, *supra* note 79, at 1231; Klein, *supra* note 36, at 926, 947.

211. *Hobbs*, 2012 Ark. 293, at 12, 412 S.W.3d at 852.

212. *Id.* at 16, 412 N.W.3d at 855.

213. MISS. CODE ANN. § 99-19-51 (West 2022).

214. Mississippi v. Allstate Ins., 97 So. 2d 372, 375 (Miss. 1957) (holding unconstitutional a statute that delegated "arbitrary and uncontrolled discretion" to the Commissioner); Clark v. State, 152 So. 820, 822 (Miss. 1934) (finding statutes that vest the agency with "unlimited and uncontrolled discretion" unconstitutional).

procedural safeguards to uphold a broad delegation of authority.[215] In these cases, the courts find that a broad delegation may be appropriate when other procedural safeguards are in place to test the constitutionality of rules and regulations once enacted.[216] The Mississippi Supreme Court has cited other state decisions to seek support in either striking or upholding a statute against a nondelegation challenge and, thus, will likely reference the many other state decisions on this issue should its execution statute be challenged.[217]

The Mississippi Constitution requires that "*the statute* . . . set forth the legislative decision and . . . prescribe adequate standards or rules for the agency's guidance."[218] Thus, the Mississippi court should look no further than the statute to determine if there are enough reasonable guidelines for the agency.[219] One of the arguments addressed in *Hobbs* is that the Eighth Amendment's prohibition on cruel and unusual punishment provides further "reasonable guidelines" to supplement the legislation.[220] However, the court held that the proper question is whether the legislature has provided the agency with sufficient standards in the statute, regardless of any outside procedural safeguards in place.[221] Likewise, in *Allstate*, the Mississippi Supreme Court noted that the presence or absence of a reasonable standard in the delegation to an administrative agency is the question of the court.[222] To decide this question, the court should ask, "[i]n the actual delegation is there found a standard, and is it sufficient?"[223] Therefore,

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215. *See supra* notes 135–39 and accompanying text.

216. *See* Brown v. Vail, 237 P.3d 263, 269 (Wash. 2010) (explaining that to delegate legislative authority properly, the legislature must give standards or guidelines regarding what should be done, and which administrative body should do it, and should also have procedural safeguards in place to ensure the laws have a method to being implemented and are constitutional after implementation).

217. *Clark*, 152 So. at 822–23 (relying on Alabama and West Virginia's barbering statutes in conducting its analysis of the Mississippi barbering statute); *Allstate*, 97 So. 2d at 377–78 (citing cases from Maryland, Wisconsin, Florida, and other state courts to support the holding that a statute that grants private groups certain powers is invalid as an improper delegation of power).

218. *Allstate*, 97 So. 2d at 375.

219. *See* Hobbs v. Jones, 2012 Ark. 293, at 15, 412 S.W.3d 844, 854 (holding that where the legislature does not provide sufficient guidance, the statute violates the separation of powers regardless of guidance provided by the Eighth Amendment).

220. *Id.*

221. *Id.*

222. *Allstate*, 97 So. 2d at 376.

223. *Id.*

any counterargument that provisions provided outside of the statute stand to guide the discretion of the agency does not accurately reflect the requirements of Mississippi's nondelegation standards.

B. The Death is Different Doctrine Requires Stricter Execution Protocol as Prescribed by the Legislature

Even if the Mississippi court, like the Supreme Court, permits a very broad delegation of authority to administrative agencies, applying the "death is different" principle requires a stricter execution protocol than that currently prescribed by the Mississippi legislature. Mississippi case law only addresses nondelegation challenges to statutes regarding topics such as barbering practices[224] and taxation,[225] but an execution statute providing vague guidelines to the DOC has higher risks, such as the arbitrary implementation of the death penalty or botched executions.[226] Broad delegation to the MDOC can lead to botched executions by way of "employ[ing] unqualified executioners, us[ing] the wrong drug during executions, and select[ing] lethal injection protocols that greatly heighten the risk of excruciating pain."[227] With no guidelines, other than notice of preference for lethal injections, on how to choose which method of execution an inmate will receive, the legislature has delegated power that may lead to arbitrary discretional decisions, a fear shared by the Mississippi Supreme Court and the U.S. Supreme Court.[228]

The Supreme Court and Mississippi Supreme Court have consistently recognized that the punishment of "death is different," requiring heightened procedural safeguards and stricter capital

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224. *See* Clark v. State, 152 So. 820, 822 (Miss. 1934) (holding that the barbering statute did not vest the board of examiners with arbitrary discretion because it provided the board with sufficient limitations).

225. *See* Broadhead v. Monaghan, 117 So. 2d 881, 892 (Miss. 1960) (explaining that the legislature does not have the power under the Constitution to give total discretion to administrative officers to determine penalties for crimes).

226. Klein, *supra* note 36, at 928 ("Inadequate procedural controls, secrecy, and minimal legislative guidance and oversight present a substantial risk of arbitrary action.").

227. Eric Berger, *Death Penalty Administration: A Response to Alexandra Klein's Nondelegating Death*, 82 OHIO ST. L.J. ONLINE 9 (2021).

228. *Compare* Gregg v. Georgia, 428 U.S. 153, 187 (1976) (overruling *Furman v. Georgia* and finding that "death as a punishment is unique in its severity and irrevocability"), *with* Mississippi v. Allstate Ins., 97 So. 2d 372 (Miss. 1957) (explaining that delegating legislative power without any rules or boundaries, is unconstitutional).

sentencing and implementation limitations.[229] Although execution protocols are not dealing with a matter of life or death, as that decision has already been made at sentencing, the legislature is instructing an agency on how to perform an execution.[230] In recognizing the "severity and finality" of death as a punishment, a more stringent standard must be applied at every level of capital punishment, including state legislation for executions.[231] In *Gregg*, the U.S. Supreme Court even recognized state legislation's vital role in eliminating concerns of arbitrariness in death penalty implementation.[232] Therefore, the Mississippi legislature must order that, even if the court allows broader delegations of authority with other subject areas, execution statutes require stricter standards written into the legislature because "death is different."

III. RECOMMENDATIONS

Mississippi should make several adjustments to its execution statute to comply with the state's nondelegation standards. First, because Mississippi's nondelegation standards require the legislature to make basic policy decisions, the state's execution statute should prescribe the order of execution methods the MDOC must follow. When other state courts found that their execution statute made the basic policy decisions, their statutes had both delineated the method of execution to be implemented and addressed the circumstances appropriate for the DOC to utilize another method. For example, California's execution statute requires that the death penalty be administered by lethal gas or lethal injection, and inmates sentenced before the statute's effective date can select which punishment to receive by submitting a writing of the choice to the warden.[233] The state will

229. Jackson v. State, 337 So. 2d 1242, 1252 (Miss. 1976); Beck v. Alabama, 447 U.S. 625, 637 (1980); Hill v. State, 432 So. 2d 427, 444 (Miss. 1983); *Gregg*, 428 U.S. at 187.

230. *See Gregg*, 428 U.S. at 195 (explaining that to ensure death sentences are not imposed in a capricious or freakish manner, sentencing authorities should be given careful instructions).

231. *See Beck*, 447 U.S. at 637 (noting that the death penalty differs from any other punishment and, as a result, requires a greater consideration of risk before implementation).

232. *Gregg*, 428 U.S. at 195 ("[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.").

233. CAL. PENAL CODE § 3604 (West 2022).

impose lethal injection if the inmate fails to make this choice.[234] Indicating when and how the DOC should implement a specific method of execution is a basic policy decision that the legislature must make under Mississippi nondelegation principles.

Additionally, the Mississippi legislature should further define "substances in a lethal quantity" in a provision of the execution statute. Providing a list of substances, and their ratios, that must be used in executions limits the MDOC's discretion when implementing lethal injections. While the effects of arbitrary discretion may be minor in cases of other statutory delegations, the decision to use incorrect dosages or untested drugs can result in excruciating, inhumane executions.[235] Although states struggled to implement lethal injections due to drug shortages when statutes required protocols such as the "three-drug protocol," the nondelegation doctrine requires sufficient guidelines to limit the MDOC's discretion. Thus, the legislature must indicate the kinds and amounts of substances in the context of lethal injections.

CONCLUSION

Clayton Lockett suffered a botched execution by lethal injection when Oklahoma used a drug many had advised against for the first time.[236] The state also injected one-fifth of the dose that other states had prescribed.[237] Realizing that the lethal drugs were not working as expected, as many saw Lockett writhe on the gurney, the DOC director halted the execution.[238] Lockett's case is just one of many illustrating the danger of leaving discretion to the DOC to determine specific execution protocol, especially the decisions on lethal injection drugs and quantities.

Mississippi's new execution statute has left crucial decisions to the MDOC, including both the execution method to use and the execution procedure to implement. This statute delineates more

234. *Id.*
235. McBride & Murphy, *supra* note 1 (describing the failed execution of Clayton Lockett, where a three-drug lethal injection combination put an inmate in intense, agonizing pain but did not kill him; he died shortly later from a heart attack).
236. *Id.*
237. *Id.*
238. *Id.*

discretion in executions to a DOC than any other state has so far[239] and extends beyond the bounds of delegation permitted by the state itself. The Mississippi execution statute has violated the nondelegation doctrine by failing to delineate a general policy regarding the method of execution, to prescribe adequate guidelines for choosing lethal injection substances, and to consider the Supreme Court principle that "death is different." Therefore, the statute is unconstitutional under Mississippi's Constitution.

239. Perlis, *supra* note 10 (quoting DPIC deputy director, Ndulue stating, "I'm not aware of another state that structures their methods of execution decisions in this way" when discussing the new Mississippi execution statute).