NONDELEGATION IN PENNSYLVANIA

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INTRODUCTION

The Supreme Court of the United States has struck down acts of Congress on nondelegation grounds only twice in that Court's entire history.[1] By contrast, the Supreme Court of Pennsylvania has invalidated two unconstitutional delegations in the last six years alone.[2] Given that successful nondelegation claims seem to be rare in the long history of the federal appellate courts,[3] we explore the two recent Pennsylvania decisions in greater detail below and consider whether our own state's comparatively lively nondelegation docket is attributable to substantive doctrinal differences or simply to mere coincidence. We conclude it is the latter.

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1. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

2. Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827 (Pa. 2017); W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist. of Phila., 132 A.3d 957 (Pa. 2016).

3. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("It is true that the Supreme Court last invalidated a statute on nondelegation grounds in 1935. But it is also true the Court first invalidated a statute on nondelegation grounds in exactly the same year, notwithstanding a number of previous opportunities. . . . We might say that the [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).").

I. DELEGATION OF LEGISLATIVE AUTHORITY TO AN UNELECTED "SCHOOL REFORM COMMISSION"

The first of these recent nondelegation cases, *West Philadelphia Achievement Charter Elementary School v. School District of Philadelphia*,[4] involved a challenge to provisions of Pennsylvania's Public School Code[5] that govern financially distressed school districts. This now partially invalidated "Distress Law" worked as follows. If a school district failed to meet certain state academic standards or budgetary requirements, the Commonwealth's Secretary of Education could declare the district to be distressed.[6] Upon such a declaration, the powers of the Philadelphia School Board would be suspended and a five-member School Reform Commission would be created to oversee the district.[7] The Commission would include some members appointed by the Governor and some members appointed by the Mayor of Philadelphia.[8] By law, the newly formed Commission would be given all powers previously possessed by the school board as well as broad statutory authority to suspend almost any requirement of the Public School Code or any regulation of the State Board of Education.[9]

4. 132 A.3d 957 (Pa. 2016)

5. *Id.* at 958; 24 P.S. §§ 1-101 – 27-2702.

6. W. Phila. Achievement Charter Elementary Sch., 132 A.3d at 958.

7. *Id.* at 959.

8. *Id.*

9. 24 P.S. § 6-696(i)(3) (authorizing the Commission to "suspend the requirements of" the School Code and its associated departmental regulations). The Pennsylvania General Assembly did impose minor limits on the Commission's authority. For example, the legislature placed a few provisions of the Public School Code beyond the reach of the Commission's suspension power, though most of the non-suspendable provisions related to school board elections. The General Assembly also required the Commission to submit an annual report to the Governor and to the Education Committees of both the House and the Senate detailing the distressed district's fiscal and academic performance. Finally, individual members of the Commission, as public employees, were subject to removal by the Governor for "malfeasance or misfeasance." *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 971 (Baer, J., dissenting).

The Commonwealth's Secretary of Education triggered the Distress Law in 2001 when he declared the Philadelphia School District to be financially distressed.[10] Given the Secretary's declaration, the Philadelphia School Board's powers were suspended and a five-member Commission was appointed to oversee the District.[11] The unelected Commission remained in control of the Philadelphia School District for more than fifteen years but failed to restore the District to solvency.[12]

In 2011, when one of Philadelphia's charter schools—the West Philadelphia Achievement Charter Elementary School—applied to the District for renewal of its charter, the Commission (*qua* School Board) tried to impose new conditions on the school's charter.[13] For

10. *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 959. At the time, the District had a $200 million budget shortfall that was projected to grow to $1.5 billion within five years. *See* Dale Mezzacappa, *A History Lesson on Historic Day for School Reform Commission*, CHALKBEAT PHILA. (Nov. 16, 2017, 2:31 AM), https://philadelphia.chalkbeat.org/2017/11/16/22184825/a-history-lesson-on-historic-day-for-school-reform-commission [https://perma.cc/6SRT-SP34] ("By 2000, the District's teachers were preparing to strike and its budget was facing a $200 million shortfall, projected to balloon to $1.5 billion in five years.").

11. W. Phila. Achievement Charter Elementary Sch., 132 A.3d at 959.

12. As an unelected body tasked with making cuts to public education, the School Reform Commission—perhaps unsurprisingly—was not popular with the voters of Philadelphia. That backlash only grew as school closures, teacher layoffs, and missed budget deadlines dominated the headlines throughout the Commission's tenure. See Kristen A. Graham, *Notable Moments During 17 Years of Philly's School Reform Commission*, PHILA. INQUIRER, (Jun. 29, 2018), https://www.inquirer.com/philly/education/src-timeline-20180629.html [https://perma.cc/7N53-AQGS] (detailing the Commission's efforts to slash budgets, seek new revenue sources, layoff teachers and staff, and close schools). In 2015, Philadelphia voters overwhelmingly supported abolishing the School Reform Commission in a non-binding ballot resolution. *See* Mark Dent, *A Not-So-Brief History of Philly's Rocky Relationship with the SRC*, BILLY PENN (Nov. 2, 2017), https://billypenn.com/2017/11/02/a-not-so-brief-history-of-phillys-relationship-with-the-src [https://perma.cc/7UKK-7R5P] ("About 75 percent of voters answered yes on a ballot question about disbanding the SRC and returning control of the school district to Philadelphia."). Eventually, in 2017, the Commission voted to disband itself and to return control of the District to a School Board appointed by the Mayor of Philadelphia. In the end, the Commission left the District with a projected $900 million budget deficit—essentially just as "distressed" as it had been when the Commission took over in 2001. *Id.*

13. W. Phila. Achievement Charter Elementary Sch., 132 A.3d at 959.

example, the Commission sought to cap West Philadelphia's enrollment at no more than 400 students.[14] Had the School Board still been in charge of the District, this would not have been possible. The School Code allows for the placement of "reasonable conditions" on a school's charter only when the school is in "corrective action status" following a failure to meet "adequate yearly progress for at least four consecutive years."[15] But West Philadelphia was *not* in corrective action status.[16] The Commission therefore sought to suspend the corrective-action-status provision, thus allowing it to impose new conditions on *any* school, even those that had met all yearly progress standards.[17]

The Supreme Court of Pennsylvania ultimately held that the Commission's broad suspension powers violated the nondelegation doctrine.[18] The court explained that Article II, Section 1 of the Pennsylvania Constitution states that "[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."[19] The nondelegation doctrine, which has been described as a "natural corollary" to that vesting clause,[20] prevents the General Assembly from delegating "to any other branch of government or to any other body or authority" the power to make law.[21] This prohibition has its roots in separation-of-powers principles and was championed by many of the political theorists who influenced the framers of the

14. *Id.* at 960.

15. 24 P.S. § 17-1729-A(a.1).

16. W. Phila. Achievement Charter Elementary Sch., 132 A.3d at 960.

17. *Id.* at 959–60.

18. *Id.* at 967.

19. PA. CONST. art. II, § 1.

20. Chartiers Valley Joint Schs. v. Allegheny Cnty. Bd. of Sch. Dirs., 211 A.2d 487, 492 (Pa. 1965).

21. Blackwell v. Pa. Ethics Comm'n, 567 A.2d 630, 636 (Pa. 1989).

United States Constitution as well as the constitutions of the individual states.[22]

Citing many of the same standards that the United States Supreme Court applies in nondelegation cases, the Supreme Court of Pennsylvania explained that, while the legislature may not delegate its lawmaking authority, it may establish "primary objectives or standards" and then entrust some other entity to "fill up the details" of the legislation.[23] In other words, the legislature must provide an "intelligible principle" to which the non-legislative body must conform.[24] The court also underscored that some Pennsylvania nondelegation decisions stress the importance of procedural safeguards like judicial review and notice-and-comment rulemaking, which prevent the arbitrary and capricious exercise of delegated power.[25]

Applying these precepts, the court concluded that the General Assembly did not provide any guidance or standards in the Distress Law that instructed the Commission concerning when and

22. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 87 (R. Cox ed. 1982) (stating that legislative power consists of the power "to make laws, and not to make legislators"); *see generally* BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS XI:6 (1748) (suggesting that political liberty requires a separation of legislative, executive, and judicial powers); THE FEDERALIST NO. 47 (Clinton Rossiter ed. 1961) (James Madison) (citing Montesquieu, and stating that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny").

23. *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 964 (citing Panama Ref. Co. v. Ryan, 293 U.S. 388, 426 (1935) ("Congress may . . . establish primary standards, devolving upon others the duty to carry out the declared legislative policy[.]")); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (requiring an "intelligible principle" to which the non-legislative body must conform).

24. J.W. Hampton, Jr., & Co., 276 U.S. at 409.

25. In one case, for example, the statute at issue required that the administrative agency establish neutral operating procedures, develop standardized documents, and give the public notice of proposed agency rules and regulations before promulgating them. Tosto v. Pa. Nursing Home Loan Agency, 331 A.2d 198, 203 (Pa. 1975). In upholding that law, the Pennsylvania Supreme Court described such elements as "important safeguard[s] against the arbitrariness of ad hoc decision making." *Id.* at 204.

how to wield its suspension power.[26] Instead, "the Legislature gave the [Commission] what amounts to *carte blanche* powers to suspend virtually any combination of provisions of the School Code—a statute covering a broad range of topics."[27] Along with the lack of an intelligible principle, the law did not include safeguards to protect against arbitrary, *ad hoc* decision making, such as a requirement that the Commission hold hearings, allow for public notice and comment, or explain the grounds for its suspensions in a reasoned opinion.[28] Thus, the Court concluded that the legislature, in giving the Commission almost unbridled authority to suspend the School Code, unconstitutionally delegated its lawmaking authority.[29]

II. DELEGATION OF LEGISLATIVE AUTHORITY TO THE AMERICAN MEDICAL ASSOCIATION

Only a year after *West Philadelphia Achievement Charter Elementary School*, the Pennsylvania Supreme Court heard another nondelegation challenge. In *Protz v. Workers' Compensation Appeal Board*,[30] a provision of the state's Workers' Compensation Act[31] was at issue.[32] Under the challenged law, an employer paying workers' compensation benefits could compel the claimant to undergo an impairment-rating evaluation ("IRE") after the claimant had received benefits for roughly two years.[33] During the IRE, a physician would determine the "degree of impairment" caused by the claimant's work injury using the methodology set forth in "the most recent

26. *W. Phila. Achievement Charter Elementary Sch.*, 132 A.3d at 965 (explaining that the Distress Law lacks "any discernable [*sic*] standards or restraints in relation to the selection of School Code provisions for suspension. Those high-level determinations are left entirely to the [Commission's] discretion, and it is not apparent that any mechanism exists to either channel or test the [Commission's] exercise of such discretion").

27. *Id.*

28. *Id.* at 967.

29. *Id.* at 966.

30. 161 A.3d 827 (Pa. 2017)

31. 77 P.S. §§ 1-2710.

32. *Protz*, 161 A.3d at 830.

33. *Id.* at 831 n.2.

edition" of a book published by the American Medical Association ("AMA") called the *Guides to the Evaluation of Permanent Impairment*.[34] If the claimant was rated at least fifty percent impaired, he or she would be eligible for lifetime disability benefits.[35] But if the IRE came back at less than fifty percent, the claimant would be considered only partially disabled and would be limited to a maximum of 500 weeks of workers' compensation benefits.[36]

When the legislature first enacted this statutory scheme in the mid-1990s, "the most recent edition" of the *Guides* was the Fourth Edition.[37] After that, the AMA released two major revisions: the Fifth Edition (in 2001) and the Sixth Edition (in 2008).[38] In other words, the legislature did not simply incorporate by reference the AMA's existing methodology; it effectively gave the AMA the authority to modify Pennsylvania's impairment-rating methodology whenever and however it wanted, with any changes automatically becoming law upon release.[39]

The Pennsylvania Supreme Court found that the legislature's delegation of authority to the AMA lacked an intelligible principle.[40]

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34. 77 P.S. § 511.2(1) ("When an employe[e] has received total disability compensation . . . for a period of one hundred four weeks," the employee "shall be required to submit to a medical examination . . . to determine the degree of impairment due to the compensable injury, if any. The degree of impairment shall be determined . . . pursuant to the most recent edition of the American Medical Association 'Guides to the Evaluation of Permanent Impairment.'"), *invalidated by* Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827 (Pa. 2017).

35. 77 P.S. § 511.2(2), *invalidated by* Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827 (Pa. 2017).

36. *Id.* (providing that a claimant with "a threshold impairment rating that is equal to or greater than fifty per centum" is presumed to be totally disabled); 77 P.S. § 511.2(7) (limiting partial disability payments to five hundred weeks).

37. Am. Med. Ass'n, Guides to the Evaluation of Permanent Impairment (4th ed. 1993).

38. AM. MED. ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (5th ed. 2001); AM. MED. ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (6th ed. 2008).

39. *See* 77 P.S. § 511.2(1) (stating that the most recent edition of the *Guides* is to be used when determining an individual's degree of impairment).

40. *See Protz*, 161 A.3d at 835.

The court underscored that "[t]he General Assembly did not favor any particular policies relative to the *Guides*' methodology for grading impairments, nor did it prescribe any standards to guide and restrain the AMA's discretion to create such a methodology."[41] The court also emphasized that, as in the charter school case, the legislature included no procedural safeguards "to protect against 'administrative arbitrariness and caprice.'"[42] The General Assembly did not, for example, require that the AMA hold hearings, accept public comments, or explain the grounds for its methodology in a reasoned opinion, which then could be subject to judicial review.[43] Furthermore, the AMA physicians who author the *Guides* are not public employees subject to discipline or termination for misconduct.[44]

In striking down the IRE statute for want of an intelligible principle, the court avoided the overarching question of whether the legislature can *ever* delegate to a private entity.[45] The court assumed, without deciding, that the intelligible principle inquiry governs

41. *Id.* Worse, it is not even clear that the General Assembly could have established the primary standards necessary to limit the AMA's discretion given that the AMA is a private organization. This fact is significant for two reasons. First, there are obviously constitutional restrictions on the legislature's ability to dictate to a private organization what it should or should not publish. *See generally* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 218 (2020) (holding that the First Amendment prevents the government from forcing a private organization to profess publicly a viewpoint not held by the organization); *cf.* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."). Second, use of the *Guides* is not unique to Pennsylvania law, making it unlikely that the AMA would take marching orders from any one state legislature. *See* AM. MED. ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 20 (6th ed. 2008) ("In the United States, 44 states, 2 commonwealths, and federal employee compensation systems (in about 90+% of US jurisdictions) either mandate or recommend using the *Guides* to measure impairment in workers' compensation claims.").

42. *Protz*, 161 A.3d at 836 (quoting Tosto v. Pa. Nursing Home Loan Agency, 331 A.2d 198, 203 (Pa. 1975)).

43. *Id.*

44. *Id.*

45. *Id.* at 837–38.

both public and private delegations alike.[46] While delegations to private persons or entities may strike some as more offensive to our constitutional order than delegations to the executive or judicial branches, neither the Pennsylvania Supreme Court nor the United States Supreme Court has directly held that a more restrictive test governs in such cases.[47] And there's at least a colorable argument that an intelligible principle is all that the Constitution requires for *any* delegation, public or private. As Justice Scalia explained in *Mistretta v. United States*,[48] when the legislature supplies an intelligible principle, it is not technically delegating *its lawmaking power* at all.[49] Thus, although the phrase "excessive delegation" is sometimes used in these cases, "what is really at issue is whether there has been *any* delegation of legislative power," which occurs only when the legislature "authorizes the exercise of executive or judicial power without adequate standards."[50] Despite this technical

46. *See id.* at 838 (explaining that the IRE provision "could not withstand constitutional scrutiny even if the AMA were a governmental body"). The United States Supreme Court similarly has avoided deciding whether the intelligible-principle test applies when the legislature delegates authority to a private person or group. In Ass'n of Am. R.R. v. U.S. Dep't of Transp., 721 F.3d 666 (D.C. Cir. 2013), *vacated*, 575 U.S. 43 (2015), the D.C. Circuit struck down a statute delegating power to Amtrak, concluding that delegations to private entities are per se unconstitutional. On appeal, however, the United States Supreme Court resolved the case on very narrow, fact-specific grounds, finding that Amtrak is a public (rather than private) entity.

47. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (stating that delegation to interested private parties "is delegation in its most obnoxious form" but nonetheless declining to apply different standards to private and public delegations); *Protz*, 161 A.3d at 837–38 (raising concerns regarding delegation to private parties but noting that Pennsylvania Supreme Court precedent has not unequivocally prohibited delegation to private actors).

48. 488 U.S. 361 (1989)

49. *Id.* at 419 ("The focus of controversy, in the long line of our so-called excessive delegation cases, has been whether the *degree* of generality contained in the authorization for exercise of executive or judicial powers in a particular field is so unacceptably high as to *amount* to a delegation of legislative powers.").

50. *Id.*; *see also* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 957 (2014) ("The structure of non-delegation doctrine suggests that it should be irrelevant whether the recipient of the delegation is public or private: the focus is whether Congress has given up too much power, not to whom it's given the power.").

nuance, some have argued that a stricter inquiry should apply when the legislature vests private persons or groups with official authority.[51]

III. WHAT COULD EXPLAIN PENNSYLVANIA'S UNUSUALLY ACTIVE NONDELEGATION DOCKET?

From these recent cases, it might be tempting to assume that Pennsylvania must have a particularly strict nondelegation doctrine. After all, the Pennsylvania Supreme Court has been striking down laws on nondelegation grounds, while the United States Supreme Court has, since 1935, upheld every statute that has ever been challenged under the analogous federal theory.[52] The United States Supreme Court has even upheld statutes with underlying intelligible principles so broad that critics argue they do practically nothing to guide the delegate's discretion.[53] Upon closer inspection,

51. *See Carter Coal*, 298 U.S. at 311 ("This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."); James M. Rice, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CALIF. L. REV. 539, 572 (2017) (arguing that "the Supreme Court should revive the private nondelegation doctrine of *Carter Coal*"); Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 469 (Tex. 1997) ("[W]e believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts."); David N. Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 834 (1987) (arguing that the nondelegation doctrine requires "heightened judicial scrutiny where matters of great concern to the state and interests protected by the Fourteenth Amendment are being handed over to private enterprise for the first time").

52. For example, the United States Supreme Court has upheld delegations of authority to administrative agencies to regulate "excessive profits" during wartime, Lichter v. United States, 334 U.S. 742, 746 (1948), to fix "fair and equitable" commodities prices, Yakus v. United States, 321 U.S. 414, 423–26 (1944), to determine "just and reasonable" rates, FPC v. Hope Natural Gas Co., 320 U.S. 591, 619–20 (1944) (Black, J., concurring), and to issue air quality standards that are "requisite to protect the public health," Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 472 (2001).

53. *See, e.g.*, NBC v. United States, 319 U.S. 190, 225–26 (1943) (holding that Congress supplied an intelligible principle when it instructed an agency to act in the "public interest"); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932) (same).

though, the statutes that the Pennsylvania Supreme Court struck down in 2016 and 2017 lacked *any* standards at all to guide and restrain the exercise of the delegated administrative functions, meaning that they were most like the statutes that the United States Supreme Court struck down in *Schechter Poultry* and *Panama Refining*.[54]

If Pennsylvania's nondelegation jurisprudence differs from its federal counterpart, it's likely only at the margins. The United States Supreme Court perhaps has been more willing than the Pennsylvania Supreme Court to discern an intelligible principle based upon the underlying statute's background, context, and general purpose.[55] And, while the Pennsylvania Supreme Court and many other state courts have stressed the importance of "procedural mechanisms that serve to limit or prevent the arbitrary and capricious exercise of delegated power," the United States Supreme Court has not.[56] But the fact that these are fairly minor differences

54. *Mistretta*, 488 U.S. at 373 n.7 ("In *Schechter* and *Panama Refining* the Court concluded that Congress had failed to articulate any policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power.").

55. One example of this phenomenon is *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946), where the Court upheld a statute that instructed the SEC to forbid reorganization plans that "unfairly or inequitably" distribute voting power. *Id.* at 104. While those words may seem hollow, the Court found that the terms "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *Id.* at 104. *Contra* W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist. of Phila., 132 A.3d 957, 965 (Pa. 2016) ("To the extent Respondents couch the legislative intention to remediate the School District's financial distress as a standard, moreover, we find this to be more aptly described as the legislative *objective*.").

56. Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827, 834 (Pa. 2017); *see* Trinity Med. Ctr. v. N.D. Bd. of Nursing, 399 N.W.2d 835, 845 n.6 (N.D. 1987) ("[C]lear legislative standards are no longer required to avoid an unconstitutional delegation where the rights of the public are protected against an abuse of administrative power by (1) adequate 'procedural safeguards' or (2) adequate 'administrative standards,' which have been established by the agency pursuant to a grant of rulemaking authority."); White River Shale Oil Corp. v. Pub. Serv. Comm'n, 700 P.2d 1088, 1091 (Utah 1985) ("As long as this delegation of authority is accompanied by adequate guiding standards and procedural safeguards to ensure that decision making by the commission is not arbitrary

tends to illustrate the flexibility inherent in the intelligible principle test.[57] By contrast, there are some originalist scholars and jurists who advocate for a truly strict nondelegation doctrine.[58] For now, though, Pennsylvania's nondelegation jurisprudence has not ventured down that path, and we still follow roughly the same "intelligible principle" standard that Chief Justice Taft announced almost a century ago.[59]

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and unreasoned, it is a constitutional delegation."); State v. Broom, 439 So. 2d 357, 362 (La. 1983) ("[T]o insure that the regulatory body is not given unbridled discretion there is a need to examine more acutely the procedural safeguards mandated by the Legislature and/or adopted by the administrative agency, while de-emphasizing the imperative need for comprehensive statutory standards."); Adams v. N.C. Dep't of Nat. & Econ. Res., 249 S.E.2d 402, 411 (N.C. 1978) (holding that "the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards").

57. Indeed, the Pennsylvania Supreme Court has never struck down a statute that contained an intelligible principle but lacked other procedural safeguards. Nevertheless, it remains theoretically possible that the absence of an intelligible principle could be cured with adequate procedural safeguards that serve as a check on delegated power. *See* 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 2.08, at 108 (1st ed. 1958) ("Putting some words into a statute that a court can call a legislative standard is not a very good protection against arbitrariness. The protections that are effective are hearings with procedural safeguards, legislative supervision, and judicial review."); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 726 (1969) ("Safeguards are usually more important than standards, although both may be important. The criterion for determining the validity of a delegation should be the totality of the protection against arbitrariness, not just the one strand having to do with statutory standards.").

58. *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328–29 (2002) ("After 1935, the Court has steadfastly maintained that Congress need only provide an 'intelligible principle' to guide decisionmaking, and it has steadfastly found intelligible principles where less discerning readers find gibberish." (footnote omitted)); Gundy v. United States, 139 S. Ct. 2116, 2136–37 (2019) (Gorsuch, J., dissenting) (arguing that the legislature can only delegate power (1) to "fill up the details"; (2) to make the application of a rule dependent on the finding of a specific fact; or (3) to assign non-legislative responsibilities to either the judicial or executive branch).

59. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).