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# Is It Time to Bury Barry? Why an Old Change at the Legislature Requires a New Look at Washington's Nondelegation Doctrine

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# IS IT TIME TO BURY *BARRY*? WHY AN OLD CHANGE AT THE LEGISLATURE REQUIRES A NEW LOOK AT WASHINGTON'S NONDELEGATION DOCTRINE

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*Abstract:* Fifty years ago, the Supreme Court of Washington adopted a relaxed version of the nondelegation doctrine in a case called *Barry and Barry v. Department of Motor Vehicles*. The *Barry* rule, which only loosely restricts the delegation of policy-making power from the Legislature to other bodies, is now widely applied in Washington State. However, the *Barry* Court's reasons for adjusting the nondelegation doctrine were based on an outdated understanding of the Legislature, especially its regular session schedule. While the Legislature's regular sessions have changed since 1972—becoming longer and more frequent due to constitutional amendment—the Court has not considered how these changes in legislative operations may have undermined *Barry*'s lax approach to the delegation of legislative authority. Washington courts should take a fresh look at the *Barry* rule in the light of today's legislative realities. A nondelegation doctrine that better aligns with the activities of the modern Legislature would help preserve the separation of powers in Washington State.



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## INTRODUCTION

This Essay contends that the Supreme Court of Washington should reassess its rationale for Washington's version of the nondelegation doctrine. A principle designed to safeguard the constitutional separation of powers, the nondelegation doctrine prevents a legislature from transferring to other branches of the government the legislature's exclusive "power to enact, suspend, and repeal laws."[1] In Washington, the Court transformed the nondelegation doctrine in the 1972 case *Barry and Barry, Inc. v. Department of Motor Vehicles*, which loosened the rule against delegating policymaking authority to non-legislative bodies.[2]

*Barry* partly rests on the notion that Washington's legislature met too infrequently to keep up with the changing needs of the public.[3] When the Court decided *Barry*, the legislature held a regular session on a biennial basis.[4] Noting that the legislature had an infrequent meeting schedule, the *Barry* Court reasoned that permitting broad delegation of authority from the legislature would help other actors within the government perform tasks required of responsive policymakers.[5] Perhaps this was a logical position at the time, but *Barry*'s reasoning soon became obsolete after Washington adopted its current pattern of holding a regular legislative session every year.[6] Therefore, the *Barry* decision is built upon an outdated understanding of the legislature's schedule—an anachronism the Court has not addressed.

The Court's failure to revisit *Barry* after all this time means that Washington is still applying a permissive form of the nondelegation doctrine developed to accommodate a version of Washington's part-time legislature that has been extinct for more than forty years. The *Barry* framework has significant consequences for the separation of powers in Washington.[7] A permissive nondelegation doctrine allows the legislature

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1. Gonzales v. Inslee, 21 Wash. App. 110, 130, 504 P.3d 890, 901 (2022) (quoting Diversified Inv. P'ship v. Dep't of Soc. & Health Servs., 113 Wash. 2d 19, 24, 775 P.2d 947, 950 (1989)).

2. Barry & Barry, Inc. v. Dep't of Motor Vehicles, 81 Wash. 2d 155, 159, 500 P.2d 540, 542–43 (1972), *appeal dismissed,* 410 U.S. 977 (1973). *See* Yakima Cnty. Clean Air Auth. v. Glascam Builders, Inc., 85 Wash. 2d 255, 263, 534 P.2d 33, 37 (1975) (Finley, J., concurring) (describing *Barry* as "mark[ing] a profound and significant change in legal philosophy with respect to the delegation of legislative power to administrative agencies.").

3. *Barry*, 81 Wash. 2d at 160, 500 P.2d at 543.

4. *See id.*

5. *Id.*

6. WASH. CONST. art. II, § 12; *see* S.J. Res. 110, 46th Leg., 1st Spec. Sess. (Wash. 1979) (codified as amended at WASH. CONST. art. II, § 12).

7. *See* Davison v. State, 196 Wash. 2d 285, 294, 466 P.3d 231, 236 (2020) ("The Washington Constitution divides our state government among three coequal branches: the legislative department,

to avoid accountability by delivering its legislative power to other branches of the government and allows non-legislative agencies to exercise the lawmaking power without the backstop of elections and the constitutionally prescribed legislative process.[8]

This Essay attempts to shed light on the logical underpinnings of Washington's nondelegation doctrine and encourages the Supreme Court of Washington to rethink its approach. First, this Essay sets a foundation by discussing the nondelegation doctrine's relationship to the separation of powers and the *Barry* Court's understanding of the nondelegation doctrine.[9] The Essay also examines the facts of the *Barry* case and summarizes the Court's reasons for resetting the nondelegation doctrine.[10] The Essay then highlights the *Barry* Court's key assumption about the legislature's schedule that motivated the Court's decision.[11] Because that assumption has become tenuous, the Essay argues that the Court should reexamine its formulation of the nondelegation doctrine as established in *Barry*.[12] Finally, the Essay proposes that *Barry*'s weak nondelegation doctrine is unnecessary in today's legislative environment.[13]

## I. *BARRY* AND THE NONDELEGATION DOCTRINE IN WASHINGTON

The nondelegation doctrine stems from the foundational principle of the separation of powers. This Part remarks on the relationship between those concepts and then examines how the Supreme Court of Washington altered the nondelegation doctrine in *Barry*.

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the executive, and the judiciary."); Colvin v. Inslee, 195 Wash. 2d 879, 892, 467 P.3d 953, 961 (2020) ("The fundamental functions of each branch are familiar to most Washingtonians. The legislative branch writes laws . . . the executive branch faithfully executes those laws . . . and '[i]t is emphatically the province and duty of the judicial department to say what the law is . . . .") (citations omitted).

8. *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., __ U.S. __, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring). "The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. 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.' But the Constitution imposes some boundaries here." *Id.* (quoting Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. PUB. POL'Y 147, 154 (2017)).

9. *See infra* Part I.A–B.

10. *See infra* Part I.B.

11. *See infra* Part II.A.

12. *See infra* Part II.A.

13. *See infra* Part II.B.

### *A. Separation of Powers and the Nondelegation Doctrine*

The separation of powers among the three branches of government is "one of the cardinal and fundamental principles of the American constitutional system, both state and federal."[14] It "ensure[s] that the fundamental functions of each coordinate branch of government remain inviolate," including the "fundamental function of the legislature . . . 'to set policy and to draft and enact laws.'"[15] The separation of powers prevents the concentration of the different types of governmental power in a single, all-powerful branch of the government—thereby preserving the people's liberty against the threat of tyranny.[16]

In Washington, the state constitution vests the legislative power in the state legislature, which consists of the Senate and House of Representatives.[17] Through this constitutional prescription, the people of Washington placed the lawmaking power exclusively in the hands of legislators.[18]

The nondelegation doctrine is intended to protect the people's placement of the legislative power in two ways. First, it restrains a legislature "from transferring its power to another branch of [g]overnment."[19] Second, the doctrine restricts non-legislative branches

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14. Wash. State Legislature v. Inslee, 198 Wash. 2d 561, 567, 498 P.3d 496, 502 (2021) (quoting Wash. State Motorcycle Dealers Ass'n v. State, 111 Wash. 2d 667, 674, 763 P.2d 442, 446 (1988)).

15. *Wash. State Legislature*, 198 Wash. 2d at 579, 498 P.3d at 508 (quoting Hale v. Wellpinit Sch. Dist. No. 49, 165 Wash. 2d 494, 506, 198 P.3d 1021, 1026 (2009); Carrick v. Locke, 125 Wash. 2d 129, 135, 882 P.2d 173, 177 (1994)).

16. *See* Collins v. Yellen, __ U.S. __, 141 S. Ct. 1761, 1780 (2021); THE FEDERALIST No. 47, at 269 (James Madison) (Clinton Rossiter ed., 1969) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

17. WASH. CONST. art. II, § 1 ("The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.").

18. Washington's constitution reserves the powers of initiative and referendum to the people. WASH. CONST. art. II, § 1. The reservation of certain lawmaking powers is an important component of Washington's system of government, but it is not material to the analysis presented in this Essay.

19. Gundy v. United States, __ U.S. __, 139 S. Ct. 2116, 2121 (2019) ("The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.") (plurality opinion); State v. Batson, 196 Wash. 2d 670, 674, 478 P.3d 75, 77 (2020) ("'[I]t is unconstitutional for the Legislature to abdicate or transfer its legislative function to others.'") (quoting Brower v. State, 137 Wash. 2d 44, 54, 969 P.2d 42, 49 (1998)); Gonzales v. Inslee, 21 Wash. App. 110, 130, 504 P.3d 890, 901 (2022) ("[T]he legislature cannot delegate purely legislative functions to other branches of government.") (citing Auto. United Trades Org. v. State, 183 Wash. 2d 842, 859, 357 P.3d 615, 623 (2015)); Associated Gen. Contractors of Wash. v. State, 19 Wash. App. 99, 108, 494 P.3d 443, 448

from legislating, recognizing that the legislature is the only branch that may make laws.[20] Without such constraints, courts and scholars observe that an overzealous legislature might destroy the people's design for their government through the act of delegating power to others.[21] Nevertheless, the legislature commonly delegates authority to other entities, such as executive branch agencies or even nongovernmental organizations.[22]

### *B. The* Barry *Decision*

The nondelegation doctrine should give life to the separation of powers, but Washington courts shifted in their application of the doctrine in *Barry*.[23] Prior to *Barry*, Washington's approach to the nondelegation doctrine was more restrictive, requiring "specific legislative standards" for the delegation of power by the legislature to other entities.[24] The Supreme Court of Washington significantly relaxed this formulation by announcing in *Barry* that "the requirement of specific legislative standards for the delegation of legislative power is excessively harsh and needlessly difficult to fulfill."[25]

*Barry* scrutinized a state Department of Motor Vehicles rule that capped the fees employment agencies could charge their clients.[26] The plaintiff employment agencies and counselors in those agencies brought

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(2021) (quoting *Batson*, 196 Wash. 2d at 674, 478 P.3d at 77), *rev. granted sub nom.* Associated Gen. Contractors of Wash. v. Inslee, 198 Wash. 2d 1032, 501 P.3d 145 (2022); *see* State v. Dougall, 89 Wash. 2d 118, 122–23, 570 P.2d 135, 138 (1977) ("While the legislature may enact statutes which adopt *existing* federal rules, regulations, or statutes, legislation which attempts to adopt or acquiesce in *future* federal rules, regulations, or statutes is an unconstitutional delegation of legislative power and thus void.") (emphasis in original).

20. *Gonzales*, 21 Wash. App. at 130, 504 P.3d at 901.

21. *Gundy*, 139 S. Ct. at 2133–34 (Gorsuch, J., dissenting). Professor Hamburger identifies the people's establishment of their government as the original delegation of authority and labels as "subdelegation" the further transfer of power from the legislature to executive branch agencies. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 377–402 (2014). "Delegation was the principle by which the people established their republic and kept their power superior to that of their government, including its legislature." *Id.* at 380.

22. Evidence of this phenomenon is easy to find in the 227 titles that comprise the Washington Administrative Code, the collection of rules adopted by non-legislative agencies, where unelected officials charged by the legislature to regulate the public create state policy. WASH. ADMIN. CODE (2022), apps.leg.wa.gov/wac/. *See* United Chiropractors of Wash. v. State, 90 Wash. 2d 1, 5, 578 P.2d 38, 40 (1978) ("Delegation to a private organization raises concerns not present in the ordinary delegation of authority to a governmental administrative agency.").

23. Barry & Barry, Inc. v. Dep't of Motor Vehicles, 81 Wash. 2d 155, 159, 500 P.2d 540, 542 (1972), *appeal dismissed*, 410 U.S. 977 (1973).

24. *Id.*

25. *Id.*

26. *Id.* at 156, 500 P.2d at 541.

suit to block the Department from implementing the fee cap.[27] They claimed that the controlling statute unconstitutionally delegated authority to the Department because the legislature did not provide appropriate legislative standards to limit the Department's discretion over the fee schedule.[28] The statute contained two brief but broad provisions that required employment agencies to obtain the Department director's approval for the use of a contract or fee schedule, and only required the director to issue "reasonable rules" for the program "from time to time."[29]

The Court sided with the Department and upheld the statute that authorized the Department's fee-setting authority.[30] The Court concluded that the statute's delegation provisions constitutionally authorized the Department to cap employment agency fees at the Department director's determined amounts.[31]

In stark contrast to the old requirement of "specific legislative standards," neither statutory provision established meaningful standards, guidelines, or a range of permissible fees for the Department to impose.[32] The Court recited precedent that had previously upheld delegations of "administrative power" to different entities under a rule requiring "reasonable administrative standards."[33] It also reiterated that its earlier opinions had emphasized that the legislature "cannot delegate its power to make a law."[34] However, the Court concluded that to require an exact standard would have been unnecessary because Washington's nondelegation doctrine should not demand that the legislature provide "specific or precise standards" when assigning a policymaking task, such as the creation of a fee schedule, to the Department.[35]

The Court based its new broad approach to delegation on three justifications.[36] Of primary importance for this Essay, the Court reasoned that a part-time legislature simply did not have sufficient policymaking capacity.[37] When the Court decided *Barry*, the Washington legislature

27. *Id.* at 157, 500 P.2d at 542.

28. *Id.* at 158, 500 P.2d at 542.

29. *Id.* at 157–58, 500 P.2d at 542.

30. *Id.*

31. *Id.* at 158, 500 P.2d at 542.

32. *Id.* at 159, 500 P.2d at 542.

33. *Id.* at 158, 500 P.2d at 542 (quoting Keeting v. Pub. Util. Dist. 1, 49 Wash. 2d 761, 767, 306 P.2d 762, 766 (1957)).

34. *Id.* at 159, 500 P.2d at 542 (quoting Carstens v. De Sellem, 82 Wash. 643, 650, 144 P. 934, 937 (1914)).

35. *Id.* at 163, 500 P.2d at 545 (emphasis omitted).

36. *Id.* at 159–61, 500 P.2d at 543.

37. *Id.* at 160, 500 P.2d at 543.

only met in regular session for sixty days every two years.[38] The Court worried that the legislature would not have the opportunity to adopt standards "and then alter [them] periodically to meet the changing needs of . . . the public."[39] In addition, the Court opined that the "efficient operation" of government would be frustrated if it was prevented from deciding policies on a case-by-case basis at an administrative level, and that the needs of modern government required the delegation of legislative power "without specific guiding standards."[40]

To reach its conclusion that the fee statute was constitutional, the *Barry* Court had to redefine its approach to the nondelegation doctrine. The Court reformulated the nondelegation doctrine with a new two-prong test that it would thereafter use to determine when the delegation of "legislative power" to non-legislative agencies is appropriate.[41] As devised by the Court, the first prong of the *Barry* test asks whether "the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it."[42] The second prong asks whether "procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power."[43]

*Barry* created a permissive nondelegation doctrine for Washington. Now, *Barry* has become a well-worn feature of Washington law.[44] It often

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38. *See id.* The original constitutional text read as follows: "The first legislature shall meet on the first Wednesday after the first Monday in November, A. D., 1889. The second legislature shall meet on the first Wednesday after the first Monday in January, A. D., 1891, and sessions of the legislature shall be held biennially thereafter, unless specially convened by the governor, but the times of meeting of subsequent sessions may be changed by the legislature. After the first legislature the sessions shall not be more than sixty days." WASH. CONST. art. II, § 12 (1889).

39. *Barry*, 81 Wash. 2d at 160, 500 P.2d at 543.

40. *Id.* at 159–60, 500 P.2d at 543 (emphasis omitted).

41. *Id.* at 159, 500 P.2d at 542–43.

42. *Id.*

43. *Id.* at 159, 500 P.2d at 543 (emphasis omitted); *see* State v. Simmons, 152 Wash. 2d 450, 455, 98 P.3d 789, 791 (2004).

44. *See, e.g.*, Auto. United Trades Org. v. State, 183 Wash. 2d 842, 357 P.3d 615 (2015); Chi. Title Ins. Co. v. Wash. State Off. of Ins. Comm'r, 178 Wash. 2d 120, 309 P.3d 372 (2013); Brown v. Vail, 169 Wash. 2d 318, 237 P.3d 263 (2010); Pierce Cnty. v. State, 159 Wash. 2d 16, 148 P.3d 1002 (2006); Larson v. Seattle Popular Monorail Auth., 156 Wash. 2d 752, 131 P.3d 892 (2006); *Simmons*, 152 Wash. 2d at 450, 98 P.3d at 789; State *ex rel.* Peninsula Neighborhood Ass'n v. Wash. State Dep't of Transp., 142 Wash. 2d 328, 12 P.3d 134 (2000); McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs., 142 Wash. 2d 316, 12 P.3d 144 (2000); King Cnty. v. Taxpayers of King Cnty., 133 Wash. 2d 584, 949 P.2d 1260 (1997); Mun. of Metro. Seattle v. Div. 587, Amalgamated Transit Union, 118 Wash. 2d 639, 826 P.2d 167 (1992); Mun. of Metro. Seattle v. Pub. Emp. Rels. Comm'n, 118 Wash. 2d 621, 826 P.2d 158 (1992); Diversified Inv. P'ship v. Dep't of Soc. & Health Servs., 113 Wash. 2d 19, 775 P.2d 947 (1989); Asarco, Inc. v. Puget Sound Air Pollution Control Agency, 112 Wash. 2d 314, 771 P.2d 335 (1989); Mahoney v. Shinpoch, 107 Wash. 2d 679, 732 P.2d 510

reappears when Washington's nondelegation doctrine is applied in cases that involve questions about the proper exercise of authority for a given public policy.[45] Under *Barry*, Washington courts do not stop the legislature from giving policymaking authority to another entity if the legislature *generally* determines who gets it, what they may do with it, and that it is not subject to abuse.[46] In the words of Justice Finley, who authored the *Barry* opinion, this reimagining of the nondelegation doctrine "marked a profound and significant change in legal philosophy with respect to the delegation of legislative power to administrative agencies."[47]

Fifty years after *Barry*, Washington remains among states where a "weak" version of the nondelegation doctrine prevails.[48] According to

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(1987); Hi-Starr, Inc. v. Wash. State Liquor Control Bd., 106 Wash. 2d 455, 722 P.2d 808 (1986); Earle M. Jorgensen Co. v. City of Seattle, 99 Wash. 2d 861, 665 P.2d 1328 (1983); State v. Holmes, 98 Wash. 2d 590, 657 P.2d 770 (1983); Nw. Gillnetters Ass'n v. Sandison, 95 Wash. 2d 638, 628 P.2d 800 (1981); State v. Ermert, 94 Wash. 2d 839, 621 P.2d 121 (1980); State v. Bryan, 93 Wash. 2d 177, 606 P.2d 1228 (1980); State v. Crown Zellerbach Corp., 92 Wash. 2d 894, 602 P.2d 1172 (1979); *In re* Powell, 92 Wash. 2d 882, 602 P.2d 711 (1979); McDonald v. Hogness, 92 Wash. 2d 431, 598 P.2d 707 (1979); Weyerhaeuser Co. v. Sw. Air Pollution Control Auth., 91 Wash. 2d 77, 586 P.2d 1163 (1978); Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 578 P.2d 1309 (1978); United Chiropractors of Wash., Inc. v. State, 90 Wash. 2d 1, 578 P.2d 38 (1978); State *ex rel.* Pub. Disclosure Comm'n v. Rains, 87 Wash. 2d 626, 555 P.2d 1368 (1976); Lindsay v. City of Seattle, 86 Wash. 2d 698, 548 P.2d 320 (1976); Hama Hama Co. v. Shorelines Hearings Bd., 85 Wash. 2d 441, 536 P.2d 157 (1975); Yakima Cnty. Clean Air Auth. v. Glascam Builders, Inc., 85 Wash. 2d 255, 534 P.2d 33 (1975); Fritz v. Gorton, 83 Wash. 2d 275, 517 P.2d 911 (1974); Wash. State Sch. Dirs. Ass'n v. Dep't of Lab. & Indus., 82 Wash. 2d 367, 510 P.2d 818 (1973); State *ex rel.* Standard Mining & Dev. Corp. v. City of Auburn, 82 Wash. 2d 321, 510 P.2d 647 (1973).

45. Recent cases featuring *Barry* include lawsuits about the authority to set prevailing wages for employees on public works projects, electric rates for cryptocurrency mining, and even the state's response to the COVID-19 pandemic. Slidewaters LLC v. Wash. State Dep't of Lab. & Indus., 4 F.4th 747, 756 (9th Cir. 2021) (citing *Barry* for the proposition that "[t]he delegation of power by the legislature to the executive to act in a time of emergency under the standards set out by the legislature and using the procedures dictated by the legislature does not present separation of powers concerns."); Blocktree Props., LLC v. Pub. Util. Dist. No. 2 of Grant Cnty., 380 F. Supp. 3d 1102, 1116 (E.D. Wash. 2019); Associated Gen. Contractors of Wash. v. State, 19 Wash. App. 2d 99, 108, 494 P.3d 443, 448 (2021), *rev. granted sub nom.* Associated Gen. Contractors of Wash. v. Inslee, 198 Wash. 2d 1032, 501 P.3d 145 (2022).

46. *See Barry*, 81 Wash. 2d at 159, 500 P.2d at 542–43; City of Auburn v. King Cnty., 114 Wash. 2d 447, 452, 788 P.2d 534, 537 (1990) ("Administrative procedures tending to discourage arbitrary action provide adequate safeguards when combined with limited judicial review."); *see also Blocktree Props., LLC*, 380 F. Supp. 3d at 1116 (finding that judicial review and public comment may provide sufficient procedural safeguards against the abuse of discretion to satisfy *Barry*).

47. *Yakima Cnty. Clean Air Auth.*, 85 Wash. 2d at 263, 534 P.2d 33 at 37 (Finley, J., concurring).

48. Joseph Postell, *The Myth of the State Nondelegation Doctrines* 45–46 (The C. Boyden Gray Ctr. for the Study of the Admin. State, Antonin Scalia L. Sch., Geo. Mason Univ., Working Paper 21–30, 2021), https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2021/07/Postell-The-Myth-of-the-State-Nondelegation-Doctrines.pdf [https://perma.cc/74MK-M8LC] (classifying Washington as a "weak" state for the nondelegation doctrine); *see* Jim Rossi, *Institutional Design and*

recent scholarship, Washington is one of the states where the nondelegation doctrine has not been applied to invalidate a statute since 1980.[49]

Yet *Barry*'s logic applied to a legislature that kept a different calendar than the one that is used today.[50] As previously mentioned, the state constitution originally established a sixty-day, biennial, regular legislative session.[51] Washingtonians later amended their constitution to augment the legislature's schedule.[52] In 1979—seven years after *Barry*—Washington voters passed the 68th Amendment, which requires the legislature to meet more often and for longer periods.[53] Since then, the legislature has met for a 105-day regular session in odd-numbered years and a sixty-day regular session in even-numbered years.[54] The next Part of the Essay explains why this change in the legislature's schedule means *Barry* has become untethered from the practical operations of the Washington legislature.

## II. *BARRY* AND TODAY'S LEGISLATURE

This Part examines whether *Barry*'s reasons for reformulating the nondelegation doctrine in Washington make sense today. We must first identify how the *Barry* Court's assumption about the old legislative calendar influenced the Court's approach to the nondelegation doctrine.[55] Then, this Part will explore how the other bases for the *Barry* decision fall away when the central misconception about legislative capacity is

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*the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1191–92 (1999) (classifying Washington as a "'weak' nondelegation" state); Gary J. Greco, *Survey, Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 598–99 (1994) (classifying Washington as among the states with the most lenient nondelegation doctrines, where most legislative delegations of power to administrative agencies are upheld); Tim J. Filer, *The Scope of Judicial Review of Agency Actions in Washington Revisited – Doctrine, Analysis, and Proposed Revisions*, 60 WASH. L. REV. 653, 653 (1985) ("[T]he Washington Supreme Court has interpreted the state constitution to allow broad delegations of legislative power to administrative agencies.").

49. Postell, *supra* note 48, at 45–46. In the category of weak nondelegation states, Postell lists Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Indiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Washington, Wisconsin, and Wyoming. *Id.*

50. *See Barry*, 81 Wash. 2d at 160, 500 P.2d at 542–43.

51. *Supra* note 38 and accompanying text.

52. S.J. Res. 110, 46th Leg., 1st Spec. Sess. (Wash. 1979) (codified as amended at WASH. CONST. art. II, § 12).

53. *Id.*

54. WASH. CONST. art. II, § 12.

55. *See infra* Part II.A.

addressed.[56]

Before looking at those specific issues, it must be noted that the *Barry* Court did not thoroughly grapple with the important separation of powers problem that loomed over the case, that is, whether assigning to an unelected official the unlimited power to set fees for an entire industry undermined the legislature's accountability for the decisions the official would make.[57] However, even without squarely confronting that basic and important question, the Court's endorsement of a permissive version of the nondelegation doctrine loses some force when the legislature has the ability to take an active role in the policymaking process.[58]

### *A.* Barry*'s Outdated Judgment About the Legislature's Capacity*

Although the state constitution vests the legislative power in the legislature, the *Barry* rule allows the legislature to assign policymaking responsibility to other bodies "unfettered by any so-called legislative standards."[59] *Barry* assumed that, because of the legislature's original infrequent meeting schedule, it was necessary for the legislature to delegate policymaking authority to the agencies that administer government programs on a full-time basis.[60]

In particular, the *Barry* Court posited that when "the legislature meets only biennially," it will lack opportunities to alter policies "to meet the changing needs of . . . the public as revealed by administrative experience."[61] The legislature's original calendar convinced the Court that the legislature could not keep up with "various economic factors" that would "affect any meticulously prescribed legislative standards" adopted on a biennial basis.[62] Thus, the *Barry* Court's specific concern about an absent legislature appears to have driven the Court to relax the nondelegation doctrine in Washington.[63]

But the *Barry* Court's doubts about the legislature's ability to engage in policymaking are not well-founded today. With the passage of the 68th Amendment, the modern legislature meets in regular session more

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56. *See infra* Part II.B.

57. *See* Barry & Barry, Inc. v. Dep't of Motor Vehicles, 81 Wash. 2d 155, 162, 500 P.2d 540, 544 (1972), *appeal dismissed*, 410 U.S. 977 (1973) (construing the state and federal constitutions to "mean only that legislative power is delegated *initially and fundamentally* to the legislative bodies.") (emphasis in original).

58. *See id.* at 160, 500 P.2d at 543.

59. *Id.* at 158, 500 P.2d at 542.

60. *Id.* at 160, 500 P.2d at 543.

61. *Id.*

62. *Id.*

63. *Id.*

often and for far longer periods.[64] Moreover, the legislature employs numerous full-time lawyers and other professionals with expertise in all areas of public policy.[65] And the legislature can call itself into session if quick action on an emerging issue of public concern becomes necessary.[66] In short, the *Barry* Court based its decision to modify the traditional nondelegation doctrine on an assumption about legislative incapacity that may have seemed persuasive in 1972, but which does not fit with the legislature's current calendar or capabilities.[67]

It is also important to highlight that today's Washington state legislators are not strictly part-time public servants. Their jobs do not stop when sessions end.[68] According to a recent survey from the National Conference of State Legislatures, Washington legislators typically spend more than two-thirds of a full-time job on legislative duties.[69] Legislators are serving on an almost-career basis even though Washington officially has a part-time legislature.[70] Indeed, "part-time" is a misleading label for Washington's legislature because legislators serve their constituents throughout the year; they are merely barred from taking any official action on legislation when they are not assembled in session.[71] Washington's legislature has proven to be a more active policymaking body in the years since *Barry*.

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64. *See* WASH. CONST. art. II, § 12.

65. The Washington State Legislature is served by a full-time professional nonpartisan staff called the Office of Program Research and Senate Committee Services. WASH. STATE LEGISLATURE, OFFICE OF PROGRAM RESEARCH, https://leg.wa.gov/house/opr/Pages/default.aspx [https://perma.cc/VWV8-8NJX]; WASH. STATE LEGISLATURE, SENATE COMMITTEE SERVICES, https://leg.wa.gov/SENATE/COMMITTEES/Pages/default.aspx [https://perma.cc/CM38-YVDA]. Additionally, each caucus of the House and Senate employs its own full-time staff of lawyers and analysts. WASH. STATE HOUSE DEMOCRATS, https://housedemocrats.wa.gov [https://perma.cc/93RP-STZW]; WASH. STATE HOUSE REPUBLICANS, https://houserepublicans.wa.gov [https://perma.cc/B45X-SKCH]; WASH. SENATE DEMOCRATS, SDC STAFF, https://senatedemocrats.wa.gov/sdc-staff/ [https://perma.cc/KC4K-Y76M]; WASH. STATE SENATE REPUBLICAN CAUCUS, https://src.wastateleg.org [https://perma.cc/MMA6-2KDQ].

66. The legislature did not attain the ability to convene a special session without the governor's approval until after the passage of Amendment 62 in 1974. WASH. CONST. art. III, § 12; S.J. Res. 140, 43d Leg., 1st Spec. Sess. (Wash. 1974) (codified as amended at WASH. CONST. art. III, § 12); *see also* Act of Mar. 24, 2022, ch. 150, 2022 Wash. Sess. Laws 852 (codified at WASH. REV. CODE § 44.04) (codifying a process for convening legislatively initiated special sessions).

67. *See Barry*, 81 Wash. 2d at 160, 500 P.2d at 543.

68. *See* WASH. CONST. art. II, § 12; WASH. REV. CODE § 44.04.010 (2021).

69. NAT'L CONF. OF STATE LEGISLATURES, *Full- and Part-Time Legislatures* (July 28, 2021) https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx [https://perma.cc/Z7WR-G4N9].

70. *See* WASH. CONST. art. II, § 12.

71. *See, e.g.*, Permanent Rules of the Senate, S. Res. 8600, 8631, 67th Leg., Reg. Sess. § 5 (Wash. 2022) https://leg.wa.gov/Senate/Administration/pages/senate_rules.aspx [https://perma.cc/SYH4-PBMY] ("[N]o executive action on bills may be taken during an interim.").

*Barry*'s statements about the legislature's limited capacity have not withstood the test of time. And yet, Washington's lenient nondelegation doctrine remains anchored to judicial presuppositions about a legislative schedule that fell into disuse more than forty years ago.[72] The Court would do well to consider whether its framing of the nondelegation doctrine remains persuasive where the legislature's practices have changed and the Court's seminal precedent inaccurately depicts the legislature's activities.

### *B. Legislative Session Frequency and* Barry*'s Other Propositions*

When the *Barry* Court changed the course of Washington's nondelegation doctrine, it cited two additional reasons, apart from its concerns with the legislature's schedule, to embrace a new understanding of the doctrine.[73] First, the Court opined that a lenient nondelegation doctrine would enhance the efficiency of government.[74] Second, and related to the first reason, the Court determined that a modern government requires delegation of legislative power without *specific* guiding standards.[75]

In *Barry*, this meant that the Court believed the Department director was better suited than the legislature to make decisions about the appropriate amount of fees employment agencies should be allowed to charge.[76] The Court further submitted that any specific standards the legislature might set to guide the director's fee-setting decisions would only amount to "vague verbalisms."[77] The following sections highlight that, because the 68th Amendment solved the "absent legislature problem" postulated in *Barry*, it also undercut the efficiency and standard-setting theories that supported the Court's seismic shift in how it would apply the nondelegation doctrine in Washington.[78]

#### *1. Government Efficiency*

At the heart of *Barry*'s skepticism about the legislature is the concern that the legislature would be unable to "alter" or "attune[]" policy decisions in the light of new information, perhaps paralyzing government and making it less efficient.[79] However, a legislature that meets regularly

72. *Barry*, 81 Wash. 2d at 160, 500 P.2d at 543.

73. *Id.* at 159–61, 500 P.2d at 542–44.

74. *Id.* at 159–60, 500 P.2d at 542–43.

75. *Id.* at 160, 500 P.2d at 543 (emphasis in original).

76. *See id.*

77. *See id.* at 160, 500 P.2d at 543.

78. *Id.* at 159–61, 500 P.2d at 542–44.

79. *See id.* at 160, 500 P.2d at 543.

for a sufficient period, and which may reassemble at any time, can make finely tuned policy judgments, just as a hypothetical bureaucrat might do in *Barry*'s vision of government.[80] The essential difference is that, unlike a bureaucrat, a legislator who fulfills their policymaking role is behaving in accordance with the separation of powers and is directly accountable to the electorate for the decisions the legislator makes.

The example of fees is illustrative because technical fee-setting authority was at the center of *Barry*.[81] The legislature has, since *Barry*, repeatedly set and reset various fees through legislation. In fact, during the legislature's 2021 regular session alone, the legislature modified the dollar amounts of fees for such diverse subjects as pesticides, fertilizer, drivers' licenses, college courses, drug take-back programs, and whale watching.[82] Through actions like this, the legislature demonstrates that it has the faculties to make detailed adjustments to the programs it creates.

With respect to *Barry*'s concerns about legislative capacity, we might ask whether a legislature that rarely meets and which cannot reconvene at-will lacks flexibility at the expense of government efficiency. It might, at least in comparison to a legislature that meets more often. But the impulse to allow for broad delegation of legislative authority to non-legislative actors in the name of preserving government efficiency should be resisted when, invoking the *Barry* Court's own standard, the legislature *does* have "the opportunity to adopt a [policy] and then alter it periodically to meet the changing needs" of the public, as Washington's legislature does.[83]

### *2. Legislative Standards*

In addition to addressing efficiency concerns, an active legislature is

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80. Two provisions of the Washington Constitution establish the legislature's authority to initiate a special session upon a two-thirds vote. WASH. CONST. art. II, § 12; art. III, § 12. Special sessions have typically been initiated by the governor through the mechanism of a proclamation under article III, section 7, often with agreement or acquiescence from the legislature. WASH. CONST. art. III, § 7. *See, e.g.*, Proclamation by the Governor 17-10 (June 21, 2017), https://www.governor.wa.gov/sites/default/files/proclamations/17-10SpecialSession.pdf [https://perma.cc/TZE5-CDGW].

81. *Barry*, 81 Wash. 2d at 156–57, 500 P.2d at 541–42.

82. Act of May 10, 2021, ch. 244, 2021 Wash. Sess. Laws 1918 (codified as amended at WASH. REV. CODE § 15.58, § 17.21); Act of May 12, 2021, ch. 282, 2021 Wash. Sess. Laws 2250 (codified as amended at WASH. REV. CODE § 15.54); Act of May 3, 2021, ch. 158, 2021 Wash. Sess. Laws 913 (codified as amended at WASH. REV. CODE § 46.20); Act of April 16, 2021, ch. 71, 2021 Wash. Sess. Laws 442 (codified as amended at WASH. REV. CODE § 28A, § 28B); Act of May 3, 2021, ch. 155, 2021 Wash. Sess. Laws 888 (codified as amended at WASH. REV. CODE § 69.48, § 43.131); Act of May 12, 2021, ch. 284, 2021 Wash. Sess. Laws 2259 (codified as amended at WASH. REV. CODE § 77.65.615).

83. *Barry*, 81 Wash. 2d at 160, 500 P.2d at 543.

capable of successfully marking out boundaries for a non-legislative actor's exercise of discretion. A legislature that meets regularly will have the opportunity to set with specificity and revisit the statutory instructions it provides to officials who carry out its policies.

In *Barry*, the Court fixated on the risk that the legislature would only lay out meaningless standards.[84] It is true that the open-ended statute under review in *Barry* did not expressly allow the director to cap employment agency fees.[85] However, that statute does not prove that the legislature is incapable of developing specific criteria that apply to the exercise of an official's discretion. It only shows that in the one particular case of the employment agency law in *Barry* the legislature failed to do so.[86]

In truth, the legislature that drafted the *Barry* statute had many options at its disposal to provide specific fee-setting criteria to the agency. Some choices include setting the dollar amount of the fees in the statute, instructing the director to set fees but capping them at a certain amount, creating a fee range with a minimum and maximum permissible fee based on objective criteria, or requiring the director to set fees at an amount that would meet a specific goal. While some of these options would have cabined the discretion of the director more than others, none of them can fairly be called "vague," "unsound," or "legally meaningless" in the language of the *Barry* decision.[87] All of the alternative options would represent "specific or precise" instructions to the official who administers the program, in contrast to the capacious standard the Court upheld in *Barry*.[88]

Like the concern about government efficiency, any doubts about the legislature's ability to provide specific standards for the exercise of law enforcement officials' discretion should be assuaged if the legislature can regularly meet to examine, reexamine, and refine its approach. Does this mean that a legislature meeting on a consistent basis will always provide precise standards for the exercise of administrative authority? No. But it does mean that a court should have high expectations for the legislature to carefully prescribe how a non-legislative official may exercise the power to make policy.[89]

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84. *Id.* at 160–61, 500 P.2d at 543.

85. *Id.* at 156–57, 500 P.2d at 541.

86. *Id.* at 157–58, 500 P.2d at 541–42.

87. *Id.* at 160–61, 500 P.2d at 543.

88. *Id.* at 163, 500 P.2d at 545 (emphasis omitted).

89. *See generally* State v. Coria, 146 Wash. 2d 631, 651–52, 48 P.3d 980, 990 (2004) (Sanders, J., dissenting) ("The pressure on legislatures to discharge their responsibility with care, understanding

Concerns about a legislature's ability to legislate with precision do not justify weakening the nondelegation doctrine. Quite the opposite. Courts that are concerned about legislatures delegating their legislative authority to non-legislative decisionmakers should energetically enforce a strong nondelegation doctrine and require specific standards, set by the legislature, to ensure that legislatures are fulfilling their lawmaking role under the separation of powers.[90]

## CONCLUSION

The Court's reliance on *Barry* to set the contours of Washington's nondelegation doctrine warrants reconsideration because it is largely based on an outdated understanding of the state legislature.[91] The *Barry* Court eschewed a rule that required specific or precise legislative standards for the delegation of policymaking authority in part because it presumed that state government could not function under such a rule, given the legislature's original regular session schedule.[92] But the *Barry* Court's presumption has been on weak footing for more than forty years, since the people of Washington amended their constitution to require the legislature to meet on a more frequent basis.[93] Today's legislature does not represent the impediment to policymaking that the *Barry* Court characterized in 1972.[94] The Supreme Court of Washington should examine whether its reasons for weakening the nondelegation doctrine in *Barry* still hold sway in a system of government where the legislature must meet annually and may reconvene of its own accord.

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and imagination should be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible or undisciplined use of language.") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545–46 (1947)).

90. *See supra* Part I.A.

91. *See supra* Part II.A.

92. *Barry*, 81 Wash. 2d at 160, 500 P.2d at 541.

93. WASH. CONST. art. II, § 12.

94. *See Barry*, 81 Wash. 2d at 160, 500 P.2d at 541.