RATIONAL NONDELEGATION

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Nondelegation has risen from the dead. In the United States, the doctrine stands for the proposition that the Constitution forbids Congress from transferring excessive power to the executive branch to issue rules and make decisions with the force of law. "[T]he legislature makes, the executive executes, and the judiciary construes the law," Chief Justice John Marshall observed in *Wayman v. Southard.*[1] Nevertheless, he wrote, "the maker of the law may commit something to the discretion of the other departments." In upholding a federal statute allowing the courts to set their rules of procedure, Chief Justice Marshall acknowledged that "the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."[2]

Despite the doctrine's ancient lineage, the modern federal judiciary has found that inquiry so delicate and difficult as to have given

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1. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

2. *Id.* at 43.

up on the task. Since the New Deal, for example, the Supreme Court has never struck down a delegation for exceeding separation of powers limits. In *Whitman v. American Trucking Association*, the Court unanimously upheld one of the broadest legislative delegations known: the Clean Air Act's authorization that the Environmental Protection Agency set air quality standards "to protect the public health" with "an adequate margin of safety."[3] Indeed, the Court last invalidated a delegation of rulemaking power in two 1935 cases.[4] *Panama Refining Co. v. Ryan* and *A.L.A. Schechter Poultry Corp. v. United States* even helped trigger President Franklin D. Roosevelt's court-packing plan and the Court's retreat from the close scrutiny of economic regulation.[5]

Academics have largely declared the doctrine dead. Professors Eric Posner and Adrian Vermeule provocatively argue that Congress could delegate virtually all of its legislative power to the agencies.[6] John Manning and Cass Sunstein separately observe that the values of the doctrine live on—at best—only in canons of statutory construction.[7] Peter Schuck argues that "most broad delegations satisfy the formal requirements" of the Constitution and that, therefore, the merits of nondelegation really "turn on functional considerations" rather than constitutional ones.[8]

Other scholars—primarily those who believe the Constitution's meaning is dictated by its original understanding—have defended

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3. Whitman v. Am. Trucking Agency, 531 U.S. 464, 466 (2001) (quoting 42 U.S.C. 7409(b)(1)).

4. *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

5. *See, e.g.*, WILLIAM LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 85 (1995); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 105-30 (1991). For a contrary view, see Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 226 (1994).

6. *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine,* 69 U. CHI. L. REV. 1721, 1723 (2002).

7. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance,* 2000 S. CT. REV. 223, 227; Cass R. Sunstein, *Nondelegation Canons,* 67 U. CHI. L. REV. 315, 316 (2000).

8. Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod,* 20 CARDOZO L. REV. 775, 776 (1999).

the principle that limits must exist upon Congress's ability to delegate lawmaking authority.[9] However, they, too, would concede that the federal judiciary does not currently enforce such a principle. A majority of the current Supreme Court has yet to identify a clear basis in the constitutional text for the nondelegation doctrine, to draw a neutral line between permissible and impermissible delegations, and to explain the proper balance between Congress and the courts.[10]

Nevertheless, the Roberts Court has signaled its willingness to breathe new life into the nondelegation doctrine. In *Gundy v. United States,* four different Justices questioned the narrow reach of the current nondelegation doctrine. The case itself involved whether Congress could vest the Attorney General with the power to require sex offenders who were convicted before passage of the Sex Offender Registration and Notification Act to register with the government. Only four Justices joined Justice Elena Kagan's opinion upholding Congress's delegation of authority. Justice Neil Gorsuch, joined by Chief Justice John Roberts and Justice Clarence Thomas, dissented from the broad grant of power to the administrative state.[11] Providing the fifth vote to uphold the statute, Justice Samuel Alito concurred in the judgment but declared his support for "reconsider[ing] the approach [the Court has] taken for the past 84 years" of blessing broad transfers of power from Congress to the executive branch.[12] Justice Brett Kavanaugh did not participate in *Gundy*, but, dissenting from denial of certiorari in a different case, stated that the issue warranted "further consideration in future

9. *See, e.g.,* Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot,* 93 VA. L. REV. 1035, 1048–54 (2007); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated,* 70 U. CHI. L. REV. 1297, 1304–17 (2003); Gary Lawson, *Delegation and Original Meaning,* 88 VA. L. REV. 327, 333–34 (2002); Michael Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto,* 76 TUL. L. REV. 265, 305–15 (2001); David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 155-64 (1993).

10. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116 (2019); Douglad H. Ginsburg, *Reviving the Nondelegation Principle in the U.S. Constitution*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT 20, 20–27 (Peter J. Wallison & John Yoo, eds., 2022).

11. *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

12. *Id.* at 2131 (Alito, J., concurring in the judgment).

cases."[13] Count these votes up, and it appears that the Court has a majority to revive some version of the nondelegation doctrine.

More consequentially, the Court has revived nondelegation principles in its new major questions doctrine. In *West Virginia v. EPA*, the Court blocked the Environmental Protection Agency (EPA) from exercising wholesale control over the nation's electrical grid in the name of reducing environmental pollution.[14] It announced a new "major questions" doctrine that bars new regulations of broad "economic and political significance" unless the agency has received "clear congressional authorization" in a statute.[15]

West Virginia is one of the latest cases in the Roberts Court's reconceptualization of the relationship between constitutional law and the administrative state. The Court's primary doctrinal reform has tightened presidential control over the agencies. In cases such as *Free Enterprise Fund v. Public Company Accounting Oversight Board*[16] and *Seila Law LLC v. Consumer Financial Protection Bureau*,[17] the Court has invalidated Congressional efforts to insulate agency personnel from the President's removal power. *West Virginia*—as well as two emergency cases challenging COVID-19 regulations—points the Court in a different and potentially more radical direction than simply expanding White House control over executive branch personnel.[18] These cases limit agencies' ability to apply

13. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

14. 142 S. Ct. 2587, 2612–13 (2022).

15. *Id.* at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)); *id.* at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). While scholars have argued that the Supreme Court created the doctrine only recently, see Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1023-49 (2023), other work maintains that its antecedents go back more than a century, see Louis J. Capozzi, *The Past and Future of the Major Questions Doctrine,* 84 OHIO ST. L.J. 191, 203 (2023).

16. 561 U.S. 477 (2010).

17. 140 S. Ct. 2183 (2020).

18. *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam) (invalidating CDC eviction moratorium); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661 (2022) (per curiam) (striking down OSHA vaccine mandate).

broad statutory grants of authority only to ways that Congress—at the time it enacted the delegations—could have anticipated.

Several scholars already predict that the new major questions doctrine could have significant consequences for administrative law.[19] Professors Daniel Deacon and Leah Litman declare the major questions doctrine to be "a powerful weapon wielded against the administrative state."[20] By imposing a clear statement requirement for regulations on "major" questions that involve politically significant policies, novel rules, or significant boosts to agency powers, Deacon and Litman argue, the major questions doctrine "could exacerbate institutional and political pathologies, undermine the ostensible premises of the major question doctrine, and frustrate agency action . . . ."[21] Professor Mila Sohoni argues that the doctrine fundamentally changes the nature of judicial review of agency action, removes the *Chevron* doctrine as the initial step in that review, and reduces the deference paid to administrators by judges.[22] Cass Sunstein observes that a weak version of the major question doctrine may carve out certain questions from the benefits of *Chevron* deference, but a strong version might completely bar agencies from exercising broad powers in a manner similar to the nondelegation doctrine.[23] "For both theory and practice, the stakes are exceedingly high—whether we are speaking of the weak version, the strong version, or the choice between them."[24]

The major questions doctrine, however, is not a doctrine of constitutional dimension, but rather a canon of statutory interpretation rooted in structure. It counsels courts against, in Justice Scalia's words, finding "elephants in mouseholes."[25] It operates as a clear

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19. *See, e.g.,* Mila Sohoni, *The Major Questions Quartet,* 136 HARV. L. REV. 262, 263 (2022). *See also* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine,* 109 VA. L. REV. 1009, 1013–14 (2023).

20. Deacon & Litman, *supra* note 15, at 1011.

21. *Id.* at 1049.

22. Sohoni, *supra* note 19, at 263–64.

23. *See* Cass R. Sunstein, *There are Two "Major Questions" Doctrines,* 73 ADMIN. L. REV. 475, 477 (2021).

24. *Id.* at 478.

25. Whitman v. Am. Trucking Agency, 531 U.S. 464, 468 (2001).

statement rule that requires courts to find unmistakable congressional authorization for novel agency actions that involve controversial or significant policies. But the major questions doctrine does not directly attack Congress's constitutional authority to delegate lawmaking power, provided that Congress does so in plain statutory language. Congress could overrule any of the major question doctrine precedents, and, presumably, even the doctrine itself. In this respect, the doctrine acts primarily as a rule of statutory construction, but one that makes sense only if the Court believes in the substantive values that it promotes.[26] And as several academic critics observe, these values may come from the nondelegation doctrine. The "strong version [of the major questions doctrine] is rooted in the nondelegation doctrine," Sunstein asserts.[27] Or as Sohoni argues, "a sufficiently robust major questions doctrine greatly reduces the need to formally revive the nondelegation doctrine."[28] Rather than enforce a broad nondelegation doctrine, Sohoni observes, the Court can achieve much the same result by "an ad hoc, agency-by-agency, rule-by-rule basis through the mechanism of the . . . new clear statement rule."[29]

Debate over the major questions doctrine, therefore, can reduce into a debate over the nondelegation doctrine. To the extent that the former doctrine suffers from a lack of definition over what is "major" or even a "question," it is worth asking whether enforcing the values of the latter doctrine justify introducing such unclarity and judicial discretion into administrative law. To the extent that the former doctrine blocks agencies from promulgating regulations with significant economic or political consequences, we should ask whether the courts have achieved the goals of the latter doctrine. The major questions doctrine will suffer from a lack of direction and scope until the Court establishes its foundation—the nondelegation doctrine.

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26. Biden v. Nebraska, 143 S. Ct. 3455, 2376–77 (2023) (Barrett, J., concurring).
27. Sunstein, *supra* note 23, at 478.
28. Sohoni, *supra* note 19, at 265–66.
29. *Id.* at 266.

This paper will address instrumental reasons for the nondelegation doctrine. Consequentialist justifications offered for nondelegation include ensuring congressional responsibility for basic policy choices, limiting the scope of federal power, protecting individual liberties, and removing decisions from unaccountable bureaucracies. Defenders of the modern administrative state, however, believe broad delegations necessary for government to adapt to new social, economic, and scientific circumstances. Congress could not spend the time and resources, or even develop the expertise, necessary to legislate on all of the matters within its jurisdiction. Others argue that broad delegation transfers technical questions from politicians to experts, which should improve the outcome of the regulatory process.

This paper takes a different approach. It will ask why the branches of government themselves would rationally want a nondelegation doctrine. It analyzes the issue using standard game theory models of the legislative process.[30] While legal scholars have used such approaches to study the administrative state for some time,[31] this is less the case in constitutional law.[32] My basic argument is that a rational member of the legislative or executive branches might favor a nondelegation doctrine due to concern over the ideological variability of agency decisions in the future. A Democratic Congress, for example, may wish to achieve broadly pro-environmental outcomes, but it cannot be confident that agencies

30. The literature using these models is vast. A leading work is DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS (1999).

31. *See, e.g.*, Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts,* 119 HARV. L. REV. 1035, 1049 (2006); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State,* 89 GEO. L.J. 97, 102 & n.26 (2000); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions,* 1 J.L. ECON. & ORG. 81, 86 (1985).

32. The only law journal article that applies game theory to nondelegation appears to be Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 VA. L. REV. 1229 (2018). That article differs from this one in that it uses game theory to attempt to define the legislative power and then to create a sliding scale for enforcement of the intelligible principle test. This article examines the broader question of the nondelegation doctrine as a part of the principal-agent problem with congressional control of agency discretion.

in the future will use their discretion as it would wish, especially under Republican presidents. Article I, Section 7's barriers to enacting legislation to override regulations, in addition to the usual transaction cost and information problems for congressional bargaining, might present a nondelegation doctrine as a second-best alternative to prevent shirking by agencies. This paper considers how the introduction of other branches and their changing policy preferences over time alter this basic principal-agent relationship.

I. THE CONTROVERSY OVER NONDELEGATION

The Constitution does not explicitly address delegation of legislative authority. Its text follows a simple three-part division of government authority into legislative, executive, and judicial powers and then allocates them to Congress, the President, and the Judiciary. Article I begins with "All legislative Powers herein granted shall be vested in a Congress of the United States."[33] While the Constitution does not forbid the executive from making law, it only grants the President "the executive power"[34] and the duty to "take Care that the Laws be faithfully executed."[35] As a result of the language of the vesting clauses and the broader principle of the separation of powers, the Supreme Court has declared that only Congress can exercise legislative power and that Congress cannot transfer it to the executive. "The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, and may not be conveyed to another branch or entity."[36]

But it is obvious that the other branches of government make law today. Courts create federal common law in the silent interstices of federal statutes or by direct constitutional authorization.[37] Federal agencies within the executive branch issue broad regulations that,

33. U.S. CONST. art. I, § 1.
34. *Id.* art. II, § 1.
35. *Id.* art. II, § 3.
36. Loving v. United States, 517 U.S. 748, 758 (1996) (citation omitted).
37. *See, e.g.,* Henry J. Friendly, *In Praise of* Erie*–and of the New Federal Common Law,* 39 N.Y.U. L. REV. 383, 408 n.119, 421 (1964).

under the Clean Air Act for example, set the miles-per-gallon standard for all cars and the emissions requirements for all power plants in the country,[38] or that under the Clean Water Act limit private use of property.[39] Independent agencies issue equally detailed regulations without undergoing White House control, such as the Securities and Exchange Commission's regulation of the financial markets, the Federal Reserve Bank's management of the money supply, or the Federal Communications Commission's control over the internet, cable, and communications networks. If all three branches of modern government make law, the question today may have become not whether the Constitution permits the delegation of legislative authority, but whether at some point the delegation goes too far. "The distinction between 'executive' and 'legislative' power cannot depend on anything qualitative," Cass Sunstein has written.[40] "[T]he issue is a quantitative one. The real question is: How much executive discretion is too much . . . ?"

A. *History of the Nondelegation Doctrine*

The dividing line between what Congress must decide for itself and what it can delegate has remained obscure to the courts. It challenged Chief Justice John Marshall in *Wayman v. Southard*.[41] In addressing a law that gave discretion to the courts to set rules of process, he started with the first principle that "the difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law."[42] This basic understanding of the separation of powers, however, did not preclude Congress from delegating some of its powers to the other branches. "But Congress may certainly delegate to others, powers

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38. *See* Revised 2023 and Later Model Year Light- Duty Vehicle Greenhouse Gas Emissions Standards, 86 Fed. Reg. 74, 434 (Dec. 20, 2021) (effective date Feb. 28, 2022) (auto emissions); West Virginia v. EPA, 597 U.S. 697, 707–15 (2022) (describing regulatory scheme for power plant emissions),

39. *See, e.g.*, Sackett v. EPA, 143 S. Ct. 1322, 1330–36 (2023) (describing regulatory framework for approval of land use adjacent to waters of the United States).

40. Sunstein, *supra* note 7, at 326–27.

41. Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

42. *Id.* at 46.

which the legislature may rightfully exercise itself."[43] Nevertheless, Congress could not delegate everything. "[T]he maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry."[44] Marshall himself drew a distinction between "important subjects, which must be entirely regulated by the legislature itself," and "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[45] Courts ever since have struggled to identify the line between "important subjects" and "those of less interest." Nevertheless, Marshall made clear that Congress could not delegate "powers which are strictly and exclusively legislative."[46]

Subsequent Supreme Court decisions have not improved upon Marshall's framing of the question and his effort to identify the line between constitutional and unconstitutional delegations. In *Field v. Clark,* the Court faced a statute that delegated to the President the authority to suspend the duty-free treatment of imports from countries that imposed "reciprocally unequal and unreasonable" tariffs on U.S. products.[47] The Court rejected the claim that the law unconstitutionally vested legislative power in the executive. "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution," the Court declared, echoing Marshall in *Wayman.*[48] But the statute did not violate the separation of powers, according to the majority, because it only charged the President with finding whether a set of facts existed; if it did, the law itself went into effect without any additional discretionary action by the President. "When he ascertained the facts that duties and exactions, reciprocally unequal and

43. *Id.* at 43.
44. *Id.* at 46.
45. *Id.* at 43.
46. *Id.* at 42–43.
47. Field v. Clark, 143 U.S. 649, 680 (1892) (quoting McKinley Tariff, ch. 1244, §3, 26 Stat. 567, 612 (repealed 1894)).
48. *Id.* at 692.

unreasonable, were imposed upon the agricultural or other products of the United States," the Court observed, "it became his duty to issue a proclamation . . . which Congress had determined should occur."[49] Left unaddressed by the Court was the difference between, for example, finding that a date had passed or an event had occurred, and making the judgment that another country's tariff was "unequal and unreasonable."[50]

Foreign trade again presented the Court with the opportunity to further elaborate a delegation test. In *J.W. Hampton, Jr. & Co. v. United States,* the Court announced the "intelligible principle" test that still governs nondelegation claims.[51] Congress had authorized the President to set the amount of duties on foreign imports so as to "equalize" the "costs of production."[52] In upholding the delegation, the Court announced: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[53] That intelligible principle test continues in force today, even appearing to be the rule of decision in *Gundy.*[54]

The Supreme Court has not struck down a statute on nondelegation grounds in nine decades because of the hollowness of the test that emerged from *J.W. Hampton.* Even the cases that invalidated New Deal legislation, *Panama Refining Co. v. Ryan* and *A.L.A. Schechter Poultry Corp. v. United States*, paid allegiance to the intelligible principle standard. *Panama* found that portions of the National Industrial Recovery Act (NIRA) failed the intelligible principle test because they provided no guidance to the executive branch for its exercise of discretion.[55] *Schechter* found that other portions of NIRA failed the intelligible principle test because they allowed the executive branch the authority to regulate the entire economy to

49. *Id.* at 693.
50. *Id.*
51. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
52. *Id.* at 399.
53. *Id.* at 409.
54. *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).
55. Panama Refining Co. v. Ryan, 293 U.S. 388, 415 (1935).

promote "fair competition."[56] But in both cases, the Court found that the statutes vested such broad power upon the executive branch to issue legislative rules that it felt little need to explain why NIRA failed the intelligible principle test but the laws in *Field* and *J.W. Hampton* did not.

Cases decided after 1935 have never found another congressional delegation to violate the intelligible principle requirement. In *Yakus v. United States,* the Court demanded only that the intelligible principle provide a standard against which a court could review the exercise of delegated authority.[57] *Yakus* itself approved the wartime authority to set prices that were "generally fair and equitable."[58] In the New Deal period, the Court upheld the Federal Communications Commission's power to regulate the airwaves[59] and the Interstate Commerce Commission's authority to approve railroad mergers,[60] so long as the regulations advanced the "public interest." Under a similar standard, the Rehnquist Court approved broad transfers of authority from Congress, such as to the U.S. Sentencing Commission to devise a system to control all judicial sentencing under federal criminal law,[61] and to the Environmental Protection Agency to set National Ambient Air Quality Standards.[62] All that the intelligible principle test seems to require is that Congress invoke the "public interest" in its delegation of authority to the agencies to survive judicial review.[63]

Striking down a federal law for delegating too much power to an agency would mark a sharp turn in the Court's approach to the administrative state. After the New Deal revolution and FDR's failed court-packing plan, the Court has never invoked the nondelegation

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56. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553–54 (1935).

57. 321 U.S. 414, 426 (1944).

58. *Id.* at 420 (quoting Emergency Price Control Act, ch. 25, § 2(a), 56 Stat. 23, 24 (terminated 1947, repealed 1966)).

59. *See, e.g.,* Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190, 225–26 (1943).

60. N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932).

61. *See* Mistretta v. United States, 488 U.S. 361, 371 (1989).

62. *See* Whitman v. Am. Trucking Agency, 531 U.S. 464, 473–74 (2001).

63. *Mistretta,* 488 U.S. at 416 (Scalia, J., dissenting) (citing *Nat'l Broad. Co.,* 319 U.S. at 216–17 (1943)); *N.Y. Cent. Sec. Corp.,* 287 U.S. at 24–25 (1932).

doctrine to invalidate a federal law. Indeed, a unanimous Court upheld the Clean Air Act, a law that seems fairly typical of the broad delegations to the agencies, as recently as 2001 in *Whitman v. American Trucking Association.*[64] Congress had provided enough detail, the Court explained, by requiring agencies to issue air regulations that "protect the public health" with "an adequate margin of safety."[65]

The same problem that beset Chief Justice Marshall continues to trouble those who would resuscitate the nondelegation doctrine today. Even if the intelligible principle test raises no barrier to Congress to delegate almost all of its legislative power, judges have had little success devising a replacement that does not draw the courts into policymaking. As Justice Gorsuch pithily put it in his dissent in *Gundy:* "What's the test?"[66] Gorsuch identified three guiding principles to lawful delegations. First, Congress could set policy regulating private conduct, with another branch left to "fill up the details," such as in *Wayman.*[67] Second, Congress could grant the other branches the power to carry out a rule based on the finding of a specific fact, such as whether another nation had lifted an embargo on US products.[68] Third, Congress could assign non-legislative duties where its power overlaps with those of other branches, such as when Congress delegates foreign affairs powers to the executive branch.[69] Gorsuch, however, did not explain how these principles would reduce into a test that courts could apply to broad statutes such as the Clean Air Act.

Inability to identify a clear test no longer appears to stand in the way of a resuscitated nondelegation doctrine. In the wake of *Whitman,* delegation once seemed on its way toward falling under the political question doctrine, because the Court could find no "judi-

64. 531 U.S. 457, 465 (2001).
65. *Id.* at 473–74 (quoting 42 U.S.C. § 7409(b)(1)).
66. Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).
67. *Id.* at 2136.
68. *Id.* at 2136–37.
69. *Id.* at 2137.

cially discoverable and manageable standards" to identify an unconstitutional transfer of authority.[70] Judges once thought the same about the outer limits of the Commerce Clause as well, but no longer.[71] In *Gundy* itself, Chief Justice Roberts and Justice Thomas joined Justice Gorsuch's dissent calling for a new effort to identify a test.[72] In 2015, Justice Thomas had called for an even broader reconsideration of the Court's approach to delegation. "The core of the legislative power that the Framers sought to protect from consolidation with the executive," Thomas wrote, "is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct."[73] Rather than the intelligible principle test, Justice Thomas would require Congress to enact any regulation that affected private conduct. "Although the Court may never have intended the boundless standard the 'intelligible principle' test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power," Thomas wrote in concurrence. "I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process."[74]

It seems that the Court is poised to resuscitate the nondelegation doctrine. A majority of the current Court has expressed a desire to explore the possibility of limiting the breadth of congressional delegation of authority to the agencies. It seems that all that is required is a test based on neutral rules with more teeth than the intelligible

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70. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

71. *Compare* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556-57 (1985) (upholding application of Fair Labor Standards Act to state and local governments), *and* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 197–98 (1980) (arguing that judicial review should not extend to federalism questions), *with* Morrison v. United States, 529 U.S. 598, 619 (2000) (holding that provision of Violence Against Women Act exceeded commerce power).

72. 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

73. Dept. of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 76 (2015) (Thomas, J., concurring).

74. *Id.* at 77.

principle test. At the same time, however, significant controversy exists over whether the Constitution in fact establishes a nondelegation principle. The next part describes the scholarly debate over the nondelegation doctrine. It shows that supporters of broad delegations of rulemaking power to the administrative state rest their defense primarily on functionalist grounds, while its critics resort in the main to historical or formalist arguments. This creates the space, explored in subsequent sections of this article, for a functionalist role for a nondelegation doctrine.

B. Academic Debate over the Nondelegation Doctrine

This Part will briefly describe the academic debate over the nondelegation doctrine. Scholars have sought to make sense of the doctrine by focusing primarily on its textual, structural, and historical justifications. Perhaps the liveliest debate centers around whether the Framers would have understood the Constitution's separation of powers to establish a principle against the broad delegation of lawmaking authority.[75] Others claim that the nondelegation doctrine improves democratic accountability, while critics argue that modern government could not function effectively without broad delegation to agencies.[76] Another debate concerns whether the judiciary can truly police delegation in a principled manner, or whether judicial review would simply embroil the courts in policy disputes between the legislative and executive branches.[77] This part identifies the absence of a functionalist defense of the nondelegation doctrine, which this article seeks to provide.

Delegation is in the world all around us. It sits at the foundation of our republican Constitution, in which the American people grant limited power to the federal government to act on their behalf. It also rests at the foundation of the modern administrative state. It

75. *See, e.g.,* Ilan Wurman, *Nondelegation at the Founding,* 130 YALE L.J. 1490, 1525 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding,* 121 COLUM. L. REV. 277, 289 (2021).

76. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 96 (1985).

77. *See generally* essays collected in Wallison & Yoo, *supra* note 10.

might not go too far to say that without delegation, the administrative state as we have known it since the New Deal could not succeed.

Supporters of broad delegation have relied primarily on functionalism. Peter Schuck, for example, declares that delegation "constitutes one of the most salutary developments in the long struggle to instantiate the often competing values of democratic participation, political accountability, legal regularity, and administrative effectiveness."[78] Schuck argues that delegation has much to do with the improvements in the U.S.'s self-government, "in the sense that its political processes and policy outcomes are now much more democratic, just, and social welfare enhancing" than in 1965.[79] Jerry Mashaw argues that delegation routes power to agencies, which can devise rules through better access to information, more expert deliberation, and even more responsiveness to the public's preferences than Congress.[80] Eric Posner and Adrian Vermeule observe that delegation is inevitable due to the need for a "division of labor in any complex institution whether public or private."[81] Adopting a transaction cost approach, political scientists David Epstein and Sharyn O'Halloran argue that delegation allows Congress to make policy in a politically efficient manner, by which they mean not overall social welfare but "in such a way as to maximize legislators' political goals."[82]

If forced to rely on a constitutional text, supporters of delegation would identify the same bases of power that justify the modern administrative state. Article I, Section 1 of the Constitution grants Congress the authority to make federal law, and the enumeration in Section 8 includes the powers to tax and spend for the general welfare, and to regulate interstate and international commerce.[83] Article I, Section 8 then allows Congress to "make all Laws which

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78. Schuck, *supra* note 8, at 776.
79. *Id.* at 778.
80. *See* Mashaw, *supra* note 31, at 94–95.
81. Posner & Vermeule, *supra* note 6, at 1744.
82. DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 9 (1999).
83. U.S. CONST. art. I, §§ 1, 8.

shall be necessary and proper for carrying into Execution the foregoing Powers."[84] If the Commerce Clause allows Congress to regulate telecommunications, then the Necessary and Proper Clause allows it to establish the Federal Communications Commission and to empower it to enact regulations.[85] Or, in what Posner and Vermeule consider the "naïve" view, the Constitution allows delegation under the President's power under Article II to "take care that the laws be faithfully executed."[86] In most broad administrative statutes, they argue, Congress has not even delegated legislative power; regulations instead represent the exercise of the executive power of enforcement.[87]

Initial criticism of broad delegation appealed to democratic theory. In his classic *Democracy and Distrust*, John Hart Ely criticized delegation for allowing Congress to escape its constitutional responsibilities. Delegation is "undemocratic, in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic."[88] Political scientist Ted Lowi made a similar claim that delegation allowed Congress to abdicate its constitutional role in enacting legislation in favor of unelected bureaucrats, which he claimed amounted to a "second republic" that has replaced the original one.[89] In a refresh of this line of thought, Neomi Rao argues that delegation allows Congress as a whole to escape accountability while allowing congressional committees or even individual members of Congress to influence agencies in their exercise of discretion.[90] Chris Walker claims that this discretion may be

84. *Id.* § 8.

85. *See, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2129–30 (2004).

86. *See* Posner & Vermeule, *supra* note 6, at 1725.

87. *Id.* at 1721.

88. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132 (1980).

89. *See* THEODORE LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 274 (2d ed. 1979).

90. Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1481–82, 1492 (2015).

so broad that it even allows powerful agencies to influence Congress to engage in even broader transfers of power.[91]

Additionally, legal scholars such as David Schoenbrod and Peter Wallison have attacked delegation on more formalist grounds. Under this view, the Constitution establishes a straightforward approach to policymaking. Congress makes the basic policy choices, especially the regulation of private conduct by law. The executive branch enforces the policies, but it has limited discretion to make the choices itself, while the courts should adjudicate disputes but also not intrude into policy. Schoenbrod and Wallison see delegation as an effort to undermine this clean separation of powers. They separately argue that Congress uses delegation to evade responsibility for its decisions. Individual members of Congress, who are primarily interested in re-election, want to avoid controversial policy choices and instead provide relief to constituents from government mandates.[92] These transfers of authority allegedly allow Congress and the agencies to engage in self-dealing hidden from the view of the American people, either by shirking their responsibilities or more easily sending benefits to interest groups.

A more persistent challenge to broad delegation, however, has come from constitutional law scholars. Gary Lawson, for example, argues that the original understanding of the Constitution's separation of powers might allow the executive branch to fill in the details while implementing the laws, but that it does not permit Congress to transfer its Article I, Section 8 powers to the agencies.[93] Because regulations do not undergo the Article I, Section 7 process of bicameralism and presentment, they cannot have the effect of laws. Larry Alexander and Saikrishna Prakash expanded on this theme by arguing that political thought at the time of the Framing, as found primarily in the work of John Locke, Montesquieu, and

91. *See* Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1377–78 (2017).

92. *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 9–10 (1993); *See generally* PETER WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE (2018).

93. *See* Lawson, *supra* note 9, at 339–41.

Blackstone, rejected broad delegations of legislative power.[94] In *Federalist No. 75*, for example, Hamilton explained that "the essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of society" and that this power could be exercised only by Congress.[95]

An even broader attack on delegation has arisen from legal historian Philip Hamburger. In his lengthy work of British and early American constitutional history, *Is Administrative Law Unlawful?*, Hamburger argues that the administrative state is unlawful because it exercises power akin to the royal prerogative of the British Kings of the seventeenth century.[96] While the Glorious Revolution put an end to executive lawmaking in favor of parliamentary supremacy and the common law, rule by executive fiat has risen again. But this time it has reappeared in the guise of the administrative state, made possible by unlimited delegations of power and inspired by continental theories of the state.[97] "Just as English monarchs once claimed a prerogative power to make law outside acts of Parliament, so too the American executive claims an administrative power to make law outside of acts of Congress."[98]

Response to Hamburger's work has been fierce. His critics responded that his work focused too much on British constitutional history of the seventeenth century and too little on traditional originalist sources, such as the colonial and state constitutions, the ratification debates, and early practice.[99] In a recent response, Julian Mortenson and Nicholas Bagley argue that the Founding contains no evidence of a nondelegation doctrine and that claiming otherwise amounts to projecting modern views back onto a very different history. The Framers, they argue, would have little difficulty with a delegation of legislative power to the executive branch, "so

94. *See* Alexander & Prakash, *supra* note 9, at 1310–17.

95. THE FEDERALIST NO. 75, at 503, 504 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

96. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

97. *Id.* at 444–50.

98. *Id.* at 31.

99. *See* Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1551 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)).

long as the exercise of that power remained subject to congressional oversight and control."[100] They point to several examples of broad delegations by the early Congresses to show that none of the branches of the federal government in the early republic thought of a rule against delegation. Ilan Wurman, however, takes Mortenson and Bagley to task for misunderstanding the nature of the executive power at the time of the Framing.[101] He argues that they have also misread John Locke's discussion of the legislative power—no doubt of great importance to the political thinking of the Framing. In an important passage, Locke declared that "the legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others."[102] Any claim that this passage, which seems on its face to prohibit delegation of the legislative power to any other branch, contains a more subtle distinction between a temporary delegation and a permanent alienation of power does not appear in any of the founding sources. If anything, the Founders appear to use "delegate," "alienate," and "transfer" interchangeably.

This article contributes to this debate by addressing the case for nondelegation on the grounds favored by defenders of the administrative state. As the foregoing discussion shows, administrative law scholars have generally stood on present day functionalist considerations, such as governmental effectiveness, democratic accountability, and bureaucratic justice to defend broad delegation of authority to the agencies. Critics, on the other hand, have generally relied on formalist and originalist arguments: that the Founders would have understood the power to make laws—and by that they meant rules that regulate private conduct—to rest exclusively in the legislature.

This article provides a different, new argument in favor of nondelegation, but on functionalist grounds. Defenders of the administrative state argued that the first wave of nondelegation scholars

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100. Julian Mortenson & Nicholas Bagley, *supra* note 75, at 280.

101. Ilan Wurman, *supra* note 75, at 1497.

102. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 79 (Prometheus Books 1986) (1690).

made claims too abstract to judge—that delegation defeats "responsibility" or "accountability." "Assuming that our current representatives in the legislature vote for laws that contain vague delegations of authority, we are presumably holding them accountable for that at the polls," Jerry Mashaw pointedly observed.[103] "How is it that we are not being represented?"[104] This article seeks to explain, using game theory approaches to public lawmaking, why a nondelegation doctrine would improve governmental effectiveness, the primary defense of the administrative state. I argue that a significant challenge for government effectiveness is the making and keeping of legislative bargains. Imperfect information and weak enforcement mechanisms will forestall agreements between groups in Congress, and between the branches of the federal government, that would benefit them and the nation. A nondelegation doctrine introduces the possibility for strengthened enforcement of legislative deals, which will encourage bargaining. While this article does not attempt to use game theory to identify a specific test,[105] it answers the more fundamental question: whether a nondelegation doctrine should exist in the first place.

II. GAME THEORY AND PUBLIC LAW

This section describes and applies the basic principal-agent model, generally applied to administrative law by positive political scientists, to the question of delegation.[106] In this simple model, Congress is the principal and agencies are the agent.[107] Because it does not have the time and resources to make rules on a certain

103. Mashaw, *supra* note 31, at 87.

104. *Id.*

105. For an attempt to create a two-part test for nondelegation based on game theory, see generally Sullivan, *supra* note 32.

106. *Cf.* Matthew D. McCubbins, Roger Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies,* 75 VA. L. REV. 431 (1989); Terry M. Moe, *The Politics of Bureaucratic Structure, in* CAN THE GOVERNMENT GOVERN? (John E. Chubb & Paul E. Peterson eds., 1989).

107. *See* McCubbins, *supra* note 106, at 434.

subject, a principal will delegate that authority to an agency for several possible reasons.[108] It can save time and resources for other, more important duties.[109] It can take advantage of the agency's specialization and technical knowledge.[110] It can avoid political responsibility for unpopular decisions or over unpredictable areas with high stakes involved.[111] But even though it does not seek to make every decision, Congress still has a preference for the direction of policy, due to its electoral mandate, partisan ideology, or even its allegiance to interest groups.[112] Even if the enacting Congress has an ill-defined preference,[113] the issuance of regulations may more sharply define the preference of a contemporary Congress. Here, the underlying theory of legislative motivation is not as important as the positive description of a Congress that has a policy preference it seeks to advance through delegation to the agencies.

The central problem of the principal-agent relationship is diverging preferences.[114] A principal will delegate authority to an agent to act in its behalf, and in the course of that delegation it will grant a

108. ROBERT D. COOTER & MICHAEL GILBERT, PUBLIC LAW AND ECONOMICS 265 (2022).

109. *See* Sullivan, *supra* note 32, at 1258 ("The very reasons that Congress might delegate lawmaking responsibilities in the first place are to free up congressional resources and to gain the benefit of agency expertise and learning on topics beyond the ken of legislators.").

110. Julian Ku & John Yoo, *Globalization and Structure,* 53 WM. & MARY L. REV. 431, 450 (2011) (noting that Congress delegated significant power to agencies for their "expertise" in "technical and scientific areas"); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers,* 119 HARV. L. REV. 2311, 2357 (2006).

111. Ku & Yoo, *supra* note 110, at 451 (noting that Congress delegated significant power to federal agencies to avoid "taking stands on controversial issues when political opposition will result no matter which option they choose").

112. *See* Levinson & Pildes, *supra* note 110, at 2357 (noting that Congress may delegate broadly "not to abnegate policymaking responsibility, but to maximize accomplishment of its policy goals"). Indeed, some scholars have noted that Congress delegates more broadly "when government is unified than when it is divided," which supports the idea "that Congress does care about policy outcomes." *Id.*

113. *See id.*

114. *See* Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem,* 106 NW. U.L. REV. 1201, 1226 (2012).

scope of discretion to the agent.[115] Without that discretion, the principal will lose the savings in time, resources, and expertise that would accrue from the delegation in the first place.[116] An agent, however, can use the discretion to engage in self-dealing conduct in a way that will be expensive for the principal to monitor.[117] Or agents can use claims of technical expertise or control over information to manipulate the context of a decision facing the principal, in order to persuade the principal to reach a conclusion that benefits the agent.[118] In the corporate law context, for example, this principal-agent problem arises when management uses its day-to-day control over a corporation to award itself excessive compensation or raises takeover defenses to outside mergers and acquisitions.[119] In the administrative law context, an agency's misuse of its discretion to pursue its own agenda, rather than that of Congress, is known as "agency slack"[120] or "bureaucratic drift."[121]

There is no perfect amount of delegation and discretion that Congress should grant an agency. Rather, there is a tradeoff. On the one side, the principal wishes to assure that the agent follows the former's preferences.[122] But on the other side, guaranteeing that the agent's actions will match the principal's wishes will require higher costs in collecting information, acquiring expertise, and overriding

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115. *See* David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion,* 3 AM. J. POL. SCI. 697, 698, 701–02 (1994).

116. *See id.* at 701.

117. *See* Richard W. Waterman & Kenneth J. Meier, *Principal-Agent Models: An Expansion?,* 8 J. PUB. ADMIN. RSCH. & THEORY 173, 185 (1998).

118. *See id.* at 176.

119. Lucian Arye Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem,* 17 J. ECON. PERSPECTIVES 71, 71, 74 (2003); Andrei Shleifer & Robert W. Vishny, *Management Entrenchment: The Case of Manager-Specific Investments,* 25 J. FIN. ECON. 123, 123, 124 (1988); Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm,* 16 YALE L. & POL. REV. 265, 320–22 (1998).

120. *See, e.g.,* Matthew Stephenson, *Optimal Political Control of the Bureaucracy,* 107 MICH. L. REV. 53, 58 (2008).

121. Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post 9/11 World,* 94 CAL. L. REV. 1655, 1702 (2006).

122. *See* Epstein & O'Halloran, *supra* note 115, at 698.

the agent's decisions.[123] The only way to ensure that the agent's actions meet the principal's wishes every time would be for the principal simply to make the choices itself, but then the principal would lose the benefits of delegation.[124] Instead of proceeding without an agent, the principal instead can create systems to monitor the agent's performance and raise an alert should the agent deviate from the principal's wishes.[125] A principal can respond to agency slack by taking corrective measures, which can include changes to a governing statute, reductions in funding, oversight investigations, and refusal to confirm appointments.[126] Once the principal strikes the proper balance between efficient delegation on the one hand, and the costs of monitoring and correction on the other, it can cement it into laws and institutions.[127]

Applying the principal-agent model to government requires a different understanding of the agendas of public officials. In business law, a delegation problem arises because management will engage in "shirking" by receiving more pay for less work.[128] Agents seek to maximize compensation per hours worked. But increasing monetary pay does not fully capture the incentives of public officials,[129] who operate in an environment with strict pay scales usually well below those in the private sector. Agents in bureaucracies focus on advancing their preferred views on policies, rather than increase their pay and benefits (though no one would turn down a

123. *See id.* at 698, 701.

124. *See* Sullivan, *supra* note 32, at 1257.

125. Epstein & O'Halloran, *supra* note 115, at 698–99, 701.

126. *See id.*

127. *See id.* at 701–02.

128. Orts, *supra* note 119, at 276–77, 316; Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror,* 54 UCLA L. REV. 1815, 1827 (2007) ("[T]he employees of a company wish to be paid for working, but wish to work as little as possible."); *see also* Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract,* 85 COLUM. L. REV. 1403, 1406–07 (1985) (discussing management's temptation "to shirk in its performance or to divert corporate assets to itself").

129. Sulmasy & Yoo, *supra* note 128, at 1827 ("In the public administration context, shirking does not make as much sense.").

raise).[130] Shirking at its worst will occur when agency officials substitute their own policy views for those of the Congress that delegated the power in the first place.[131] But less egregious forms of shirking can occur when officials shape the decision-making context—by manipulating information or technical expertise—before the principal in a manner that favors the formers' preferred outcomes.[132] But shirking may not have occurred if agency officials use information and expertise to simply help the principal reach a more informed decision.[133] Like the amount of delegation and monitoring, shirking can fall along on a sliding scale where bright lines may not clearly exist on the margins between shirking and faithful implementation of a principal's wishes.

We must also apply the model over time. In the context of delegation, the principal-agent relationship occurs in three stages. First, Congress delegates authority; second, the agency promulgates a regulation; third, Congress responds.[134] Legislative disapproval can take the form of a statutory override, budget cuts, or oversight.[135] Because the relationship between the principal and agent is strategic, we would expect Congress to rarely, if ever, need to enact overriding legislation.[136] Congress and the agencies still pursue their

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130. *Id.;* William N. Eskridge Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes,* 2013 WIS. L. REV. 411, 433 (2013) (noting that agencies might shirk, among other ways, by "usurp[ing] Congress's authority" or by "fail[ing] to pursue the congressional goals effectively, perhaps because of interest group capture"); *see also* Jacob Gersen, *Designing Agencies, in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 334 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) ("[B]ureaucrats might maximize budgets for their agencies, the scope of their own power, leisure . . . .").

131. Sulmasy & Yoo, *supra* note 128, at 1827.

132. *Id.* (noting that public administrators may shirk by "manipulating information and events").

133. *Id.* (noting that "shirking may not have occurred" just because the agent with "specialized experience and better information[] provides advice to the principal that influences the latter's decision").

134. *See* Sullivan, *supra* note 32, at 1255.

135. *See id.;* Epstein & O'Halloran, *supra* note 115, at 699.

136. *See* Sullivan, *supra* note 32, at 1256–57 (noting that "the agency would have no reason to even try to deviate from Congress's legislative preferences, and so would legislate exactly as Congress would" if the agency knows Congress's preferences).

own agendas, but they act in a way that takes into account possible responses, which will arise from the other players' interests and the costs and benefits of their courses of action.[137] An agency will not wish to issue a regulation that would trigger a legislative override or a funding cut, a reduction in its discretion, and perhaps even a permanent narrowing of the delegation of authority.[138] Instead, agencies will promulgate regulations within the boundaries of congressional preferences.[139] The agency might have difficulty determining congressional preferences if it is acting in an area of uncertainty—such as new circumstances or information asymmetry—but it still seeks to act within a range of outcomes that will not prompt a congressional response.[140]

The relationship between Congress and the agencies also is not a one-shot game.[141] Congress creates agencies that are long-lived, if not permanent, with which it has long-term interactions.[142] This fact creates conditions that may give agencies more incentive and freedom to act outside of Congress's preferences.[143] Reversing regulations requires an overriding act. The Article I, Section 7 process is notoriously difficult due to bicameralism and presentment, especially when combined with the Senate filibuster requiring a three-fifth's vote to proceed to floor consideration.[144] The agency will adopt policies up to the preference of a filibustering Senate minority or of the President, depending on which one is further out on

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 1258–59 (explaining that "the threat of congressional overrides and punishment may deter the agency from exercising its will in legislating other than as Congress would have it do").

141. *Id.* at 1261.

142. *Id.*

143. *Id.* at 1264 (explaining that "the extent of an agency's legislative power in a delegation situation" depends on "the terms and context of particular delegations of lawmaking authority").

144. *See* U.S. CONST., art. I, § 7; Senate Rule 22.

the policy spectrum.[145] Because the game is dynamic and continues into the future, the odds of a congressional overriding statute become even steeper because of Congress's limited resources to monitor and other pressing items on its agenda.[146]

Agencies have multiple means to pursue a policy at odds with that of the principal. An agency could refuse to promulgate new regulations desired by Congress. Agencies can "slow roll" congressional initiatives simply by delaying implementation.[147] Even if the regulations satisfy legislative preferences, agencies could use prosecutorial discretion to reach their own preferred outcomes.[148] Agencies can even take more systematic approaches to creating slack. Agencies might benefit from permanent information asymmetries that limit the knowledge and expertise available to Congress.[149] They might promote officials who excel at frustrating legislative oversight.[150] They can devote more resources toward pursuing their own agendas in areas that congressional committees may have difficulty in reaching with normal monitoring.[151] This amounts to a form of moral hazard in public administration, where agencies will produce excessive regulatory activity because of lax oversight and an agency's desire to achieve its own preferences.[152]

In a dynamic game, therefore, Congress will have to take up stiffer measures to guard against the wider opportunities for

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145. Sullivan, *supra* note 32, at 1258 (noting that "in the extreme where Congress has no ability to monitor or respond to the agency's exercise of lawmaking discretion, the agency will simply legislate according to its own lawmaking preferences").

146. *Id.*

147. *See* Rachel Augustine Potter, *Slow-Rolling, Fast-Tracking, and the Pace of Bureaucratic Decisions in Rulemaking,* 79 J. POL. 841, 841 (2017) ("Yet delay may be a reflection of bureaucrats' strategic calculations, rather than a symptom of ineptitude, malfeasance, or circumstance").

148. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (recognizing that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion").

149. *See* Sulmasy & Yoo, *supra* note 128, at 1829.

150. *See id.*

151. *See id.* at 1828–29.

152. *See id.* at 1829.

agency slack. Congress will have an incentive to invest in mechanisms to monitor the agencies, not just to gain information on one policy decision, but to gain cumulative information about the agency over time.[153] The easiest tool to control slack is to enact narrower delegations of legislative authority to the agencies.[154] A broad delegation of authority with few limits on its exercise will produce the greatest opportunity for an agency to pursue its own agenda; conversely, a narrower delegation with greater procedural and substantive limits will reduce the moral hazard and the scope for slack.[155] Congress can achieve this by enacting detailed legislative rules, principles, and priorities to constrain agency discretion.[156] Congress can influence the hiring and promotion of officials by supporting those who share congressional preferences.[157] Congress might grant an agency greater autonomy in limited areas, such as enforcement, in exchange for the latter's commitment to Congress's broader policy goals.[158] But handcuffing agencies also raises the costs of delegation and can harm the agency's mission, especially if Congress keeps more of the decision-making authority for itself but lacks the expertise and information available to the agency.[159]

Congress can also monitor agencies, both to reduce information asymmetries and to identify cases for override, by involving third parties. Scholars have described some monitoring devices as "fire alarms," which rely on third parties such as the media or interest groups to watch agencies and raise the flag should they observe

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153. KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW 46 (2d ed. 2014) (noting that "Congress [uses oversight to ensure] that agencies exercise their authority and spend their money in a manner that is consistent with evolving legislative policy goals").

154. *See* Epstein & O'Halloran, *supra* note 115, at 701 (explaining that "agencies can be controlled through limits on the range of policies they can enact").

155. *See id.* at 701–02 ("In other words, there is a fundamental trade-off in designing administrative procedures between informational gains and distributive losses").

156. *Id.* at 701.

157. *See* Sulmasy & Yoo, *supra* note 128, at 1829.

158. *See id.*

159. *See* Epstein & O'Halloran, *supra* note 115, at 701.

deviations from congressional preferences.[160] Perhaps the most well-known example of a fire alarm is the Administrative Procedure Act, which requires agencies to produce information on its rulemaking and then authorizes third party plaintiffs to seek judicial review over the result.[161] Scholars have classified others as "police patrols," that rely on investigations, oversight hearings, and the budget to engage in more intrusive monitoring of agency conduct.[162] Congress can even enlist agencies to monitor each other and report to Congress by encouraging jurisdictional rivalries.[163]

To be effective, monitoring depends on corrective options. A principal will not only need to detect deviations from their preferences, but it also will want meaningful sanctions for shirking in order to return agents to its range of preferences.[164] While monitoring and correction raise the costs of delegation to the principal, expending more resources on them will become necessary as agency slacking increases.[165] Like efforts to force disclosure of more information, congressional responses to agency action will generate their own record that will be of use to Congress in controlling a wayward agency. Congress, for example, might not detect every or even many examples of agency shirking, but when it does, it can deliver an extremely costly response to deter future drift from its preferences.[166]

III. GAME THEORY AND NONDELEGATION

This game theory perspective gives us two ways to understand the nondelegation doctrine. First, Congress may wish to create a

160. *See* Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

161. *See id.* at 173; Sullivan, *supra* note 32, at 1259.

162. *See* McCubbins & Schwartz, *supra* note 160, at 166.

163. Sullivan, *supra* note 32, at 1260–61 ("By empowering multiple agencies with parallel authority, Congress may benefit from competition between agencies, potentially giving Congress access to information it would otherwise not get.").

164. McCubbins et al., *supra* note 106, at 433–34.

165. *See* Sulmasy & Yoo, *supra* note 128, at 1826.

166. Sullivan, *supra* note 32, at 1258–59.

series of escalating sanctions in cases where it cannot devote extensive resources to monitoring. Congress should create an expected cost to impose on an agency that considers promulgating a rule that goes beyond legislative preferences. We can think of each response—congressional inquiries, oversight hearings, funding cuts, overriding statutes, and even permanent changes in an agency's fundamental governing law—as occupying a place on a spectrum of responses to agency shirking. An agency seeking to act outside of congressional preferences would take into account not just the magnitude of a response, but also the probability of detection and response. The expected cost of the response, rather than just the magnitude of the response itself, is what matters. The agency would then balance whether it made sense to shirk based on the benefit of achieving its policy preferences against the expected cost of congressional sanction.

The nondelegation doctrine would occupy a place as a severe sanction, but one so far with limited expected cost. In terms of magnitude alone, nondelegation would be more expensive for an agency than congressional action overriding a specific regulation, which would reverse only an individual exercise of delegated power, rather than multiple possible exercises of such power. But nondelegation would still be a less costly sanction than a statute that permanently eliminated agency authority or reduced its jurisdiction. Because the Supreme Court has not enforced the nondelegation doctrine since 1935, the probabilities of reversal are so small that the expected cost of the sanction may have approached zero. Congress might want the probability of the nondelegation doctrine to be greater than nothing, so that it can fill a certain place on a spectrum of responses.

A feature of this analysis is that it is agnostic as to the exact test used by courts to enforce the nondelegation doctrine. What matters is not so much the exact wording of the doctrine, but how often courts are willing to enforce it. Critics have attacked the intelligible principle test as unsupported by precedent, inadequate as doctrine,

or circular.[167] Eric Posner and Adrian Vermeule would go farther and say that there should be no test at all, because the Constitution creates no principle for courts to enforce short of a bar on the actual transfer of Congress's right to vote on legislation.[168] Even vocal supporters of a nondelegation doctrine, such as Larry Alexander and Saikrishna Prakash, shy away from providing a workable test.[169] But even if the intelligible principle test had meaningful content, it would not pose any restraint on strategic, rational agencies if the courts fail to use it. Courts could also develop a new test, but if they do not intend to apply it, agencies would continue to face little expected cost for shirking.

Note that a more vigorous nondelegation doctrine might not produce a great number of decisions. If Congress and agencies are acting strategically—and they know that courts will apply a nondelegation doctrine—they should act within the bounds of preferences set by the courts. They might also see warning signs. Courts will first begin striking down individual rulemakings as arbitrary and capricious or start rejecting agency interpretations, especially after *Loper Bright*'s reversal of the *Chevron* doctrine.[170] As John Manning and Cass Sunstein have separately observed, courts could also use the nondelegation doctrine as a norm by which to interpret statutes.[171] But if agencies continue to press beyond the preferences of the enacting Congress even after experiencing setbacks, they will approach the boundaries of the nondelegation doctrine. Agencies should pull back before they encounter a wholesale restriction on their exercise of delegated power because they wish to avoid a congressional backlash that could result in an even greater loss of power. Once the Court issues its first decisions restricting bureaucratic discretion, the agencies rationally should modify their future behavior to fall within Congress's range of preferences.

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167. Lawson, *supra* note 9, at 355–78.

168. Eric A. Posner & Adrian Vermeule, *supra* note 6, at 1721–22 ("In our view there just is no constitutional nondelegation rule, nor has there ever been.").

169. Larry Alexander & Saikrishna Prakash, *supra* note 9, at 1298–99.

170. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

171. Manning, *supra* note 7, at 227; Sunstein, *supra* note 7, at 316.

A second way to understand nondelegation from a game theory perspective is as a means of reducing uncertainty on the part of Congress. If a majority in Congress is unsure about its future electoral support, it will seek to insulate policymaking by delegating power to an agency. This will make it more difficult for a future Congress, with a majority from the opposition party, to completely change policy direction. The agency will run on the original course set by Congress even after the original legislators have left office.[172] A congressional majority might especially favor delegation to an agency if it is electorally weak and the political process throws several veto gates in the way of any future overriding legislation. Delegation may allow that temporary majority to set the agency on policy autopilot with few opportunities by successors to alter course.

But if Congress is also unsure about agency preferences over time, it may not wish to delegate power that remains fully insulated from external control. The logic of the principal-agent game suggests that if a majority in Congress remains confident of its electoral success in the future, it would not seek extensive limits on delegation. It would have the power to sanction shirking or enact overriding legislation easily. Any restrictions on the exercise of delegated authority either in terms of rulemaking procedure or judicial review would increase the ineffectiveness of agency action without any corresponding benefit. We would expect, for example, a parliamentary system along the British model to have almost no judicial review of agencies or anything like a nondelegation doctrine. But because of the difficult process of enacting statutes set out by Article I, Section 7, and the possibility that the executive branch could fall under the control of a different political party—which has been the case for a majority of the years since President Lyndon B. Johnson left office[173]—Congress cannot override agencies so easily. It

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172. *See* Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244–45 (1987).

173. *Party Government Since 1857*, U.S. HOUSE OF REP.: HIST., ART. & ARCHIVES, https://history.house.gov/Institution/Presidents-Coinciding/Party-Government/ [https://perma.cc/7WQF-754G].

may rationally look for other mechanisms to reverse agency action that do not depend on the enactment of statutes.

The nondelegation doctrine here is similar to the choices that Congress faces when it chooses to delegate a decision wholly to an agency or wholly to a court.[174] If Congress trusts an agency to honor Congress's policy choices in the future, it will delegate broadly. It might even favor deference rules that require judicial deference to agency decisions—the dynamic that prevailed until *Loper Bright.* But if Congress is uncertain about an agency's future policy preferences, it could choose to delegate a decision to the courts, as it did with the Sherman Antitrust Act. Courts will probably pay more attention to maintaining the preferences of the enacting Congress given their allegiance to interpreting statutes based on legislative intent. Precedent will also make it less likely that a court will change its interpretation over time. That is not to say that courts do not change their interpretation and enforcement policy over time, only that from the standpoint of comparative institutional politics, they are less likely to than are agencies, which might alter their agendas because of the results of a recent election.

Consideration of whether to vest greater oversight of agency policymaking in the judiciary also requires an expansion of the definition of the principal. In most models, the Congress is the sole principal, and the agency is the agent. But the Presidency also plays a rival role. Presidents are involved in the original delegation through their powers to propose legislation and to veto. The executive branch commonly uses a veto threat as leverage to negotiate changes in statutes, usually in coordination with the President's partisan supporters in Congress.[175]

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174. *See generally* Matthew Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts*, 119 HARV. L. REV. 1035 (2006); Rui J.P. de Figueiredo, Jr., *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321 (2002); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982).

175. *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 150–60 (1999).

Once Congress passes a law, the President will compete with Congress over the agency's exercise of the delegated power. Presidents seek that power because the electorate may hold them politically responsible for agency choices, especially those that impact the economy or influence policy on highly contested issues. If a President takes office during a sharp recession, as Ronald Reagan did in 1981, he will seek greater control over regulations that affect economic growth. The Reagan administration responded to these incentives by aggressively centralizing cost-benefit review over all major regulations in the Office of Management and Budget.[176] Despite several changes in partisan control of the White House since, none of Reagan's successors relinquished that power. While the Constitution does not explicitly state that the agencies need take direction from the White House in promulgating regulations, the Court has held that the President's constitutional duty to take care that the laws are faithfully executed gives him the power to command subordinate executive officers.[177]

Presidents may even have greater ability to control agency implementation than Congress. They appoint the top leadership of the agencies, though with the advice and consent of the Senate for the highest positions.[178] They have the power to remove principal officers and perhaps all others who are not members of the civil service.[179] The power of appointment gives them the power to determine promotions for political appointees. Under the Take Care Clause, Presidents exercise prosecutorial discretion to allocate resources and personnel to pursue their enforcement priorities.[180] They can even use the Take Care Clause, combined with the threat of removal, to direct inferior officers to follow their orders. Congress may delegate to an agency, but it risks presidential influence over the regulators that causes the final rules to swing even farther

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176. Christopher DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1075–76 (1986).

177. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2193 (2020).

178. *See* U.S. CONST. art. II, § 2.

179. *See, e.g.,* Myers v. United States, 272 U.S. 52, 132–35 (1926); *Seila Law*, 140 S. Ct. at 2192.

180. United States v. Texas, 142 S. Ct. 1964, 1971 (2023).

beyond legislative preferences. Congress would not just have to take into account the President at the time of enactment, with whom it might agree, but future Presidents, with whom it is likely at some point to disagree.

Taking time into account also means considering future Congresses as well. Suppose Congress wants to set policy in a strongly pro-environmental direction in the Clean Air Act. It could delegate broad power to the agency, which it might predict will keep policy moving in the same direction. But also suppose a President wins election who seeks to prioritize industrial activity over the environment and his appointments to the EPA repeal previous regulations and enact less protective replacements. The enacting Congress might command enough of a majority to override the regulation, but it cannot be confident that the Congresses of the future will share the same preferences.

Within this framework, a nondelegation doctrine would appeal to a risk-averse legislator. If he delegated broadly to an agency, the legislator would take a greater chance that a future agency might shirk, that a different President might pull the agency even farther beyond the enacting Congress's wishes, or that a future Congress would have different preferences and decline to override the regulation. Such a legislator would look to a third party, such as the courts, to restrain the agency. Much of the existing scholarship looks at the choice between handing a decision over to an agency or to the courts. But they neglect the intermediate possibility of giving courts greater review over agency decisions. Congress could do this by pushing the courts to change their current approach of deference to agencies both in their rulemaking and their interpretation of ambiguous laws and regulations. Congress could also do this by encouraging courts to apply a nondelegation doctrine that prohibits excessive, standardless transfers of power to the agencies.

The enacting Congress would prefer this for two reasons. First, expanding judicial review over agencies would keep the guiding range of preferences to those of the enacting Congress. Dynamic theories of statutory interpretation expect that agencies will pay attention to the preferences of the current Congress, not the one that

enacted the law.[181] It is only the current Congress that can cut the agency's budget, delay its appointments, and override its policies. But because courts still reject dynamic theories of interpretation in favor of a formal quest for the intentions of the enacting Congress, expanding judicial review has the effect of keeping the possible range of policy outcomes in the future closer to the median legislator at the time of enactment. This should be true both for increasing judicial scrutiny of individual regulations, which falls under arbitrary and capricious review, and of a bundle of agency actions, which amounts to the nondelegation doctrine.

Second, broader judicial scrutiny would have the effect of providing stability in the exercise of delegated power over time. Agencies need not obey stare decisis. They can change their rules based on new information, theories of regulation, or even political preferences due to elections. Presidents can use their constitutional powers to effect even more dramatic change in agency rulemaking. Increasing judicial scrutiny of these decisions can force regulatory change to be more gradual, less unpredictable, and less partisan. A nondelegation doctrine will place outer limits on how far agencies can press their powers and may serve as a broader restraint on the overall exercise of delegated power across issues within an agency's jurisdiction.

This is not to say that judicial scrutiny of delegated lawmaking is certain while agency decisions are not. Just as agencies can shift their positions over time, courts can as well. Courts will apply their review over agency decisions within a range of preferences, just as the Congresses and Presidents at the time of statutory enactment and in the future try to shift the exercise of delegated power in the direction of their preferences. But unlike agencies, legislatures, and Presidents, courts decide in a comparatively slow, decentralized manner that will produce less change over time. Presidents increasingly seek to appoint judges that hew to their ideological prefer-

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181. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 49 (1994).

ences in constitutional interpretation. But even as today's Presidents seek to shift the ideological makeup of the courts, such change takes time because of the gradual nature of the judicial appointments process and the creation and slow spread of new norms through a decentralized judicial system. Even after two terms in office, a President may well not appoint a majority of the Justices of the Supreme Court or of the judges on the appellate courts.

IV. NONDELEGATION AND PRESIDENTIAL INTEREST

The last section used game theory approaches to public law to understand the circumstances when Congress might want a nondelegation doctrine. This section will take up the question whether a nondelegation doctrine might support presidential interests as well. This view runs contrary to the general assumptions of the principal-agent analysis of bureaucratic politics. In the game set out in Part II, the legislature delegates to agencies but wishes to keep strings attached, while the President uses his powers over the executive branch to break those strings and pull policy toward his preferences. Under this approach, observers assume that Presidents are happy to receive ever greater grants of power. The President seeks more authority over domestic policy because the electorate commonly holds him responsible for it, even if the executive branch does not actually have control. Indeed, much political science scholarship about the presidency emphasizes the lack of actual power in the office to affect change over domestic matters.[182] Presidents will welcome grants of delegated power from Congress, which allow them to live up to their electoral promises, influence affairs in their ideologically preferred direction, and increase the power of their

182. *See generally* WILLIAM G. HOWELL & TERRY M. MOE, RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT—AND WHY WE NEED A MORE POWERFUL PRESIDENCY (2016); THEODORE J. LOWI, THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED (1986). This theme of a weak presidency runs back to RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS (1960) if not WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (1885). *But see* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 13-14 (2003).

office. Presidents therefore should oppose the nondelegation doctrine.

The maneuvering around *Gundy* presents a more complicated picture. The Trump administration's Solicitor General defended Congress's delegation of power to the Justice Department to decide whether sex offenders convicted before passage of SORNA had to comply with its terms.[183] In the case itself, the Attorney General used the delegated power to require registration for "sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."[184] Two Justices appointed by the Trump administration, however—Justices Neil Gorsuch and Brett Kavanaugh—have led the charge for re-examination of the nondelegation doctrine. Justice Gorsuch wrote the dissenting opinion calling for a resurrection of the doctrine[185] and Justice Kavanaugh in a separate case also appealed for the Court to take up the question.[186] If their appointments represent the Trump administration's approach to constitutional interpretation, their stance on nondelegation runs counter to the actual positions taken by the same administration in litigation.

This section will examine why a President might support a nondelegation doctrine. It shifts this Article's use of game theory to the model of bargaining failures. We can understand delegation as part of a broader relationship between the President and Congress over sharing power. As the Court observed in cases such as *Chadha*[187] and *Bowsher*,[188] the Framers designed the separation of powers to protect individual liberty by making cooperation difficult. But as James Madison observed in *The Federalist*, the Constitution also cre-

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183. *See generally* Brief for the United States, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086).

184. *Gundy*, 139 S. Ct. at 2122 (quoting 72 Fed. Reg. 8897 (Feb. 28, 2007)).

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

186. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

187. INS v. Chadha, 462 U.S. 919, 950 (1983) ((quoting THE FEDERALIST No. 51, at 324 (James Madison) (Jacob E. Cooke ed. 1961)).

188. Bowsher v. Synar, 478 U.S. 714, 721 (1986).

ates political incentives for the two branches to overcome these barriers to enact laws in the public interest.[189] In a certain set of cases, both branches will be better off if they can come to an agreement on sharing power. If that legislation involves the delegation of significant authority from Congress to the President, the two branches will more easily agree if they can make credible promises on how the executive will carry out the law.[190] A nondelegation doctrine might help them in making and keeping such commitments, and hence facilitate bargaining that is in the President's interests.

The analysis here borrows from the literature on conflict, which is itself based on the same models used to examine the choice between litigation and settlement.[191] Rational actors can resolve a dispute by reaching a settlement or engaging in conflict.[192] In a criminal case, for example, prosecutors and defendants face a choice between a plea bargain or trial. In international disputes, nation-states can resolve a territorial dispute by making a deal, expressed in a treaty, or going to war.[193] If they enjoy complete information, rational actors should always seek the settlement over conflict.[194] At a minimum, for example, litigants could reach an agreement that

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189. THE FEDERALIST No. 51, at 352, 353 (James Madison) (Jacob E. Cooke ed. 1961).

190. *See* Eric Posner & Adrian Vermeule, *The Credible Executive,* 74 U. CHI. L. REV. 865, 888 (2007) (indicating that when the executive and Congress are of the same political party and share ideology, the more likely Congress is to delegate its powers).

191. *See generally* James D. Fearon, *Rationalist Explanations for War,* 49 INT'L ORG. 379 (1995) [hereinafter Fearon, *Rationalist]*; Robert Powell, *Bargaining Theory and International Conflict,* 5 ANN. REV. POL. SCI. 1 (2002) [hereinafter Powell, *Bargaining]*; Kenneth A. Schultz, *Do Democratic Institutions Constrain or Inform?: Contrasting Two Institutional Perspectives on Democracy and War,* 53 INT'L ORG. 233 (1999). *See also* Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery,* 23 J. LEG. STUD. 435 (1994).

192. *See, e.g.,* Fearon, *Rationalist*, *supra* note 191, at 379–81; T. David Mason & Patrick J. Fett, *How Civil Wars End: A Rational Choice Approach,* 40 J. CONFLICT RESOL. 546, 548 (1996).

193. *See, e.g.,* Shawn D. Bushway, Allison D. Redlich and Robert J. Norris, *An Explicit Test of Plea Bargaining in the "Shadow Of The Trial,"* 52 CRIMINOLOGY 723, 724 (2014).

194. Fearon, *Rationalist*, *supra* note 191, at 381; Robert Powell, *The Inefficient Use of Power: Costly Conflict with Complete Information,* 98 AM. POL. SCI. REV. 231, 231 (2004) [hereinafter Powell, *Inefficient Use]*.

mirrors the likely outcome of any trial, but which would avoid litigation costs.[195] Nations should make a treaty that divides a disputed territory, along the lines that they likely would have reached after a conflict, while avoiding the costs of war. The costs of litigation in the former example, and of war in the latter example, amount to deadweight losses that rational actors should want to escape.[196] Even a litigant that has virtually zero chance of prevailing should agree to a settlement that admits as much, because it will still save litigation and opportunity costs.[197]

In order to reach the decision on whether to settle or fight, rational actors must make calculations about the probability that they would prevail in a conflict.[198] That probability, multiplied by the value of the territory or litigation, would produce the expected benefit of a conflict.[199] To take a simple example, the expected benefit of a lottery ticket is the probability of winning the lottery, which is determined by the number of tickets, multiplied against the size of the jackpot. If the two parties are rational, they would know that their chances of prevailing would be the opposite of the other side's chances, because the sum of probabilities must add up to 1. If one team has a 70 percent chance of winning a game, for example, the other team must have a 30 percent chance of winning. To take the lottery ticket example, a rational actor should purchase the ticket when its price is less than the probability of winning times the size of the jackpot.[200]

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195. Cooter & Gilbert, supra note 108, at 364.

196. Julian Ku & John Yoo, *Bond, the Treaty Power, and the Overlooked Value of Non-Self-Executing Treaties,* 90 NOTRE DAME L. REV. 1607, 1619 (2015).

197. *See, e.g.,* Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective,* 58 STAN. L. REV. 1267, 1275 (2006).

198. Jide Nzelibe & John Yoo, *Rational War and Constitutional Design,* 115 YALE L.J. 2512, 2527 (2006).

199. John Yoo, *Rational Treaties: Article II, Congressional Executive Agreements, and International Bargaining,* 97 CORNELL L. REV. 1, 15 (2011) [hereinafter Yoo, *Rational Treaties*].

200. *See* John Yoo, *War, Responsibility, and the Age of Terrorism,* 57 STAN. L. REV. 793, 804 (2004) [hereinafter Yoo, *War, Responsibility]* (it is "bad policy" to act when the costs outweigh the expected benefit).

Scholars such as James Fearon and Robert Powell fruitfully applied this model to international politics.[201] Suppose a national government and a rebel group dispute territory. The rebels threaten to fight to gain control over the territory. The government must choose between conceding the territory or fighting to maintain its control. To make that decision, the government must know the value of the territory and the probability that it will prevail.[202] It will fight if the probability it will win, times the value of the territory, is greater than the rebel group's probability of winning in a conflict times the value of the territory. The government will know that the rebel group, if it acts rationally, will not fight because it will not prevail in a conflict and will also lose the costs of the fight.[203] The government and the rebels should reach an agreement that keeps the territory in the government's hands, while both avoid the deadweight loss of a conflict.[204]

But rational actors can still end up in a conflict.[205] If the government and rebel groups have access to only incomplete information, they may misjudge the variables necessary to make an accurate assessment of the expected benefits and costs of settlement versus conflict.[206] The government, for example, may not know the rebel group's ability to win, which will depend on troop and weapon levels, but also leadership, morale, and training, as well as political

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201. *See, e.g.,* Fearon, *Rationalist*, *supra* note 191; Robert Powell, *War as a Commitment Problem,* 60 INT'L ORG. 169 (2006) [hereinafter Powell, *Commitment Problem].*

202. James D. Fearon, *Why Do Some Civil Wars Last So Much Longer than Others?*, 41 J. PEACE 275, 275–276 (2004) [hereinafter Fearon, *Civil Wars*]; Mason & Fett, *supra* note 192, at 548.

203. Powell, *Inefficient Use*, *supra* note 219, at 233.

204. *See* Ku & Yoo, *supra* note 196, at 1621. The literature here makes several assumptions: both the government and rebels must be able to estimate the real probabilities of prevailing in a conflict; they are not risk-seeking (they do not gamble irrationally on low-probability outcomes); the territory can be divided or transferred in toto with accompanying side deals; neither side can completely eliminate the other, in that a conflict would only involve control over the disputed territory and not end the overall bargaining relationship.

205. Nzelibe & Yoo, *supra* note 198 at 2528; *see also* Branislav L. Slantchev & Ahmer Tarar, 55 AM. J. POL. SCI. 135, 136 (2011).

206. Yoo, *Rational Treaties*, *supra* note 199, at 17.

factors such as popular support and foreign allies.[207] The government may be able to gather some of this information, but some of it may also be private and harder to judge. Litigation has the same quality.[208] A plaintiff may have access to some information necessary to estimate its chances of winning, such as the legal rules, the evidence and witnesses of which it knows, and the quality of its counsel. But it will not know directly of the evidence and witnesses in the hands of the defendant, nor perhaps of the quality of the defendant's trial counsel.

If the two parties to a dispute could reveal their private information, they could reach an agreement to avoid conflict. But assuring that the information is credible is difficult. A party may be tempted to bluff—producing false information showing a higher probability of winning—to obtain a better deal than they should obtain in a bargaining environment with perfect information.[209] Bluffing means that parties will tend to discount the reliability of information that their opponents voluntarily produce. Parties can attempt to overcome this problem by engaging in costly signaling; in other words, an expensive act that shows that the information produced is credible.[210] A party could send such a credible signal, for example, by taking an act that would be politically costly to itself should it be bluffing.[211] If a nation's leader declares that it will fight, but then backs down, the leader will suffer political costs at

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207. *See, e.g.,* James D. Morrow, *Capabilities, Uncertainty, and Resolve: A Limited Information Model of Crisis Bargaining,* 33 AM. J. POL. SCI. 941, 947–48 (1989) (discussing factors nation-states struggle or can't assess when determining the probability of victory).

208. *See* Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation under Uncertainty,* 56 EMORY L.J. 619, 653 (2006) ("In any given [litigation] dispute, there is imperfect information . . . .").

209. *See* Sebastian Rosato, *The Flawed Logic of Democratic Peace Theory,* 97 AM. POL. SCI. REV. 585, 599 (2003); James D. Fearon, *Domestic Political Audiences and Escalation of International Disputes,* 88 AM. POL. SCI. REV. 577, 578 (1994) [hereinafter Fearon, *Domestic Political*].

210. *See* Erik Gartzke, *War Is in the Error Term*, 12 INT'L ORG. 567, 579 (1999); Nzelibe & Yoo, *supra* note 198, at 2529.

211. *See* Schultz, *supra* note 191, at 2.

home from elites or the public.[212] A party could engage in costly spending and investments which would be wasted if it were bluffing. In the international context, a nation could build bases and infrastructure, or permanently deploy military forces and political resources, to the territory in dispute.[213]

Another important way to overcome the bluffing problem is to use an independent third party to mediate the production of credible information.[214] In the domestic litigation context, the Federal Rules of Civil Procedure allow parties to produce information on evidence and witnesses through a discovery process managed ultimately by the courts. The force of federal law makes the information produced credible.

But even if parties to a dispute can solve asymmetric information and bluffing challenges, commitment problems will pose an equal if not greater obstacle.[215] Even if the parties enjoy enough information to accurately calculate their expected values of winning a dispute, and thus they understand the bargain to be made that would avoid the deadweight losses of a conflict, they still might not choose settlement. The commitment problem is that the parties might not trust each other to keep their word in the future.[216] In environments that are less governed by binding law and institutions, such as international politics or domestic political conduct that is non-justiciable, there are few means to compel the parties to comply with agreements.[217] Parties may be tempted to renege on a settlement, especially when the resolution of the dispute itself alters

212. *See* Yuleng Zeng, *Bluff to peace: How economic dependence promotes peace despite increasing deception and uncertainty*, 37 CONFLICT MGMT. PEACE SCI. 633, 633 (2020) [hereinafter Fearon, *Signaling*] (citing James Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, 41 J. CONFLICT RESOL. 68, 78 (1997)).

213. Banislav L. Slantchev, *Military Coercion in Interstate Crises*, 99 AM. POL. SCI. REV. 533 (2005).

214. *See e.g.*, LESLEY G. TERRIS, MEDIATION OF INTERNATIONAL CONFLICTS 2, 9 (2016).

215. Gartzke, *supra* note 210, at 571.

216. Monica Duffy Toft, *Issue Indivisibility and Time Horizons as Rationalist Explanations for War*, 15 SOC'Y STUD. 34, 35 (2006).

217. *See* Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005) (in international environments agreements are often drafted to be more easily violated and international politics lack the structure to enforce such agreements).

the status quo or triggers rapid change in the balance of power between them.[218] In the territorial dispute example, a party that emerges from a resolution better off because it has gained control over more resources and population may want to break the deal and seek even more advantage with its newfound power.[219]

If the environment where the dispute takes place is governed by weak institutions, parties will have little reason to trust each other to keep their commitments. In international relations, Fearon and Powell observe that states will have difficulty in reaching international agreements, even with perfect information, because of the lack of international institutions with enforcement power.[220] This problem will also be true, as Thomas Schelling first notably observed, in a series of domestic settings where enforcement will be weak.[221] Separation of powers disputes between the President and Congress share this feature. If the courts hold that the political question doctrine prevents judicial involvement in an area, the lack of enforcement could discourage the branches from reaching agreements to settle their political or constitutional disputes. Bargaining may also prove difficult if the courts refuse to honor mechanisms that signal credibility. In *INS v. Chadha,* for example, the Court declared that it would not enforce the outcomes of legislative vetoes, but instead would allow the underlying executive branch action—there, a decision by the Attorney General to block a removal order of an alien—to go forward.[222] But without a legislative veto, Congress will have less reason to trust the President's promises that the executive branch will respect legislative preferences, and hence delegation is less likely to occur.

218. Powell, *Commitment Problem, supra* note 201, at 171–72.

219. *See, e.g.,* Robert Powell, *War as a Commitment Problem,* 60 INT'L ORG. 169, 171 (2006); Robert Powell, *The Inefficient Use of Power: Costly Conflict with Complete Information,* 98 AM. POL. SCI. REV. 231, 231 (2004).

220. Fearon, *supra* note 191, at 384; Powell, *Commitment Problem, supra* note 201, at 181.

221. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 5 (1960) (emphasis omitted).

222. 462 U.S. 919, 928 (1983).

This model would explain why the President might favor greater judicial review over the delegation of power to the agencies. Suppose that Congress and the President both wish to expand federal regulation of a certain issue. They could choose to cooperate through enactment of legislation that delegates rulemaking power to an agency within the control of the executive branch. Congress is willing to delegate authority, but only if it knows that the executive will commit to exercising the power within a certain range of policy outcomes. The President reveals that his political preferences in using that power overlaps with Congress's preferences. If regulation within Congress's preferences leaves the President better off, the President should promise to stay within Congress's range in order to persuade the legislature to delegate the power. The President and Congress should be able to reach a deal because both branches are better off cooperating than doing nothing.

But the problem is that Congress may have few reasons to trust the President to keep his promise. Once Congress passes the law, the President could break the deal, use the delegated power outside the spectrum of policies to which he originally agreed, and suffer little chance of reversal thanks to his veto power over any reversing statute. If Congress does not have a credible commitment from the President that he will keep his word, and the President's use of delegated power would leave Congress worse off, it will not reach an agreement and pass the statute. Without any judicially enforceable agreement, Congress can retaliate by cutting funding and holding oversight of executive exercise of the delegated power, which may not much discourage the President. Congress's most meaningful sanction against presidential reneging is the same used in infinitely repeating tit-for-tat games: a loss of presidential reputation for keeping promises and, therefore, legislative refusal to cooperate in the future.

As scholars have observed, the parties have a way out. They can send costly signals that reveal their intent to keep their commitments. In the context of forming a nation, for example, groups can send a costly signal that it will keep a power-sharing deal by agreeing to a written Constitution. Parties to a Constitution might further

agree to judicial review as a commitment that they intend to live up to their promises and not seek to use the power of the new government to break the original bargain.

A more vigorous nondelegation doctrine can perform a similar function to that of a written Constitution in overcoming commitment problems in bargaining between the executive and legislative branches. Congress may distrust a President's promises on how he will wield delegated power in the future. This may especially be the case if the delegation will enhance the legal and political standing of the President compared to Congress. Congress will also have little reason to trust a President's promises about the exercise of the power by his successors, over whom he is unlikely to have much influence.

For his part, the President would benefit from the delegation, but he does not have many tools to credibly commit to exercising the power within the range of congressional preferences. The President can agree to a judicially enforced nondelegation doctrine as a costly signal that he intends to abide in the future by the promise he makes today. A nondelegation doctrine would not interfere with every exercise of a delegation, but it would allow courts to correct for any significant deviations from the agreement between the branches. A nondelegation doctrine would also place the question in the hands of an independent third party with which both branches have greater trust to detect violations of the agreement and impose remedies. The doctrine advantages the President, but it also benefits both parties because it allows them to invite external enforcement of the agreement, and thus solve the most difficult obstacles to bargaining.

A nondelegation doctrine may also provide a solution to a problem in bargaining between the executive and legislature created by the timing of execution. A common problem in bargaining arises over the order in which two parties perform their obligations. In the delegation of authority, Congress must go first in enacting the delegation, while the President moves second in exercising the grant of authority within the bounds agreed to between the

branches. Once Congress performs its part of the bargain, the President will enjoy the advantage by then applying the delegation. If the President chooses to renege and abuse the grant of power, Congress has less ability to counter the President or even terminate the deal. By committing to a nondelegation doctrine, the President can assure Congress that he will obey the original bargain even after the balance of power in the relationship has shifted in his or her direction.

Of course, the nondelegation doctrine is not a cure-all nor unique in its benefits. The Administrative Procedure Act and judicial review over agency action generally also perform the same function. Vesting review over agency action in the courts, though it reduces the efficiency of delegated power, smooths the way toward an agreement between the executive and legislative branches to share power in the first place. Rather than an obsolete mechanism, the nondelegation doctrine similarly should help the President and Congress cooperate. Of course, it would not have the same value in every area of inter-branch bargaining. In certain areas, Congress may have such great incentives to delegate power that it would do so even without the need for such commitments. These could include areas where the potential harm to the nation due to inaction is great, such as in emergencies, crises, or war, or where the political benefits of shifting policymaking is especially high, such as politically controversial questions or technically difficult problems.

But tools such as the nondelegation doctrine have become more important as others have declined. The Court has increasingly looked askance at other means of executive-legislative cooperation, such as the legislative veto, insulated decision makers, and unusual agency forms. The Rehnquist Court, for example, invalidated the widely-used legislative veto, even though—as Justice White's dissent ably explained—its presence encouraged Congress to delegate broad powers. In *INS v. Chadha,* the Court explained that the Framers intended the Constitution to defeat such governing innovations because they believed an excessively efficient government could

threaten individual liberty.[223] Similarly, the Roberts Court has struck down recent efforts to create new forms of agency independence, such as the Consumer Finance Protection Board director's for-cause removal protection. In *Seila Law v. CFPB,* the Court observed that the Constitution concentrated executive power in an elected President accountable to the people, but that it otherwise resisted the concentration of authority in other bodies, such as the CFPB, which combined the ability to regulate, prosecute, and draw its own funds without congressional approval.[224] Both the legislative veto and for cause removal encouraged congressional delegation; the former by allowing Congress to grant power but with strings attached, the latter by keeping the exercise of the delegation free from direct presidential control. With the Court finding these devices inconsistent with the separation of powers and its protection for individual liberty, nondelegation will rise to fill their place. That doctrine, however, will require judges to accept the non-intuitive result that formally policing delegations will have the result of encouraging more delegations.

CONCLUSION

This article does not undertake the difficult task of constructing a neutral doctrinal test that could enforce a nondelegation doctrine. Even if a majority on the Court wishes to dispense with the current intelligible principle test, federal judges have yet to produce a replacement that does not call on the courts to pick and choose among their favored delegations. This article has taken a different tack. It has sought to analyze the nondelegation doctrine using a public choice approach to the relationship between Congress, the President, and the agencies. On this point, this article contributes to the debate over delegation by explaining an important role for a nondelegation doctrine based on the functional considerations favored by administrative scholars, rather than originalist history or democratic theory grounds. It argues that, in certain situations, Congress

223. *Id.* at 944.
224. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020).

would favor a nondelegation doctrine that invites greater judicial scrutiny over agency action. It concludes that a more vigorous nondelegation doctrine might actually encourage greater cooperation between the branches by assuring them that their bargains over sharing power will be enforced. In this respect, a nondelegation doctrine might produce the unanticipated consequence of producing better legislative outcomes and increased social welfare.