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POWERS, BUT HOW MUCH POWER? GAME THEORY AND THE NONDELEGATION PRINCIPLE

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Of all constitutional puzzles, the nondelegation principle is one of the most perplexing. How can a constitutional limitation on Congress's ability to delegate legislative power be reconciled with the huge body of regulatory law that now governs so much of society? Why has the Court remained faithful to its intelligible principle test, validating expansive delegations of lawmaking authority, despite decades of biting criticism from so many camps? This Article suggests that answers to these questions may be hidden in a surprisingly underexplored aspect of the principle. While many papers have considered the constitutional implications of what it means for Congress to delegate legislative *power, few have pushed hard on the second part of the concept: what it means for an agency to have legislative* power.

Using game theory concepts to give meaning to the exercise of legislative power by an agency, this Article argues that nondelegation analysis is actually more complicated than it appears. As a point of basic construction, a delegation only conveys legislative power if it (1) delegates lawmaking authority that is sufficiently legislative in nature, and (2) gives an agency sufficient power over the exercise of that authority. But, again using game theory, this Article shows that an agency's power to legislate is less certain than it first appears,

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making satisfaction of this second element a fact question in every case.

This more complicated understanding of the nondelegation principle offers three contributions of practical significance. First, it reconciles faithful adherence to existing theories of nondelegation with the possibility of expansive delegations of lawmaking authority. Second, it suggests a sliding-scale interpretation of the Court's intelligible principle test that helps explain how nondelegation case law may actually respect the objectives of existing theories of nondelegation. Third, it identifies novel factors that should (and perhaps already do) influence judicial analysis of nondelegation challenges.

I. INTRODUCTION

In 1935, the Dust Bowl was in full swing. Droughts ravaged the Great Plains. Massive dust storms blackened the sky from Texas to Canada. This was five years into the Great Depression and about 20 percent of the U.S. work force was unemployed. Overseas, Europe was spiraling into violence, with Hitler rearming Germany while Mussolini invaded Ethiopia. And at home, the Supreme Court issued successive opinions striking down components of FDR's desperately anticipated New Deal legislation as unconstitutional delegations of legislative power.

Panama Refining Co. v. Ryan[1] and *A.L.A. Schechter Poultry Corp. v. United States*[2] concerned portions of the National Industrial Recovery Act ("NIRA") authorizing the President to regulate the interstate transportation of oil and dictate "codes of fair competition" for various industries. The Court held these authorizations void as unconstitutional because the lawmaking authority they conveyed was not sufficiently bound by a congressional statement. In *Panama Refining*, the Court complained that "Congress has declared no policy, has established no standard, has laid down no rule" such that "[t]here is no requirement, no definition of circumstances and conditions in which [the President must act]."[3] In *Schechter*, it drew the argument further, deriding a key provision of the statute as "without precedent" in granting broad regulatory authority with "no standards [to guide its exercise], aside from the statement of the general aims of rehabilitation, correction and expansion," leaving exercises of the delegated lawmaking discretion "virtually unfettered" by the terms of the Act.[4] In the language of modern nondelegation cases, these provisions lacked an intelligible principle to guide and cabin the exercise of the delegated lawmaking authority. They were thus void as unconstitutional delegations of the legislative power.

But *Panama Refining* and *Schechter* stand as infamous exceptions to the general rule. The Court has never since invalidated any statute on nondelegation grounds; nor had it done so before.[5] To the confusion of

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[1] 293 U.S. 388, 408–09 (1935).

[2] 295 U.S. 495, 521–22 (1935).

[3] *Panama Refining,* 293 U.S. at 430.

[4] *Schechter*, 295 U.S. at 541–42.

[5] See, e.g., Mistretta v. United States, 488 U.S. 361, 373 (1989) ("Until 1935, this Court never struck down a challenged statute on delegation grounds. After invalidating in 1935 two statutes as excessive delegations . . . we have upheld, again without deviation, Congress'

lower courts and the frustration of legal scholars, sweeping grants of what appear to be embarrassingly legislative powers have been consistently upheld against nondelegation challenges,[6] often with less of an intelligible principle to circumscribe their exercise than the stricken NIRA provisions afforded.[7]

Still, it is difficult to claim that this leniency is wrong, as there has never been any widely accepted view of what exactly the nondelegation principle demands. The Constitution contains no nondelegation clause, and the line of Supreme Court decisions developing this limitation has never more than feebly gestured at the motivating theory behind the principle. Over the decades, arguments have been made against the delegation of legislative powers on textual grounds,[8] on separation-of-powers principles,[9] on analogy to the common law of agency,[10] and on functional considerations about political accountability, comparative expertise, and the costs of lawmaking.[11] The Court has at times adopted

ability to delegate power under broad standards." (citations omitted)). One special-case exception is *Carter v. Carter Coal Co.*, involving the delegation of lawmaking powers to "private persons whose interests may be and often are adverse to the interests of [those they would regulate]." 298 U.S. 238, 311 (1936). The Court rejected this scheme as "legislative delegation in its most obnoxious form." Id.

[6] See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (enumerating broad delegations of rulemaking authority upheld on nondelegation challenges); Clinton v. City of New York, 524 U.S. 417, 471–72 (1998) (Breyer, J., dissenting) (detailing historic hesitancy to invalidate statutes on nondelegation grounds).

[7] See, e.g., Kenneth Culp Davis, A New Approach to Delegation, 36 U. Chi. L. Rev. 713, 715 & n.3 (1969) (citing cases in which the Supreme Court found delegations constitutional "*without pretending to find statutory standards*"); James O. Freedman, Review, Delegation of Power and Institutional Competence, 43 U. Chi. L. Rev. 307, 307 n.6 (1976) (citing standards such as "public convenience, interest or necessity" and "unfair methods of competition" as evidence that "the requirement of a prescribed standard has proven so expansive that it has had little inhibiting effect").

[8] See, e.g., Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 345–51 (2002) (arguing that the text of Article I of the Constitution constitutes a limitation on the delegation of the legislative power by Congress).

[9] See, e.g., Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, A Theory of Legislative Delegation, 68 Cornell L. Rev. 1, 2–5 (1982) (describing the pragmatic separation-of-powers approach to nondelegation questions).

[10] See, e.g., Cynthia R. Farina, Deconstructing Nondelegation, 33 Harv. J.L. & Pub. Pol'y 87, 91 (2010) (considering how agency law might inform nondelegation cases).

[11] See, e.g., David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 8–12 (1993) (arguing for a more robust nondelegation principle to increase legislative accountability, among other things). But cf. Mistretta v. United States, 488 U.S. 361, 372 (1989) (making the similarly functional argument that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society,

aspects of all these approaches. Yet all of them share two disquieting properties. First, none of them can easily reconcile the nondelegation principle with the existence of the modern administrative state; at least, not without either hollowing the nondelegation principle or demanding radical reorganization of government. Second, none of them can explain the Court's intelligible principle test. As Larry Alexander and Saikrishna Prakash put it, no one but the Supreme Court "adopts the view that what distinguishes constitutional grants of discretion from unconstitutional delegations of legislative power is the presence or absence of an intelligible principle."[12]

This Article aims to clarify both the nondelegation principle and the intelligible principle test. It does so not by simplifying the theory, but by complicating it. The thesis of this Article is that nondelegation analysis is not a one-prong question: whether a statue delegates rulemaking authority of the type that should be exercised by the legislature. Rather, nondelegation analysis requires a two-prong inquiry in every case. In addition to the usual question, whether delegated authority is of a type that should be exercised by the legislature, there is always a second question to address: whether, and to what extent, Congress has actually delegated power over lawmaking outcomes at all.

This Article's approach to the puzzle of nondelegation differs from the literature in two ways. First, the Article does not singularly focus on any existing constitutional theory of nondelegation, but instead aims to show how constitutional structure and game theory inform all existing theories of nondelegation.[13] Second, in giving meaning to the prohibited act of delegating "legislative power," this Article sets aside historic efforts to define the meaning of legislative power, to instead focus on the second part of the concept—what it means for Congress to delegate

replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives").

[12] Larry Alexander & Saikrishna Prakash, Delegation Really Running Riot, 93 Va. L. Rev. 1035, 1044 (2007); see also Freedman, supra note 7, at 307 ("Because the results the Court has reached have often seemed inconsistent with the principles it has stated in reaching them, the non-delegation doctrine has long been regarded as theoretically unsatisfactory."). But cf. Maurice H. Merrill, Standards—A Safeguard for the Exercise of Delegated Power, 47 Neb. L. Rev. 469, 473–79 (1968) (describing some potential benefits that flow from definite limiting standards).

[13] See generally Charles L. Black, Jr., Structure and Relationship in Constitutional Law (1969) (providing a seminal argument for the use of governmental structure and organizational relationship as tools of constitutional interpretation).

legislative power. While both concepts are integral to the nondelegation principle, the latter is underappreciated in the constitutional literature, and may be the more influential consideration in practice.

The following pages develop this theory of nondelegation with rigor, but the core logic of the argument is easily summarized. Consider two extremes. First, imagine that Congress were able to delegate lawmaking authority to an agency under an incentive structure that made it in the agency's interests to exercise its discretion only as Congress would have done in the agency's position. In this case, plenary lawmaking authority could be given to the agency without transferring to it "power" in the sense of actual discretion over the lawmaking outcome. The agency would be authorized to exercise lawmaking powers, but would lack the power to do anything other than what Congress would itself do. Since no power has been transferred to the agency in this hypothetical, legislative power has not been transferred, and the nondelegation prohibition should stand silent. Second, suppose that Congress is not in any way able to incentivize the agency to act as Congress would in the agency's position. Every grant of lawmaking authority necessarily transfers plenary lawmaking power to the agency, but that transfer still only offends the nondelegation principle when the delegated power is legislative in nature. While this second extreme is the focus of most constitutional nondelegation scholarship, a middle ground between extremes is where most cases probably fall; and it is here that a more mature theory of the nondelegation principle emerges.

This two-prong theory of nondelegation suggests an interpretation of the intelligible principle test that places the needed degree of textual specificity on a sliding scale. In situations where Congress seems well equipped to incentivize agency action (where delegation transfers little lawmaking power to the agency), the need for an intelligible principle is low. Vague standards meet the need. But as the challenge of incentivization rises (as monitoring problems, frictions in Congress's ability to react to agency lawmaking, and disconnects in the relationship between the agency and Congress imply that a delegation would transfer more substantial lawmaking power to the agency), the need for an intelligible principle also rises. More exacting statements of policy, standards, and procedure are needed as the credibility of incentivization fades.

This theory of nondelegation stands at the intersection of three separate literatures. One is the constitutional literature on nondelegation, which seeks to justify the nondelegation principle on textual, philosophical, legal, and functional grounds.[14] This literature has generally focused on defining the concept of legislative power, and the proposed theory can be seen as a generalization of its results. A second literature approaches nondelegation issues from the administrative-law perspective of seeking safeguards, procedures, and *ultra vires* review as limits on the exercise of agency discretion.[15] The proposed theory emphasizes many of the same factors, but the focus is broader than these protections, and the concern is with political review (not judicial review) of agency lawmaking. The third literature involves game-theoretic analyses of principal–agent models of delegated discretion.[16] The proposed theory uses results from this literature as the vehicle for a constitutional interpretation of what it means to have legislative power. Put another way, this Article combines three strands of research in an effort to formulate a more general theory of the nondelegation principle.

The remainder of this Article proceeds as follows. The next Part orients the argument within scholarship and case law on the legislative nondelegation principle. The Article then defines the meaning of "power to make law" in the context of an informal game-theoretic model of delegations of lawmaking authority. Relying upon this definition of

[14] These theories are surveyed in Section 0.

[15] E.g., Lisa Schultz Bressman, *Schechter Poultry* at the Millennium: A Delegation Doctrine for the Administrative State, 109 Yale L.J. 1399, 1402 (2000) (suggesting a theory of nondelegation in which procedural protections advance normative concerns about rule of law and accountability); Davis, supra note 7, at 729–30 (focusing on procedural safeguards and judicial review as limits on agency regulatory discretion).

[16] E.g., Randall L. Calvert, Mathew D. McCubbins & Barry R. Weingast, A Theory of Political Control and Agency Discretion, 33 Am. J. Pol. Sci. 588, 589 (1989); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J.L. Econ. & Org. 243, 246 (1987) [hereinafter McCubbins et al., Administrative Procedures] (focusing on administrative procedures and political control as limits on agency discretion). See generally Jean-Jacques Laffont & David Martimort, The Theory of Incentives: The Principal–Agent Model 33–36 (2002) (providing a comprehensive introduction to principal-agent models in general game theory); Sean Gailmard, Accountability and Principal–Agent Theory, *in* The Oxford Handbook of Public Accountability 90 (Mark Bovens et al. eds., 2014) (summarizing work on principal-agent models of legislative delegations); Mathew D. McCubbins, Common Agency? Legislatures and Bureaucracies, *in* The Oxford Handbook of Legislative Studies 567–68 (Shane Martin et al. eds., 2014) [hereinafter McCubbins, Common Agency] (surveying the history and modern subparts of game theoretic study of legislative delegations in particular).

power, the Article proposes a two-pronged theory of nondelegation, informed not only by the text of the empowering statute, but also by an inquiry into the dynamics of the relationship between Congress and the agency, and thus the extent of the agency's power to legislate. The proposed theory of nondelegation is developed to supply a context-dependent intelligible principle test, which seems to fit comfortably within the language and results of existing case law. The Article concludes with remarks about the factors relevant to proper nondelegation analysis and the use of game theory as a tool of constitutional interpretation.

II. THE CHALLENGE OF NONDELEGATION

Suppose that Congress enacts a statute giving rulemaking authority to some independent or executive agency.[17] Suppose further that this statute falls within Congress's enumerated powers and satisfies the usual constitutional requirements of bicameralism, presentment, etc.[18] The delegation is nonexclusive in the horizontal sense that nothing prevents Congress from vesting parallel authority in another agency,[19] and in the vertical sense that Congress retains superior authority to legislate on anything within the scope of the delegated subject matter.[20] Is this delegation of rulemaking authority constitutionally permissible?

It is generally agreed that Congress does have some constitutional power to delegate discretionary authority in this manner. The power to do so might be read to flow from the Necessary and Proper Clause of the

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[17] The Administrative Procedure Act's ("APA") broad definition of "agency" as including, subject to a few enumerated exceptions, "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," more than suffices to describe the scope of the present inquiry. 5 U.S.C. § 551 (2012). The constitutionality of agencies themselves is at least arguably implied by the Take Care Clause. U.S. Const. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States").

[18] See U.S. Const. art. I, §§ 7–8.

[19] See Alexander & Prakash, supra note 12, at 1040 ("[N]othing prevents Congress from granting two or more entities rulemaking power over the same area."). For example, the Federal Trade Commission and the Department of Justice have concurrent jurisdiction over the enforcement of several federal antitrust laws.

[20] See id. ("Congress retains the ability to enact statutes itself. Any statute subsequently enacted by Congress would trump any inconsistent rules made under the auspices of a delegation."); see also R. Douglas Arnold, Political Control of Administrative Officials, 3 J.L. Econ. & Org. 279, 280–81 (1987) (listing ways that Congress may legislatively and nonlegislatively modify earlier grants of authority).

Constitution.[21] Or it might simply be taken as given under existing case law.[22] The Court has never seriously denied that Congress has the power to commit certain discretionary decisions to agencies,[23] and even its rare invalidation of a statute on nondelegation grounds in *Panama Refining* was clear about Congress's base authority to delegate.[24]

Because Congress has some power to delegate, the hypothetical delegation of rulemaking authority could be constitutionally permissible. But it could also be invalid on nondelegation grounds. When would this occur? The doctrinal answer is easy: a delegation of lawmaking authority is unconstitutional when the empowering statute lacks an intelligible principle to circumscribe the agency's exercise of discretion. But what exactly this test requires—and why—is more difficult to say.

A. The Intelligible Principle Requirement

For better or worse, it is fairly easy to recount the history and modern expression of the constitutional nondelegation doctrine. The Supreme Court's struggle with congressional delegations of lawmaking authority dates back to at least the mid-nineteenth century.[25] From the start, the Court candidly admitted the difficulty of the task. In 1825, Chief Justice

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[21] U.S. Const. art. I, § 8, cl. 18; see also Lawson, supra note 8, at 345–51 (discussing the limitations of the Necessary and Proper Clause as a justification for delegating *some* rulemaking authority).

[22] See, e.g., Loving v. United States, 517 U.S. 748, 758 (1996) ("This Court established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself.").

[23] See, e.g., Buttfield v. Stranahan, 192 U.S. 470, 496 (1904) ("Congress legislated on the subject as far as was reasonably practicable . . . . To deny the power of Congress to delegate [residual] duty would, in effect, amount but to declaring that the plenary power vested in Congress to [legislate] could not be efficaciously exerted."); see also Lichter v. United States, 334 U.S. 742, 778 (1948) ("A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes.").

[24] 293 U.S. 388, 421 (1935) ("Without capacity to give authorizations of [some] sort [of rulemaking discretion to agencies] we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.").

[25] The case usually cited as the earliest expression of the legislative nondelegation principle is *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813), in which counsel for the appellant argued (without citation) that "Congress could not transfer the legislative power to the President." Id. at 386. The Court was not required to explore this argument in any detail, as the challenged act was a simple application of conditional legislation. See also Field v. Clark, 143 U.S. 649, 681 (1892) (discussing counsel's argument about Congress's ability to delegate its legislative power to the President); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–49 (1825) (similar); Cincinnati, Wilmington & Zanesville R.R. v. Comm'rs of Clinton Cty., 1 Ohio St. 77, 87 (1852) (similar).

Marshall cited fuzziness in the boundaries of the legislative and executive functions as grounds for judicial caution:

> [T]he legislature makes, the executive executes, and the judiciary construes the law; but the 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, into which a Court will not enter unnecessarily.[26]

The challenge of locating the line between those actions that Congress must make for itself, and those that can be properly ascribed to an agency in its execution of law, remains the central difficulty in implementing the nondelegation principle today. Notwithstanding a few efforts at distinguishing more important matters of policy from less important matters,[27] at distinguishing those acts of Congress which convey legislative authority in a "real" or "just" sense from those that do not,[28] and at distinguishing laws featuring "legislative character in the highest sense of the term" from those that "savor[] somewhat of mere rules prescribed [on an individualized basis],"[29] the Court's test of whether a statute unconstitutionally delegates legislative power soon converged on the current search for an intelligible principle.

The leading authority for the intelligible principle requirement is the 1928 case of *J. W. Hampton, Jr., & Co. v. United States*.[30] Chief Justice Taft explained the test as follows: "If Congress shall lay down by legislative act an intelligible principle to which the person or body

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[26] *Wayman*, 23 U.S. (10 Wheat.) at 46. *Wayman* actually involved a congressional grant of authority to the judiciary, but the proposition applies just as well to congressional grants of rulemaking authority to agencies.

[27] E.g., id. at 43 ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from 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.").

[28] E.g., Union Bridge Co. v. United States, 204 U.S. 364, 385 (1907) ("*In no substantial, just sense* does it confer upon that officer as the head of an Executive Department powers strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the courts." (emphasis added)); *Buttfield*, 192 U.S. at 496 ("[The statute] does not, *in any real sense*, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and . . . [left] to executive officials the duty of bringing about the result pointed out by the statute." (emphasis added)).

[29] Butte City Water Co. v. Baker, 196 U.S. 119, 126 (1905).

[30] 276 U.S. 394 (1928).

authorized [to make substantive law] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[31] The idea is that if Congress has sufficiently "indicated its will" in the empowering statute, then the delegation is not legislative.[32] Or, to put it succinctly, delegations of rulemaking authority conveyed under the limit of an intelligible statement of congressional intent are allowed; those without the limit of an intelligible principle are prohibited.[33]

But what is the measure of an intelligible principle? To how fine a degree must Congress direct the conduct of the agent if the delegation is to escape invalidation? As far as the practical mechanics of the test were concerned, *J. W. Hampton, Jr., & Co.* merely offered that "the extent and character of [the conveyance of lawmaking authority] must be fixed according to common sense and the inherent necessities of the governmental co-ordination."[34] Unsurprisingly, given this noncommittal statement of the standard, the apparent focus of the Court's intelligible principle inquiry has wandered over time.

In *Panama Refining* and *Schechter*, for example, the requirement of an intelligible principle seemed like a demand that Congress determine for itself the substantive policy of delegated rulemaking, as well as the standards and procedures by which rules would be promulgated.[35] The agency's only role was to "fill in the blanks" left by Congress.[36] This high demand for congressional specificity, and the corresponding subordination of agency discretion in lawmaking, is in some ways reminiscent of earlier judicial efforts at separating important matters

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[31] Id. at 409.

[32] United States v. Grimaud, 220 U.S. 506, 517 (1911); accord Margaret H. Lemos, The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine, 81 S. Cal. L. Rev. 405, 417 (2008) (summarizing the logic as follows: "So long as Congress has specified the general policy and standards . . . it has not ceded the essential 'legislative power' that it alone holds, and citizens . . . can respond in the voting booth if they disagree with the policy choices Congress made.").

[33] See Alexander & Prakash, supra note 12, at 1043–45 (providing a similar summary, as well as serious criticism of the intelligible principle requirement).

[34] *J. W. Hampton, Jr., & Co.*, 276 U.S. at 406.

[35] See supra notes 1-4 and accompanying text.

[36] See Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring) (reading *Panama Refining* and *Schechter* as demanding that Congress "lay down the general policy and standards that animate the law," so that the agency need only "refine those standards, fill in the blanks, or apply the standards to particular cases" (internal quotation marks omitted)).

(which Congress had to decide for itself) from less important matters (which it could validly delegate).[37]

But *Panama Refining* and *Schechter* represent a high-water line in the Court's demand of congressional specificity, and—as already noted—are atomistic in the Court's decisions. In other cases, the Court has shown impressive comfort with a lack of congressional specificity. These cases often point to mediating considerations in lieu of statutory specificity, or in excuse of it.

In some cases, for example, the Court has focused on a tribunal's ability to engage in *ultra vires* review of an agency's exercise of its lawmaking discretion. In *Yakus v. United States*, decided a mere decade after *Panama Refining* and *Schechter*, the Court stressed judicial review of agency rulemaking as the apparent measure of an intelligible principle: an empowering statute would be found lacking only if "it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed."[38] This reasoning has motivated other Supreme Court decisions,[39] and has undergirded influential lower court opinions as well.[40] The apparent reasoning is that *ultra vires* review completes the delegation scheme by ensuring that the agent does not exceed the scope of its authority.[41] Put another way, "[p]rivate rights are protected by access to the courts to test the application of the policy in the light of [the intelligible principle]," however broad that might be.[42]

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[37] See supra note 27.

[38] 321 U.S. 414, 426 (1944).

[39] See, e.g., Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 218 (1989) ("Earlier this Term . . . [we] reaffirmed our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed, no delegation of legislative authority . . . has occurred." (citations and internal quotation marks omitted)).

[40] See Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971) (citing "compatibility with the legislative design" as assessed by "the courts and the public" as a source of "control and accountability" on which the nondelegation principle is premised).

[41] E.g., Touby v. United States, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) ("[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds."); Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly—and courts have upheld such delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits . . . ." (citation omitted)).

[42] Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946); see also Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L.

In other cases, the Court's focus has seemed to turn on the scope of discretion given to the agency in comparison to the extent of policy direction and procedure imposed on that discretion by Congress. Concern with the scope of delegated authority was apparent in the Court's opinion in *Schechter*.[43] But recent cases have been even more explicit. In *Whitman v. American Trucking Associations*, for example, the Court stated baldly that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[44] Other cases have hinted that the need for specificity may also vary according to existing agency expertise and authority.[45]

Finally, in other cases the intelligible principle test is presented and applied in terms suggesting that it is little more than hollow formality. The Court has long disclaimed that the nondelegation principle "does not demand the impossible or the impracticable."[46] But does it demand anything at all? In *Whitman*, the Court acknowledged that it has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[47]

Governmental pragmatism and the difficulty of the problem are reasonable justifications for hesitating to enforce the nondelegation principle too rigorously,[48] but few perceive any threat of overapplication. Modern decisions openly admit the record of limp

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Rev. 452, 486 (1989) ("After *Yakus*, the constitutionally relevant inquiry is . . . whether [Congress] supplied enough policy structure that someone can police what its delegee is doing . . . .").

[43] *Schechter*, 295 U.S. at 541–42 (condemning the statute "[i]n view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed").

[44] 531 U.S. 457, 475 (2001).

[45] See, e.g., Loving v. United States, 517 U.S. 748, 772 (1996) ("Perhaps more explicit guidance as to how to select aggravating factors would be necessary if delegation were made to a newly created entity without independent authority in the area.").

[46] See, e.g., *Yakus*, 321 U.S. at 424 ("The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action . . . .").

[47] *Whitman*, 531 U.S. at 474–75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

[48] See, e.g., *Mistretta*, 488 U.S. at 372 ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); supra note 26 and accompanying text (describing the difficulty of the nondelegation inquiry).

standards that have satisfied the intelligible principle test,[49] and academic commentary is no more delicate. K.C. Davis long ago wrote that "[o]ne cannot read the many Supreme Court opinions revolving around standards without realizing the emptiness of the insistence," continuing that "[n]othing should hinge upon [the] presence or absence of such vague phrases as 'public interest' or 'just and reasonable.'"[50] Gary Lawson puts it even more directly: "[The Court] . . . has steadfastly found intelligible principles where less discerning readers find gibberish."[51]

B. Theories of Legislative Nondelegation

One constant in the Court's otherwise-inconsistent treatment of nondelegation challenges is its insistence that there is some such constitutional limitation. Cases routinely begin with the recitation that delegations of the legislative power are unconstitutional. If so, where is this limitation found? Nothing in the text of the Constitution speaks to the delegation of legislative powers one way or the other.[52]

Early nondelegation opinions dodged the question by simply asserting that the legislative power could not be delegated. An example is the proclamation of *Field v. Clark*, stating without citing any authority: "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."[53] Over the years, the Court has hinted at various bases for the principle—most often the text of Article I or separation-of-powers principles—but exactly because opinions have entertained many different thoughts on

[49] See, e.g., *Whitman*, 531 U.S. at 474 (collecting vague standards that the Court has found to satisfy the intelligible principle requirement); *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting) ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?").

[50] 1 Kenneth Culp Davis, Administrative Law Treatise § 2.04, at 87 (1958).

[51] See Lawson, supra note 8, at 328–29.

[52] Cf. id. at 335–43 (arguing that lack of an express nondelegation clause is not, as a matter of constitutional interpretation, evidence of the absence of this principle).

[53] 143 U.S. 649, 692 (1892); see also Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (stating, in dicta and without citation, that "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative").

what motivates the nondelegation principle, uncertainty about the principle's constitutional authority remains.[54]

As a rough approximation, four broad theories are often suggested as potential bases for the nondelegation principle. The first is a textual interpretation of the Article I Vesting Clause as an implicit statement of the nondelegation principle. The second is a derivation of the nondelegation principle from separation-of-powers principles. The third is an argument by analogy, inferring the nondelegation principle from rules in the common law of agency. The fourth is a catchall category, consisting of a variety of arguments for and against the delegation of legislative powers on functional and normative grounds. As explained in detail below, none of these theories easily explain the existence of the modern administrative state alongside a substantive nondelegation principle, and none can explain the intelligible principle test by which the Court has historically reviewed nondelegation challenges.

1. Textual Arguments

The simplest theory of nondelegation infers the principle from the text of the Article I Vesting Clause, which provides that "*All* legislative Powers herein granted shall be vested in a Congress of the United States."[55] The text of the Article I Vesting Clause differs subtly from the vesting clauses in Articles II and III, which provide, respectively, that "*The* executive Power shall be vested in a President,"[56] and "*The* judicial Power of the United States, shall be vested in one supreme Court."[57] Sometimes on the support of this subtle difference, sometimes independent of it, the textual argument for nondelegation reads the Article I Vesting Cause as an exclusive grant of lawmaking authority to Congress: that is, as providing that the legislative power shall *only* be vested in Congress.

The Court has in some cases adopted this textual reading explicitly,[58] but the argument is vulnerable to the powerful rebuttal that the same text

[54] See generally *Whitman*, 531 U.S. at 459 (2001) (revealing disagreement between the justices over the source and demands of the nondelegation principle).

[55] U.S. Const. art. I, § 1 (emphasis added).

[56] Id. art. II, § 1 (emphasis added).

[57] Id. art. III, § 1 (emphasis added).

[58] E.g., *Whitman*, 531 U.S. at 472 ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . .").

can just as plausibly be read as a nonexclusive grant of authority. As Justice Stevens has written: "In Article I, the Framers vested "All legislative Powers" in the Congress just as in Article II they vested the "executive Power" in the President. Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others."[59] Prominent scholars have expressed similar doubts about this textual theory of the nondelegation principle.[60]

But even supposing that the textual theory of nondelegation is right, the implied nondelegation principle becomes exactly the "delicate and difficult inquiry" that Justice Marshall warned about in *Wayman v. Southard*.[61] That is, a statute which delegates the exercise of "legislative power" is invalid, while a statute which merely authorizes executory rulemaking is not.[62] The concept of "legislative power" is not defined in the Constitution,[63] so to operationalize this textual theory of the nondelegation principle one must first shoulder the withering responsibility of deciding what it means to exercise *legislative* power.

As you might expect, there is ample disagreement about what the legislative power entails, and different definitions result in profoundly different versions of the nondelegation principle. Lawson, for example, draws the line between legislation and execution on the importance of the delegated responsibility.[64] The implied nondelegation principle is this: "Congress must make whatever policy decisions are sufficiently

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[59] Id. at 489 (Stevens, J., concurring in part and in the judgement) (citations omitted).

[60] 1 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 2.6, at 66 (3d ed. 1994) ("The Court probably was mistaken from the outset in interpreting Article I's grant of power to Congress as an implicit limit on Congress' authority to delegate legislative power.").

[61] 23 U.S. (10 Wheat.) 1, 42–49 (1825); see supra note 26 and accompanying text.

[62] See Mistretta v. United States, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting) (stating and defending this formal distinction).

[63] See Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1238 n.45 (1994) (noting that even the framers of the Constitution recognized that "legislative power" was not self-defining). See generally William B. Gwyn, The Indeterminacy of the Separation of Powers and the Federal Courts, 57 Geo. Wash. L. Rev. 474 (1989) (discussing the development of and disagreement surrounding the meaning of "executive power" as used in the Constitution).

[64] Lawson, supra note 63, at 1237–41. Note that Lawson's argument on this point is far more subtle and careful than this short summary suggests. See also Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally, 337 F. Supp. 737, 745 (D.D.C. 1971) ("There is no analytical difference, no difference in kind, between the legislative function—of prescribing rules for the future—that is exercised by the legislature or by the agency implementing the authority conferred by the legislature. The problem is one of limits.").

important to the statutory scheme at issue so that Congress must make them," and what remains may be validly delegated to an agent as necessary and proper.[65] By contrast, Eric Posner and Adrian Vermeule argue that the legislative power is simply the de jure powers of the members of Congress—such as the authority to vote on proposed legislation.[66] By this standard, *any* delegation of lawmaking authority short of the full abdication of the de jure powers of a congressperson is permissible under the nondelegation principle.

Two unsettling propositions are apparent. First, the textual theory of the nondelegation principle cannot easily reconcile a serious nondelegation principle with the modern administrative state. Either the principle has bite (as in Lawson's view), in which case many Supreme Court opinions have been wrong and much of modern government must be disassembled, or the principle lacks bite (as in Posner and Vermeule's view), in which case the nondelegation principle is far more trivial than even the most apologetic Supreme Court cases have suggested. Second, in any event, the textual theory gives no plausible basis for thinking that constitutionality should turn on the presence or absence of a potentially weak intelligible principle in the empowering statute.[67]

2. Separation-of-Powers Principles

Similar to the textual theory, but more flexible, is a theory of nondelegation based on separation-of-powers principles popular at the time of the Founding and ostensibly embedded in the Constitution's separate assignment of the legislative, executive, and judicial powers to the three respective branches of the federal government.[68] The Court has often cited separation-of-powers principles as the basis for the

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[65] Lawson, supra note 63, at 1239; see also Gary Lawson, Delegation and the Constitution, 22 Reg. 23, 27–29 (1999) (making a similar argument).

[66] Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1723 (2002). Posner and Vermeule's argument is, again, more nuanced and sophisticated than this short summary suggests.

[67] See Alexander & Prakash, supra note 12, at 1044 (arguing that "an intelligible principle that barely (if at all) cabins rulemaking discretion" cannot plausibly define the boundary of the legislative power); see also David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 83 Mich. L. Rev. 1223, 1229 (1985) (commenting on the practical weakness of the "intelligible principle" constraint).

[68] See supra notes 55–57 and accompanying text (discussing the three vesting clauses).

nondelegation principle.[69] But, just as was the case for the textual theory of nondelegation, the separation-of-powers theory is susceptible to various interpretations.[70] The core difficulty is deciding what the separation-of-powers principle actually prohibits Congress from doing.

A formalist understanding of the separation-of-powers principle may simply restate the textualist theory of nondelegation. That is, all power defined as legislative must be strictly and exclusively exercised by the legislature, so the nondelegation question would again be a matter of characterizing power as legislative or executive in nature. The previous analysis of the textual theory of nondelegation applies in full to this view of the separation-of-powers principle. While the Supreme Court has a few times come close to this rigid understanding of the separation of powers,[71] in most cases it adopts a more flexible approach.[72]

The typical functionalist understanding of the separation-of-powers principle focuses less on the character of a delegation as legislative or executive than on the effects of delegation on governmental balance. The Court has at times gone far to this functionalist extreme, rejecting the "archaic view of . . . three airtight departments of government" in favor of a constitutional inquiry into "whether [an] Act disrupts the proper balance" of the branches of government.[73] The corresponding theory of nondelegation prohibits only undue delegations of power—those that would disrupt this proper balance.

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[69] See, e.g., Mistretta v. United States, 488 U.S. 361, 371–72 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government . . . . [W]e long have insisted that the integrity and maintenance of the system of government ordained by the Constitution mandate that Congress generally cannot delegate its legislative power to another Branch." (internal quotation marks omitted)).

[70] See Thomas O. Sargentich, The Contemporary Debate About Legislative-Executive Separation of Powers, 72 Cornell L. Rev. 430, 438–44 (1987) (describing and comparing checks-and-balances arguments supporting different degrees of judicial intervention in separation-of-powers cases).

[71] See, e.g., Kilbourn v. Thompson, 103 U.S. 168, 191 (1880) ("[It is] essential to the successful working of this [constitutional] system that the persons intrusted [sic] with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.").

[72] See, e.g., Buckley v. Valeo, 424 U.S. 1, 121 (1976) ("[T]he Constitution by no means contemplates total separation [of powers] . . . . The men who met in Philadelphia in the summer of 1787 . . . saw that a hermetic sealing off of the three branches . . . would preclude the establishment of a Nation capable of governing itself effectively.").

[73] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977) (internal quotation marks omitted) (quoting Nixon v. Adm'r of Gen Servs., 408 F. Supp. 321, 342 (D.D.C. 1976)).

What "proper balance" entails is an open question, but nondelegation cases that emphasize this functional view of the separation-of-powers principle have typically followed Madison's writings.[74] That is, the constitutional question is operationalized, as illustrated in *Mistretta v. United States*, as asking whether a delegation of rulemaking authority is subject to adequate checks and balances:

> In adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.[75]

This approach has obvious connections to the Court's occasional focus on the ability of courts to engage in *ultra vires* review of agency actions as a check on agency discretion.[76] And it finds support in academic suggestions that standards, procedures, and judicial review constitute the checks on agency action that may make broad delegations of lawmaking power constitutional.[77]

But, again, a cursory overview of the theory is enough to highlight disquieting issues. On a formalist approach, the separation-of-powers theory is essentially the same as the textualist theory of nondelegation. It is difficult to reconcile with modern government, and at any rate does not explain the intelligible principle test. On a functionalist approach, the separation-of-powers theory is more consistent with expansive delegations of legislative power, but even here it appears to anticipate more specificity in an intelligible principle than the Supreme Court has historically demanded. It is difficult to envision judicial review of agency rulemaking for consistency with a "public interest" standard as the kind of check on power that Madison was contemplating.[78]

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[74] See The Federalist No. 47 (James Madison) (arguing that the commingling of powers does not violate separation-of-powers principles).

[75] 488 U.S. 361, 381 (1989).

[76] See supra notes 38–42 and accompanying text.

[77] Bressman, supra note 15, at 1415–16, 1425–26; Davis, supra note 7, at 729–30.

[78] E.g., Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (finding "public interest, convenience, or necessity" a sufficiently intelligible principle).

3. Common Law Principles of Agency

Another theory of nondelegation derives this constitutional limitation not from the text or structure of the Constitution but from background concepts in the common law of agency. The argument is often associated with the agency-law maxim *delegata potestas non potest delegari* (delegated authority cannot be further delegated),[79] ostensibly known to the Founders at the time of the drafting.[80] An old state court case captures the spirit of this theory of nondelegation:

> That a power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another, is a general and admitted rule. Legislatures stand in this relation to the people whom they represent. Hence it is a cardinal principle of representative government, that the legislature cannot delegate the power to make laws to any other body or authority.[81]

Unfortunately, it is not that simple. First, it is hardly obvious that the common law of agency is a proper source of constitutional authority for limiting the powers of the political branches of government. Second, even assuming it is, the authority and meaning of the *delegata potestas* maxim are less certain than they may at first appear. In a detailed historical review, Patrick Duff and Horace Whiteside long ago argued that the accepted form of the maxim was actually the result of a printing error. The earliest authoritative assertion of the maxim seems not to have stated the now familiar rule that restricts delegations, but rather the extremely permissive proposition that the "King's power is not diminished by its delegation to others."[82]

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[79] See, e.g., *J. W. Hampton, Jr., & Co.*, 276 U.S. at 405–06 ("The well-known maxim '*Delegata potestas non potest delegari*' . . . is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law.").

[80] Cf. *Mistretta*, 488 U.S. at 419–20 (Scalia, J., dissenting) ("As John Locke put it almost 300 years ago, '[t]he power of the *legislative* being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.'" (quoting John Locke, Second Treatise of Government 87 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1689))).

[81] Locke's Appeal, 72 Pa. 491, 494 (1873).

[82] Patrick W. Duff & Horace E. Whiteside, Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law, 14 Cornell L.Q. 168, 173 (1929).

Third, even giving the *delegata potestas* maxim the full constitutional credit of its modern meaning in the law of agency, the common law of agency is still not as rigid as it might at first appear. As Cynthia Farina explains, the *delegata potestas* maxim was never the end of common law analysis on the fitness of an agent to delegate authority to a subagent.[83] For example, the common law historically allowed an agent to delegate incidental, mechanical, and ministerial acts to a subagent.[84] And the general rule against subdelegation also excepted subdelegation with the express assent of the principal,[85] or with implied assent in the event of substantially changed conditions.[86]

Thus, like the previous approaches, the agency-law theory of nondelegation admits different interpretations of the limitation. It might be understood to allow any delegation of rulemaking authority which does not diminish the power of Congress to legislate,[87] something close to Posner and Vermeule's nondelegation principle.[88] It might permit only incidental delegations of lawmaking authority, subject to major policy choices made by Congress, something similar to Lawson's

[83] Farina, supra note 10, at 91–93 (noting that the *delegata potestas* maxim "only begins the analysis" as other common law rules allowed the delegation of power over incidental and necessary matters where reasonable or with the principal's consent). See generally Restatement (First) of Agency §§ 34–35, 77–80 (1933) (describing conditions under which delegations of authority may include authority to act beyond the express terms of the delegation).

[84] E.g., id. § 78 (1933) ("Unless otherwise agreed, authority to conduct a transaction does not include authority to delegate to another the performance of acts incidental thereto which involve discretion or the agent's special skill; *such authority, however, includes authority to delegate to a subagent the performance of incidental mechanical and ministerial acts*." (emphasis added)).

[85] E.g., Warner v. Martin, 52 U.S. 209, 223 (1850) (interpreting the *delegata potestas* maxim to mean the agent "cannot depute the [delegated] power to a clerk or under agent, notwithstanding any usage of trade, *unless by express assent of the principal*" (emphasis added)).

[86] See Farina, supra note 10, at 93 (explaining that under substantially changed circumstances, assent to the agent's necessary exercise of expanded authority may be "reasonably inferred if 'the principal is aware of the change and its effect and is in a position to change his orders if he desires such change'" (quoting Restatement (First) of Agency § 33 cmt. a (1933)).

[87] Cf. Louis L. Jaffe, An Essay on Delegation of Legislative Power: II, 47 Colum. L. Rev. 561, 565 (1947) (summarizing this theory as a simple rule that "as long as the legislature may repeal a law, all delegations are valid").

[88] See supra note 66.

nondelegation principle.[89] Or it might be somewhere in between, allowing for the delegation of lawmaking authority where necessitated by circumstances and where the public is aware of the practice and consents to it.

As before, these theories of the nondelegation principle square with the modern administrative state only insofar as they limit the practical significance of the principle, perhaps by reading a congressional right to delegate broad lawmaking authority as expressly or impliedly authorized by the public. Also, nothing in any of these agency-law theories of nondelegation explains why the presence or absence of a potentially vague expression of congressional intent should supply the constitutional test of validity.

4. Functional Governance Concerns

Finally, myriad nondelegation theories flow from functional concerns about the legislative process and the ends of lawmaking. These are not necessarily constitutional concerns; some simply reflect important normative desiderata of lawmaking and democratic government. Nor are these concerns of one mind on the proper scope of delegations of lawmaking authority. Indeed, they run the gamut from harshly critical of legislative delegations to warmly accepting.

For example, a common prodelegation consideration is the idea that Congress needs to delegate broadly if government is to keep pace with growing regulatory needs. The Supreme Court has often used practical necessity to argue for broad delegations, citing the "hard-headed practicalit[y]" that "Congress frequently could not perform its functions" if it were required to legislate specifically on every topic as leaving broad-stroke delegation "the only way in which the legislative process can go forward."[90] It is not just delegation but weakly constrained delegation that makes this process workable.[91]

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[89] See supra notes 64–65 and accompanying text (briefly summarizing Lawson's theory of the nondelegation principle).

[90] Bowles v. Willingham, 321 U.S. 503, 515 (1944); see also Loving v. United States, 517 U.S. 748, 758 (1996) ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."); *Mistretta*, 488 U.S. at 372 ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); Am. Power & Light Co. v. SEC, 329 U.S. 90, 105

There are other prodelegation functional considerations as well. For example, delegation of lawmaking responsibility to unpolitical subject-matter experts may reduce the costs of legislation.[92] Delegation of lawmaking power may improve the overall quality of the laws being enacted because of the more decentralized process through which decisions are made.[93] And delegation may promote greater consistency and transparency in lawmaking through agency notice procedures, interested-party involvement, and similar practices.[94]

But antidelegation functional concerns are available for nearly all of these arguments. Opposing the idea that delegation is necessary to meet the modern demand for regulation is concern that broad delegations of legislative power allow Congress to legislate too much.[95] Opposing the benefit of reducing the cost of lawmaking through delegation is concern that many cost reductions arise from circumventing constitutional hurdles to legislation.[96] Opposing the notion that agencies may pass

(1946) ("The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules . . . .").

[91] Davis, supra note 7, at 720 ("A modern regulatory agency would probably be an impossibility if power could not be delegated with vague standards.").

[92] E.g., Aranson et al., supra note 9, at 18 (commenting that delegations trade "congressional decision costs" for "agency costs"); Richard J. Pierce, Jr., Political Accountability and Delegated Power: A Response to Professor Lowi, 36 Am. U. L. Rev. 391, 404 (1987) ("Agencies encounter much lower transaction costs than Congress.").

[93] E.g., Davis, supra note 7, at 726 ("[Courts] should [admit] that putting the content of the Code of Federal Regulations through the congressional enacting process would mean worse government, not better government, because Congress is and should be geared to major policies and main outlines, and administrators are better able to legislate the relative details . . . ."); see also Richard B. Stewart, Beyond Delegation Doctrine, 36 Am. U. L. Rev. 323, 329–35 (1987) (making a similar point in greater detail).

[94] See, e.g., Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81, 99 (1985) (noting the ways that agency procedures may lead to more stable and transparent operation than congressional voting would).

[95] See Farina, supra note 10, at 95–98 (summarizing and commenting on these functional concerns about excessive lawmaking).

[96] See Alexander & Prakash, supra note 12, at 1049–54 (noting that delegation circumvents various Article I, Section 7 requirements); Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 247–49 (1986) (discussing law and economics insights into the role of bicameralism in shaping the outcome of legislation); David Schoenbrod, Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine, 36

better laws than Congress are concerns about the rule of law when agencies generate voluminous codes of specific rules; about democratic accountability for laws passed by politically insulated agencies;[97] and about policy drift and agency capture when agencies interact closely and repeatedly with the same interest groups they are meant to regulate.[98]

These antidelegation concerns are themselves susceptible to attack,[99] the end result being that functional theories of the nondelegation principle range from permissive to extremely restrictive, depending on what concerns motivate the inquiry and what weight the various factors are given. For present purposes, it suffices to note two things. First, none of these functional concerns seems able to simultaneously justify a serious nondelegation principle and the modern administrative state. Second, none of these functional concerns relates at all to the modern doctrinal test of constitutional validity—the presence or absence of a potentially vague intelligible principle in the authorizing statute.

III. GAME THEORY & THE POWER TO LEGISLATE

Existing theories of the nondelegation principle are diverse and divergent, as this brief summary shows. But they share in common an effort to define the scope of lawmaking powers that Congress should not be permitted to delegate. Abusing terminology, they all focus on trying to define the meaning of legislative powers.[100] This Article charts a

Am. U. L. Rev. 355, 371–87 (1987) (summarizing the procedural protections built into congressional legislation).

[97] See generally Theodore J. Lowi, Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power, 36 Am. U. L. Rev. 295 (1987) (arguing that broad, unrestricted delegations of discretionary power are antithetical to the rule of law); Theodore J. Lowi, The End of Liberalism: The Second Republic of the United States (2d ed. 1979) (same); see also Sargentich, supra note 70, at 448–64 (discussing the argument for, and limitations of, this rule-of-law interpretation of the nondelegation principle).

[98] See David B. Spence & Frank Cross, A Public Choice Case for the Administrative State, 89 Geo. L.J. 97, 114–15 (2000) (summarizing the literature and providing prominent citations); see also Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2142–45 (2004) [hereinafter Merrill 2004] (summarizing these concerns). See generally Thomas W. Merrill, Capture Theory and the Courts: 1967–1983, 72 Chi.-Kent L. Rev. 1039 (1997) (giving a broader discussion of capture-theory concerns).

[99] See generally George I. Lovell, That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine, 17 Const. Comment. 79 (2000) (offering persuasive criticisms of many of these antidelegation functional concerns).

[100] In a textual approach, this is the literal question. In a separation-of-powers theory, the *legislative* power may take on a broader meaning of the power that cannot be given to

different course. It aims to clarify the nondelegation principle by instead focusing on the second part of the prohibited act: trying to say what it means for an agency to exercise legislative power.

An immediate difficulty is the expansive list of possible definitions of power, itself an abstract term. A thorough treatment of the universe of possibilities is beyond the scope of this Article.[101] It is also unnecessary. In the constitutional context, the concept of power is not as malleable as it might at first seem, since purely formal motions of lawmaking are not at issue. Congress has the technical capacity, for example, to pass a statute dissolving the judicial and executive branches of government. But since the Supreme Court would judge this unconstitutional, and since the President would most likely decline to enforce it at any rate, there is no constitutional cause for alarm. A reasonable description of the situation is to say that while Congress could technically vote out such a statute, it lacks the power, in our constitutional system, to effect this outcome. A like concept is needed for an agency's power to exercise the authority delegated to it by Congress.

The remainder of this Part defines an agency's power to legislate by analogy to a variety of principal-agent games. Game theory, a mathematic framework for studying conflict and cooperation among actors with interdependent preferences,[102] has long been used to study delegations of discretion.[103] Game theory not only provides a precise

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another branch without disrupting the balance of government. In analogy to the law of agency, the *legislative* power is that for which Congress does not have authority to subdelegate. In a functional approach, the *legislative* power encompasses the scope of decisions that must be made by Congress to satisfy relevant functional objectives.

[101] See, e.g., Steven Lukes, Power: A Radical View (2d ed. 2005) (reproducing and commenting on one of the earlier and more influential efforts to systematically define *power* in a social framework); Thomas E. Wartenberg, The Forms of Power: From Domination to Transformation (1990) (incorporating many different theories of *power* in a pluralistic model); Robert A. Dahl, The Concept of Power, 2 Behavioral Sci. 201 (1957) (providing an influential definition of *power* in a legislative context).

[102] See generally Robert Gibbons, Game Theory for Applied Economists (1992) (providing an accessible introduction to game theory); Roger B. Myerson, Game Theory: Analysis of Conflict (1991) (providing a more rigorous introduction).

[103] See, e.g., Sean Gailmard, Accountability and Principal-Agent Theory, *in* The Oxford Handbook of Public Accountability 90 (Mark Bovens et al. eds., 2014) (summarizing work on principal-agent models of legislative delegations); Jerry L. Mashaw, Greed, Chaos, and Governance: Using Public Choice to Improve Public Law ch. 6–7 (1997) (applying game theory and public choice concepts to various issues around delegations of legislative powers); Matthew [sic] D. McCubbins et al., Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431,

definition of an agency's power to legislate, but also suggests what factors may increase or decrease an agency's legislative power.

A. The Definition of Legislative Power

In game theory, it is common to refer to an actor's ability to influence the outcome of a game as the actor's "power." Examples include *voting power* (the ability of a given voter to influence the outcome of a voting process),[104] *bargaining power* (the ability of a negotiating party to secure an agreement that benefits that party),[105] and *market power* (the ability of a firm to raise prices above a competitive baseline).[106] Generalizing this terminology, power in game theory is the ability to influence the outcome of a process that is subject to the influence of multiple actors.[107] Influence, here, can be either direct control over an outcome (like casting a vote) or indirect control over an outcome (like using the threat of future punishment to compel someone else to cast a vote). This concept of power requires not just the ability to take an action affecting the outcome of a game, but also the willingness to take such an action, in light of the actions that other agents are expected to take. Max Weber long ago captured the core idea: "'Power' . . . is the

433–34 (1989) (studying a three-party principal-agent model of delegations of policy discretion).

[104] See, e.g., Guillermo Owen, Evaluation of a Presidential Election Game, 69 Am. Pol. Sci. Rev. 947 (1975) (illustrating this definition in a game-theory voting model). See generally Matthew Braham, Causation and the Measurement of Power, *in* Power, Voting, and Voting Power: 30 Years After, at 63–69 (Manfred J. Holler & Hannu Nurmi eds., 2013) (discussing this definition of voting power and related indexes of voter power).

[105] See, e.g., Stefan Napel, Bilateral Bargaining: Theory and Applications 27 (2002) (using bargaining power in the typical sense of ability to direct the division of profit in a structured noncooperative bargaining game); id. at 13 (using bargaining power in the also-typical sense of player-weights in a cooperative bargaining game).

[106] See, e.g., Jonathan B. Baker & Timothy F. Bresnahan, Economic Evidence in Antitrust: Defining Markets and Measuring Market Power, *in* Handbook of Antitrust Economics 1, 15 (Paolo Buccirossi ed., 2008) (defining market power as "the ability of firms to raise price above the competitive level for a sustained period"); Massimo Motta, Competition Policy: Theory and Practice 40–41 (2004) (similar).

[107] See generally Rodolfo Coelho Prates, Power in Game Theory, *in* 7 Contributions To Game Theory And Management 282 (Leon A. Petrosyan & Nikolay A. Zenkevich eds., 2014) (summarizing concepts of *power* and suggesting how power arguments might be added to game theoretic frameworks); Wolfgang Balzer, Game Theory and Power Theory: A Critical Comparison, *in* Rethinking Power 56 (Thomas E. Wartenberg ed., 1992) (contrasting game theory with alternative but similar formal models of power).

probability that one actor within a social relationship will be in a position to carry out his own will despite resistance [from others]."[108]

This notion of power as capacity to influence the outcome of a game despite resistance will be familiar to any student of constitutional or administrative law. It is the essential concept of power implicit in Madison's emphasis of constitutional checks and balances in preventing the tyrannous abuse of power.[109] The same idea of power is also implicit in concerns about the abuse of unchecked agency discretion in the administrative-law context.[110]

Delegations of legislative power create principal-agent relationships in both economic and legal senses of the term,[111] and the game theory concept of power translates easily to the principal-agent game between Congress and an empowered agency. At a high level of abstraction, the "legislative delegation game" involves three decisions. First, Congress—the principal—specifies the subject-matter domain in which the agency is authorized to make laws. Second, the agency decides what laws to promulgate within the scope of authority delegated to it by Congress. Third, Congress may respond in some way: possibly legislating on its own to override the agency's lawmaking or possibly using budgetary control to punish or reward the agency for its lawmaking decisions.[112]

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[108] Max Weber, Economy and Society: An Outline of Interpretive Sociology 53 (Guenther Roth & Claus Wittich eds., 1968).

[109] See supra note 74 and accompanying text (discussing Madison's interpretation of the separation-of-powers principle in Federalist 47); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgement) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.").

[110] E.g., Davis, supra note 50, § 1.09, at 68 ("We have had [in drafting organic statutes] little or no concern for avoiding a mixture of three or more kinds of powers in the same agency; we have had much concern for avoiding or minimizing unchecked power.").

[111] See Restatement (Third) Of Agency § 1.01 (2006) ("[Legal] [a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."); Stephen A. Ross, The Economic Theory of Agency: The Principal's Problem, 63 Am. Econ. Rev. 134, 134 (1973) ("We will say that an [economic] agency relationship has arisen between two (or more) parties when one, designated as the agent, acts for, on behalf of, or as representative for the other, designated the principal, in a particular domain of decision problems.").

[112] See Peter H. Schuck, Delegation and Democracy: Comments on David Schoenbrod, 20 Cardozo L. Rev. 775, 785–86 (1999) (suggesting that the appropriations process "sharply constrains the authority and discretion of agencies" through "the language of the funding

To operationalize the model, assume that both Congress and the agency have well-defined preferences.[113] Though far from innocuous, this technical assumption is not novel to this Article and—as a modeling exercise—helps to reveal broader legal principles.[114] It is not necessary to take a stand, here, on what exactly congressional and agency preferences entail.[115] For present purposes, it suffices to say that Congress and the agency are assumed not to have entirely identical preferences on all matters—which seems a fairly safe assumption.

Defining "power" in the game theory sense of ability to exercise influence over the outcome of a game, the agency's legislative power in the principal-agent game is its ability to enact laws that Congress would not itself enact if given the choice.[116] To make this concrete, note that Congress is assumed to have a preferred choice of what laws the agency should enact—call this L_C. But the agency, too, has a preferred choice of which laws to enact, which will not generally coincide with the preferences of Congress—call the laws that the agency would prefer to enact L_A. Congress and the agency may both influence the outcome of the agency's lawmaking decision in this game—call the resulting law that the agency actually enacts L_A^*. In terms of the above definition of power, the extent of the agency's legislative power is the distance between its actual choice of law in the game and the choice that

legislation, through formal committee and subcommittee oversight hearings, and through the frequent informal interactions between members and agency officials").

[113] Technically, assume that both Congress and the agency have state-independent von Neumann-Morgenstern utility functions and act as expected utility maximizers.

[114] Much has been written about the complexity of defining preferences for aggregate bodies such as Congress or a federal agency. These challenges fall no harder against the following analysis than they do against the many papers that have attempted to model agencies' exercise of discretionary authority, that have assumed the existence of voter preferences in more than the most trivial applications of majority voting, or that have ever relied upon the notion of legislative intent in statutory interpretation.

[115] Cf. McCubbins, Common Agency?, supra note 16, at 578 (discussing various theories of agency preferences, but also the absence of much hard evidence supporting these theories).

[116] The reader might note that this implicitly assumes congressional legislation is the baseline against which power is measured. Nearly all concepts of power require some choice of baseline. See Harald Wiese, Applying Cooperative Game Theory to Power Relations, 43 Quality & Quantity 519, 520 (2009) (arguing that "every fruitful definition of power-over needs a reference point which may concern a 'usual', 'normal', or 'moral' situation"). In the nondelegation context, constitutional comfort with congressional legislation recommends using Congress's policy preferences as the reference point.

Congress would have preferred the agency make: $|L_A^* - L_C|$.[117] A similar idea of agency "discretion" appears in the game theory literature on the behavior of agencies when delegated legislative responsibilities.[118]

Intuitively, the agency's power to legislate is the discretion it has to enact laws different than those the legislature would want it to enact, in light of whatever resistance it can expect from Congress. In Part IV of this Article, I defend the constitutional significance of this concept of agency power. For now, however, the pressing question is whether and why the agency should be expected to exercise legislative power at all. That is, when and why would $L_A^* \neq L_C$.

B. One-Shot Delegation Conveys Legislative Power

Start with the simplistic game in which Congress decides the scope of authority to delegate to the agency, the agency legislates within the scope of its authority, and then Congress has an opportunity to respond by passing its own legislation or punishing or rewarding the agency. Suppose this game is played once and then ends forever: in the terminology of game theory, it is a "one-shot game."

If Congress had all the same information as the agency, then it could use its third move in the principal-agent game to constrain the agency's exercise of lawmaking discretion to always coincide with congressional preferences. As a trivial example, Congress could simply watch the law that the agency enacts, and if it differs from L_C, Congress could either punish the agency severely or simply override it statutorily. Knowing that Congress would respond this way, the agency would have no reason to even try to deviate from Congress's legislative preferences, and so would legislate exactly as Congress would: $L_A^* = L_C$.[119] And knowing that the agency would be so constrained, Congress could grant it very

[117] For brevity, discussion delves no deeper into the interpretation of these outcomes as either points in high-dimensional policy space or payoffs resulting from a policy choice. See id. at 520–21(providing high level discussion and citations for this type of distinction). In either event, a reasonable distance concept would exist.

[118] Calvert et al., supra note 16, at 597 (defining agency "discretion" in a similar sense for regulatory choices in a policy space).

[119] See Laffont & Martimort, supra note 16, at 33–36 (illustrating optimal-contract logic when the principal has the same information as the agent); Calvert et al., supra note 16, at 595 (noting that with perfect information "the legislature and executive have complete control over the policy outcome [of agency lawmaking]"). But cf. McCubbins et al., supra note 103, at 435–40 (emphasizing that the need for coalition action by multiple principals can result in uncontrollable agency lawmaking, even with perfect information).

broad legislative authority without actually transferring to it any power over the lawmaking outcome. The agency would be exercising legislative powers, but Congress would retain all the legislative power.[120]

Of course, the massive assumption on which this result is premised is that Congress has available to it all the information available to the agency—which is unlikely to be true. 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.[121] These benefits will only exist when Congress faces informational disparities relative to the agency.[122] That is, Congress only benefits from the subject-matter expertise of the agency when it lacks the agency's informational expertise; and Congress only frees up its own resources when it delegates legislative responsibility without immediately turning around to closely monitor every action the agency takes.

This disparity of information is important, because an empowered agency has no latent incentive to enact Congress's preferred choice of laws. In the previous example, the agency expected Congress to respond to any deviation from L_C in a way that made it pointless for the agency to even try to deviate from congressional preferences in its lawmaking. But if Congress lacks the ability or resources to monitor the agency's lawmaking, then the agency will generally be able to exercise its legislative authority by enacting laws that take account of its own legislative preferences. In general, this means that the agency will not enact the laws that Congress would want it to enact: $L_A^* \neq L_C$. And 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: $L_A^* = L_A$. This is the maximum of agency legislative power: within the scope of its

[120] This paraphrases a distinction expressed by Richard Neustadt in another context. Richard E. Neustadt, Presidential Power and the Modern Presidents 10 (1990) ("In [the preceding] words of a President, spoken on the job, one finds the essence of the problem now before us: 'powers' are no guarantee of power; clerkship is no guarantee of leadership.").

[121] See supra notes 92–94 and accompanying text (providing additional details).

[122] Cf. Ross, supra note 111, at 134 ("The problems of agency are really most interesting when seen as involving choice under uncertainty . . . .").

delegated authority, the agency's influence over lawmaking outcomes is plenary.

The forgoing is an intuitive explanation of an agency's legislative power when given lawmaking authority by Congress, but the intuition rests on the support of decades of game theory scholarship. Whenever a principal is modeled as having imperfect information, then under a wide range of modeling decisions and assumptions, formal analysis of principal-agent games always reveals a transfer of power to the agent.[123] Game theoretic analysis thus presents exactly the tradeoff emphasized in the constitutional nondelegation literature: Congress can either legislate specifically (limiting the agency's legislative power but sacrificing much of the benefits that could come from agency assistance), or it can legislate broadly (gaining the benefits of agency assistance, but at the cost of transferring legislative power to the agency).[124]

C. Oversight and Procedure Dampen Legislative Power

Yet just *how much* power the agency has in even this simple one-shot principal-agent game is debatable. As laid out above, the agency's lawmaking power is plenary within the delegated subject matter only when Congress is assumed to have *no information* that it can use to constrain the agency's action. But there are many ways that Congress might seek to gather and maintain information about the agency's lawmaking decisions. And the more it does so, the more 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.[125] In the limit, as congressional monitoring of agency lawmaking becomes perfect, the agency's legislative power evaporates.

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[123] See generally Laffont & Martimort, supra note 16 (providing a detailed introduction to major forms of the principal-agent game and the related theory of contractual incentivization); Myerson, supra note 102, ch. 6 (providing a rigorous introduction to general contracting problems, including the need to satisfy incentive compatibility and participation constraints).

[124] See generally Laffont & Martimort, supra note 16, ch. 2 (demonstrating this "rent extraction-efficiency tradeoff" as a general property of principal-agent models); Gailmard, supra note 103 (collecting and summarizing research showing the same rent extraction-efficiency tradeoff in the specific context of principal-agent models of legislative delegation).

[125] See Arnold, supra note 20, at 279 ("Although [legislators] delegate [rulemaking] authority out of necessity, they generally seek ways to monitor and control how bureaucrats

How might Congress improve its ability to monitor agency lawmaking actions? The possibilities are endless. Congress could, for example, appoint oversight committees to monitor specific agencies.[126] It could directly increase its expertise in a subject matter by forming specialized committees with subject-matter expertise.[127] It could rely on its voting constituents to bring its attention to any agency actions that are inconsistent with the legislators' political interests.[128] And it could rely on an extensive apparatus of administrative procedures to reveal and document how and why the agency is exercising its lawmaking discretion.

Many administrative procedures are expressly directed at forcing agencies to disclose information about their lawmaking activities. For example, since 1935, the Federal Register Act has required agencies to publish any documents they produce with "general applicability and legal effect"[129] in the Federal Register. Since 1946, the Administrative Procedure Act has allowed interested parties to receive notice of agency lawmaking, and has given the public some ability to place its own comments and relevant information on the public record.[130] And since 1996,[131] federal agencies have been required to give both houses of Congress notice of any agency rulemaking,[132] and have had to wait sixty days before a "major rule" can take effect, during which time Congress may pass fast-track legislation to override an agency's lawmaking decisions.[133] These requirements are in addition to other more specific

exercise this authority. *Their aim is to ensure that administrative decisions remain as close as possible to those which they would otherwise make themselves*.") (emphasis added).

[126] See Arnold, supra note 20, at 280 (discussing the role of congressional critiques of past agency actions in directing future behavior); Schuck, supra note 112, at 785 ("Agencies fear intrusive oversight and their decisions and behavior often reflect what political scientists refer to as 'anticipatory reaction' to those controls.").

[127] See Sean Gailmard, Expertise, Subversion, and Bureaucratic Discretion, 18 J.L. Econ. & Org. 536 (2002) (modeling the delegation decision as also including a congressional option of gaining more expertise, which the authors find would be more frequently exercised as congressional and agency preferences diverge).

[128] See Mathew D. McCubbins & Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms, 28 Am. J. Pol. Sci. 165, 166 (1984) (describing a theory of "fire alarm" oversight of agency action).

[129] 44 U.S.C. § 1505 (2012).

[130] 5 U.S.C. § 551 *et seq.* (2012).

[131] Id. §§ 801–808 (2012).

[132] Id. § 801(a)(1)(A).

[133] Id. § 801(a)(3)(A). This 60-day window may be extended if Congress passes a joint resolution of disapproval but is vetoed by the President. Id. § 801(a)(3)(B).

notice procedures that may be built into individual empowering acts, or that may apply to agencies as a whole.[134]

Other administrative procedures indirectly force agencies to provide Congress with information about their lawmaking decisions. The availability of judicial review of agency actions,[135] for example, does more than safeguard private interests against abuses of agency discretion.[136] Just as other administrative procedures are information-forcing in effect, the process of a private suit and judicial review of agency actions brings attention to agency lawmaking and forces an agency to disclose the basis and reasoning for its actions.[137] Like the sixty-day waiting period for major rules, the dilatory and information-forcing effects of private litigation give Congress both the opportunity and means to take corrective measures if an agency deviates from legislative preferences.

These administrative procedures are in addition to yet more mechanisms by which Congress can gain information on agency lawmaking. Appropriation and appointment procedures give Congress regular opportunities to review and respond to agency behavior.[138] 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.[139] And the independent

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[134] For example, the 1970 National Environmental Protection Act requires that "to the fullest extent possible" all agencies must issue "detailed statement[s]" of the potential environmental impacts associated with any "major [actions they take] significantly affecting the quality of the human environment." 42 U.S.C. § 4332 (2012).

[135] Courts have long understood the APA to raise a presumption of judicial review for private parties affected by wrongful agency action. See, e.g., Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967). Exactly how much protection judicial review really provides is, however, debatable. Compare Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (describing the strong deference that courts accord to agency interpretations of ambiguous provisions in their own empowering statutes—what has come to be called "Chevron deference"), with Schuck, supra note 112, at 788 (commenting that while *Chevron* deference reduces the threat of judicial review, "courts can, and often do, manipulate this doctrine in order to preserve much of their influence over agency decisions, including enforcing agency fidelity to congressional intent").

[136] See supra note 15 and accompanying text (describing procedural safeguards as a means of limiting abuse of discretion and of advancing rule of law).

[137] Cf. McCubbins & Schwartz, supra note 128, at 166 (describing "fire-alarm" oversight).

[138] Cf. Calvert et al., supra note 16, at 593–99 (describing a principal-agent model of legislative delegation including an appointment stage).

[139] See Mathew D. McCubbins, Abdication or Delegation? Congress, the Bureaucracy, and the Delegation Dilemma, 22 Reg. 30, 34 (1999) ("[A]gencies whose jurisdictions

oversight and reporting by popular media bodies provides yet another source of information about agency actions.[140] In short, oversight and the procedural forcing of information disclosure by agencies have grown relentlessly since the early 1900s—to the point where some scholars now argue that Congress has substantial information about agency lawmaking and significant potential to incentivize agencies to legislate according to congressional preferences.[141] A situation may have arisen in which empowered agencies have, at most, limited legislative power.

D. Relationships Further Dampen Legislative Power

This *still* does not end the agency-power analysis. A qualification to all the preceding discussion was that it applied to one-shot principal-agent games in which Congress and the agency interacted one time only and then the game ended. That's obviously not how most delegations of legislative power are actually structured. Many of the most interesting delegations of lawmaking authority empower or even create agencies that are expected to continue to exist and interact with Congress long into the foreseeable future. What changes when the one-shot game is played many times in sequence—approximating the continuous and ongoing relationship between Congress and such agencies?

"What changes?" is potentially a lot. When the principal-agent game is repeated many times in sequence, both Congress and the empowered agency are able to condition their strategic interactions not just on the actions each takes in a given stage of the repeated game, but also on the entire history of play up to a given point. And when the one-shot game

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overlap will compete for budgets and statutory authority, making it all the more necessary for them to please political leaders."); see also David M. Kreps, A Course in Microeconomic Theory 610–11 (1990) (surveying game theory research on multiple-principal and multiple-agent models).

[140] See, e.g., Schuck, supra note 112, at 789–90 (commenting on the political control of agencies through media oversight and reporting).

[141] E.g., Calvert et al., supra note 16, at 590 (modeling political control of agency policy discretion by both the legislative and executive branches); Arthur Lupia & Mathew D. McCubbins, Representation or Abdication? How Citizens Use Institutions to Help Delegation Succeed, 37 Eur. J. Pol. Res. 291, 296–301 (2000) (modeling how third-party involvement relates to political control); McCubbins, supra note 139, at 33–37 (enumerating strategies by which Congress may mitigate agencies' exercise of policy discretion); McCubbins et al., Administrative Procedures, supra note 16, at 253–64 (arguing that administrative procedures enable Congress to overcome informational inequalities between itself and agencies); Schuck, supra note 112, at 784–87 (noting the various ways that Congress can exercise political control over agencies).

is repeated an indefinite number of times—such that neither Congress nor the agency can easily predict when their interactions will end—the set of potential outcomes of the game expands dramatically.

A powerful set of results in the game theory literature on repeated games is commonly referred to as the "folk theorem."[142] In rough terms, the folk theorem provides that, in any infinitely repeated game in which the actors care enough about future iterations of the game, any outcome better than the worst possible equilibrium in a single stage of the game is supportable as an equilibrium of the infinitely repeated game.[143] Put another way, outcomes that would not be possible in any single stage of a principal-agent game might become possible when the actors repeat their interaction an indefinite number of times in sequence.[144]

To try to make this more concrete, indefinite repetition of the legislative delegation game can be thought of as giving Congress two more tools for monitoring and responding to agency lawmaking decisions.[145] First, Congress's ability to observe entire histories of play allows it to monitor the agency more accurately—or at lower cost—than would be possible in any single stage of the game. Second, Congress's ability to condition threats and rewards on the entire history of play gives it a more robust club for responding to acts of agency lawmaking than it may have in any single iteration of the principal-agent game.

These tools could significantly alter the distribution of power in the principal-agent relationship. In a general principal-agent context, for example, Roy Radner has shown that infinite repetition of the game can, in theory, allow the principal to strongly constrain an agent's discretion without requiring the principal to invest in costly monitoring

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[142] This name owes to uncertainty over the initial authority for this type of theorem, which was generally known through informal oral conversations between *folk* in the game-theory community before it was rigorously formalized in any publication.

[143] This is a very rough approximation to the real proposition. For a precise statement, see Drew Fudenberg & Eric Maskin, The Folk Theorem in Repeated Games with Discounting and with Incomplete Information, 54 Econometrica 533 (1986); Myerson, supra note 102, at 331–36.

[144] See generally Laffont & Martimort, supra note 16, at ch. 8 (illustrating applications of this reasoning to general principal-agent models).

[145] See Roy Radner, Repeated Principal-Agent Games with Discounting, 53 Econometrica 1173, 1173–74 (1985) (suggesting the intuitive model where, instead of investing in costly monitoring practices, the principal undertakes low-cost long-run statistical modeling of the agent's behavior, subject to a severe but self-enforcing threat of punishment if this monitoring ever turns up abuses of the agency's discretion).

measures.[146] This is a special case of a more general version of the folk theorem, applicable to many games with imperfect information.[147] In short, repetition of the principal-agent legislative delegation game may enable Congress to significantly curtail an agency's legislative power.

How would this work in practice? It would involve relational incentivization of agency cooperation. Again, delegations of lawmaking authority often create or empower agencies that will continue to enact laws—and interact with Congress—long into the foreseeable future. In each of its sessions, Congress has an opportunity to respond to acts of lawmaking by the agency: legislatively overriding specific agency rules; surgically using the appropriations process to reward or punish agencies, or even specific divisions or regulatory actions of agencies;[148] holding formal inquiries to publicly critique agency behavior;[149] modifying or entirely revoking the very delegation of legislative powers to an agency. These responses were possible in even the one-shot model of the game, but infinite repetition allows them to be used differently: Congress can effectively threaten long-term punishments and rewards to offset short-term incentives for agencies to deviate from congressional preferences. For example, Congress might give an agency broad legislative powers, but subject to an understanding that it will curtail those powers, cut funding, and maybe even dismantle the agency if Congress ever concludes that agency lawmaking has deviated from its preferences. The point of the folk theorem is that this type of strategy may in fact be a

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[146] Id.; see also Roy Radner, Monitoring Cooperative Agreements in a Repeated Principal-Agent Relationship, 49 Econometrica 1127, 1127–28 (1981) (providing similar results in the case of long, but not infinite, repetition of the game).

[147] See generally Drew Fudenberg, David Levine & Eric Maskin, The Folk Theorem with Imperfect Public Information, 62 Econometrica 997 (1994) (proving a general version of the folk theorem).

[148] See Arnold, supra note 20, at 280 (discussing the use of appropriations to reward "bureaucrats who produce pleasing decisions" and to punish those who don't); Schuck, supra note 112, at 786 (commenting that "substantive controls on agency policymaking are often included even in . . . omnibus budgetary reconciliation legislation").

[149] See Arnold, supra note 20, at 280:

> Congressional committees hold extensive public hearings to inquire about past, present, and future decisions. They can use the same hearings to communicate congressional views about how administrative officials should adjust their decisions to accommodate congressional preferences. Congressional committees also issue detailed reports that critique past decisions and specify how agencies ought to decide future cases. Most agencies treat the provisions in such committee reports, and especially those in the reports of appropriations subcommittees, just as seriously as they do statutory provisions.

self-reinforcing equilibrium of the game—incentivizing the agency to substitute Congress's legislative preferences for its own because of the severe threat of sanction, and incentivizing Congress to follow through with the threat of sanction because doing so constricts the agency's legislative power under this long-run delegation scheme.

But the folk theorem is only a claim about feasibility. It shows that relational incentivization *could* be relied upon to constrict an agency's legislative power—not that it can, would, or must be used to do so in any given situation. In particular, the efficacy of this type of relational incentivization strategy declines with the quality of information available to Congress.[150] Relational incentivization may thus be seen as a type of strong, informal constraint on agency power, and a potential cost saver relative to explicit monitoring efforts. It is an important factor to consider in assessing the extent of the agency's legislative power, but it does not change the fundamental relationship that agency power will usually grow as the quality of Congress's information declines.

E. Summary: Uncertainty of Legislative Power

The point of this analysis is not to say that congressional incentivization of agency lawmaking should always be expected to wrest all legislative power from the agency. Nor is the point to say that an agency's legislative power is plenary once authority is delegated by Congress. Rather, the point is to say that the extent of an agency's legislative power in a delegation situation is always ex ante uncertain—a fact-bound question that can only be addressed through specific inquiry into the terms and context of particular delegations of lawmaking authority.

I certainly do not claim that this fact-bound power inquiry is trivial. Even this extended treatment of the inquiry omitted complications like the need for bicameral support of congressional responses,[151] the influence of executive involvement in delegations and legislative responses,[152] and the need for agency constituents to be able to estimate

[150] See Fudenberg et al., supra note 147, at 1034 (noting that "the equilibrium set contracts as public outcomes reveal less and less information [about private actions]").

[151] See U.S. Const. art. I, §§ 7–8.

[152] See McCubbins et al., supra note 103, at 435–40 (discussing the effects of shared influence over agency decision making by Congress and the President); Calvert et al., supra note 16, at 590–99 (same).

congressional preferences as part of any efficient cooperative equilibrium of the game, all of which further complicates an already involved analysis. But neither is the game theory literature silent on the factors that contribute to or mitigate an agency's legislative power. The extent of apparent informational disparities, the availability and quality of procedural controls and other tools for monitoring agency lawmaking activities, and the possibility of strong incentivization of agency lawmaking through long-run relational strategies are all factors to consider in trying to gauge the extent of an agency's legislative power under a given delegation of lawmaking authority.

Though ultimately an empirical question, it seems only intuitive that rarely will a delegation of lawmaking authority completely transfer legislative power to an agency, or for that matter permit Congress to retain all power over lawmaking outcomes.[153] In most cases, *some* power will transfer with a delegation of lawmaking authority. But that only tees up the interesting and important question: *how much power*?

IV. COMPLICATING THE NONDELEGATION PRINCIPLE

Constitutional theories of the nondelegation principle have for decades argued that delegations of the *legislative power* are invalid. Surprisingly little theoretical attention has been dedicated, however, to trying to say what it means for an agency to have legislative *power*. The game theory concept of power to make laws offers a precise definition of legislative power. Adding this power concept to the nondelegation proscription suggests a more complicated nondelegation principle. A delegation of legislative powers will not offend the nondelegation principle without the intersection of two conditions: first, the authority delegated to the agency must be *legislative* in nature; and second, the agency must have *power* to deviate from congressional preferences in exercising this legislative authority. Of course, neither of these concepts is truly binary. The practical question is whether the agency would be given lawmaking authority that is *too legislative* in character, given the power that the agency would have over lawmaking outcomes; whether the agency would have *too much power* over lawmaking outcomes, given the nature of the lawmaking authority it would be exercising. As

[153] This is not a novel proposition. See Davis, supra note 50, § 2.16, at 153 ("[W]hen power is delegated, no matter how complete the delegation may on its face seem to be, the legislative body still has an effective voice in its exercise.").

the following pages show, this more complicated version of the nondelegation principle generalizes existing scholarship and offers insights into Supreme Court decisions and the intelligible principle test.

A. The Two-Prong Nondelegation Principle

This Article argues that no theory of the nondelegation principle can properly consider the meaning of *legislative* to the exclusion of *power*. How easy is it to retrofit existing constitutional theories of nondelegation to include a separate power inquiry? As it turns out, retrofitting existing theories is surprisingly easy. Most theories reveal an intuitive connection to—and need for—agency power analysis.

1. Textual Theories

A textual theory of nondelegation, which derives the principle from an exclusive reading of the vesting of "[a]ll legislative Powers" in "a Congress of the United States," expressly demands *some* definition of what it means to exercise legislative power.[154] This Article proposes that the game theory concept of power supplies this definition. This makes particular sense in context. The oft-noted pragmatism of the Founders is difficult to reconcile with the possibility that they intended the Vesting Clause to refer only to formalistic notions of being vested in the trappings of authority or going through the procedural motions of making law, however futile they might be. Instead, as has been constantly noted since before the ratification of the Constitution, a system of checks and balances and a plan to maintain tension between independent branches of government was implemented to restrain the functional power of the government and to protect generally against tyranny.[155] This is part and parcel of the game theory concept of *power* to legislate.

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[154] U.S. Const. art. I, § 1. The Constitution vests the President with the "executive Power," U.S. Const. art. II, § 1, and the Supreme Court with the "judicial Power," U.S. Const. art. III, § 1. There seems little reason to read the plural form of the noun "powers" to mean something different than "power" in Article I.

[155] See, e.g., Richard E. Neustadt, Presidential Power: The Politics of Leadership 42 (1960) ("The constitutional convention of 1787 is supposed to have created a government of 'separated powers.' It did nothing of the sort. Rather, it created a government of separated institutions *sharing* powers."); Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 602 (1984) ("[T]he governmental structure [the Framers] created embodies both separated powers and

A generalized textual theory of nondelegation proposes the intuitive rule that Congress should be the entity that exercises lawmaking power when the nature of this lawmaking is sufficiently legislative; this power, however, may be discharged either by Congress legislating on its own, or by Congress delegating legislative authority in a way that allows it to retain sufficient power over the lawmaking outcome. In the negative, Congress is only required to legislate specifically when it could not otherwise retain for itself sufficient power over the agency's lawmaking decisions, *and* when these lawmaking decisions rise to the level of being legislative in nature. The meaning of legislative *power* in this version of the theory is that described at length in Part III. The meaning of *legislative* power is a source of disagreement among scholars, but this two-pronged approach seems to generalize any interpretation, and makes intuitive sense in the context of existing theories.

Take Lawson's interpretation of legislative power, which roughly defines legislative powers as those policy decisions which Congress must make because of their substantive importance.[156] The two-prong version of this nondelegation theory embraces the exact same normative judgment: if a policy decision is so important that Congress must make it, then Congress must either legislate on its own or delegate lawmaking responsibility in a way that ensures it retains tight control over the final legislative outcome. Either way, Congress drives the bus.

Or take Posner and Vermeule's quite different version of the textual nondelegation principle, prohibiting only those delegations that rise to the level of transferring the de jure powers of members of Congress.[157] This permissive view of the nondelegation principle admits trivial generalization: since almost no delegation conveys *legislative* power under this definition, even plenary conveyances of lawmaking *power*

interlocking responsibilities . . . . Maintaining conditions that would sustain the resulting tension between executive and legislature was to be the central constraint on any proposed structure for government."); id. at 604 ("The Framers expected the branches to battle each other to acquire and to defend power.") (quoting Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins 60 (1976)).

[156] Lawson, supra note 63, at 1239 ("Congress must make whatever policy decisions are sufficiently important . . . that Congress must make them."); see also supra notes 64 & 65 and accompanying text (discussing Lawson's theory of nondelegation).

[157] Posner & Vermeule, supra note 66, at 1723 ("[T]he content of [the nondelegation] prohibition is the following: Neither Congress nor its members may delegate to anyone else the authority to vote on federal statutes or to exercise other *de jure* powers of federal legislators."); id. at 1726 (elaborating on this assertion).

would remain constitutionally permissible. But Posner and Vermeule's theory points up a paradox that again reveals an intuitive connection to the two-prong theory of nondelegation. Note that members of Congress are busy people with substantial support staffs to assist them in exercising many—if not all—of their de jure powers. While no one would argue that these staffers are not agents of Congress, nor that they are not as close as possible to exercising the de jure powers of a congressperson when they draft or edit legislation, or provide summaries and recommendations for voting purposes, their exercise of discretion in these responsibilities engenders no nondelegation concerns. Why not?

A reasonable answer is that congressional staffers raise no concern because they seem unlikely to have a great deal of legislative power. In their close and continuous contact with the members of Congress they serve, staffers could technically substitute language in a bill or misinform a member of Congress in a way that influences the exercise of the their de jure powers. But that wouldn't happen: the member of Congress would soon discover the act, and the expected response would obviate the benefit of undertaking such an act in the first place. The same reasoning applies to a delegation of legislative power to a closely controlled agency. The more that Congress may be expected to retain the ultimate power of legislative outcomes, the less it matters whether Congress or another entity undertakes the formalistic step of enacting a law.

2. Separation-of-Powers Theories

The two-prong theory of nondelegation also generalizes separation-of-powers theories. Formalist separation-of-powers theories turn on the strict definition of what it means to exercise legislative power, and thus are subject to the same generalization described in the previous section. Functional separation-of-powers approaches are even more deeply entwined with the proposal to add a distinct power inquiry.

A functional approach to the separation-of-powers principle emphasizes checks and balances as protection against abuses of power, and the corresponding nondelegation principle only limits undue delegations of legislative power: those that would disrupt "the proper

balance between the coordinate branches [of government]."[158] It is difficult to see how the proper balance could be assessed without an inquiry into the distribution of legislative power in a proposed delegation scheme. The generalization here is really more of an operationalization of the core concept. A delegation of lawmaking responsibility is void as disrupting the proper balance when it conveys too much power over lawmaking outcomes to an agency. By the same stroke, an expansive delegation of lawmaking discretion is not void as disrupting the proper balance when it is made in a manner suggesting that Congress would retain sufficient power over the actual lawmaking outcomes, such that the balance of power has not substantially shifted by the act of delegation.[159]

3. Common Law Agency Theories

This two-prong approach also generalizes the agency-law theory of nondelegation. Both approaches are premised on taking seriously the agency relationship underlying a delegation of legislative powers. The two-prong approach simply adds structure to the question whether Congress—the agent of the public—has enough legislative power in the relationship to make the lawmaking acts of the agency—the subagent—essentially ministerial in nature.[160] Congress could, as elsewhere, effect this result by legislating specifically *or* by legislating broadly but in a

[158] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977); see also Mistretta v. United States, 488 U.S. 361, 380–84 (1989) (applying *Nixon*'s general separation-of-powers concept in the specific case of a nondelegation challenge).

[159] A latent ambiguity in this separation-of-powers theory of nondelegation is whether it contemplates a definition of what it means for power to be *legislative*, independent of the power to make laws. One possibility is that only important acts of lawmaking are legislative in this scheme. Cf. Lawson, supra note 63, at 1239 (suggesting that "Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them"). Another possibility is that all lawmaking is deemed to be legislative, so that the whole of the constitutional inquiry would collapse to the power inquiry. Cf. United States v. Grimaud, 220 U.S. 506, 517 (1911) ("[I]t is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations.").

[160] See, e.g., Restatement (First) of Agency § 78 (1933) ("Unless otherwise agreed, authority to conduct a transaction does not include authority to delegate to another the performance of acts incidental thereto which involve discretion or the agent's special skill; such authority, however, includes authority to delegate to a subagent the performance of *incidental mechanical and ministerial act*s." (emphasis added)); see also Farina, supra note 10, at 91–93 (elaborating on this as it applies to an agency-law theory of the nondelegation principle).

way that adequately preserves its discretion as the guiding influence on lawmaking.[161] To the extent that the underlying theory of nondelegation is the unique fitness of the legislature to direct the policy choices behind legislation,[162] the substantive inquiry is completely preserved in this generalization: the interesting question is not whether Congress is formally enacting laws on its own, but whether it is exercising sufficient power over the lawmaking process and outcome.

A curious way in which the two-prong theory of nondelegation exports part of the agency theory to other contexts is in the timing of the power analysis. As Farina explains, the agency-law theory of nondelegation allows for changes in an agent's authority to delegate lawmaking responsibility over time:

> When a principal engages an agent to act [over an extended period of time], the scope of actual authority cannot be static or the course of external events might leave the agent unable to achieve the goals of the principal. The general rule, therefore, is that authorization is interpreted as of the time it is acted upon . . . .[163]

As described in Part III, inquiry into the extent of an agency's power is heavily informed by context.[164] Like the law of agency approach, this power inquiry cannot be conducted in the abstract, but must be undertaken as of the time a delegation of lawmaking authority is acted upon or challenged.[165] The two-prong theory of nondelegation thus

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[161] Variations on the law-of-agency theory expand or contract the importance of this power consideration. See supra notes 87–89 (discussing versions of the agency-law theory of different limiting potential).

[162] See supra notes 80–81 and accompanying text (discussing this theory).

[163] Farina, supra note 10, at 93 (citations and internal quotation marks omitted) (emphasis added); see also Restatement (First) of Agency § 33 cmt. a (1933) ("[A] change of circumstances may increase, diminish, or terminate [the agent's] privilege to exercise a power [on behalf of] the principal.").

[164] See Sections 0 and 0, discussing factors like the presence of information-forcing procedures, the quality of public and private sources of monitoring information, and the expected duration of a delegation relationship as time-varying factors that should be expected to influence the distribution of legislative power. See also Keith Werhan, Principles of Administrative Law 46 (2d ed. 2014) ("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." (emphasis added)).

[165] Cf. Lichter v. United States, 334 U.S. 742, 783 (1948) (using evidence that Congress was aware of specific agency practices and did not seek to modify them when revising the empowering statute to reason that these practices reflected "*current correct understanding of the congressional intent*" which, along with other practices, "substantially incorporated" into

agrees with the timing of the law of agency approach, and does so regardless of the theory of nondelegation supplying the definition of *legislative* power in the first prong of the theory.

4. Functional Governance Theories

As discussed in Subsection II.B.4, the staggering variety of normative and functional arguments for and against delegations of legislative powers complicates explanation of how a discrete power inquiry would generalize this entire field. In some cases, it concededly would not. If the normative basis for a nondelegation principle is the insistence that avoidance of legislative drafting and the hurdles of bicameralism and presentment allows for too much lawmaking,[166] for example, then the relative legislative power of the empowered agency is simply not relevant to the inquiry. In other cases, however, the extent of an agency's power to legislate is intimately related to the underlying normative concern.

Take the commonly advanced theory that delegations of legislative power should be curtailed because they allow Congress to escape public accountability for the laws that are enacted by an empowered agency.[167] Oversimplified, the normative argument is that voters may not hold Congress responsible for the laws enacted by the agencies it has imbued with legislative authority. This might, perhaps, be true if Congress has delegated legislative *power* to the agency,[168] but Congress's accountability for agency lawmaking is at its zenith when Congress retains substantial legislative power in the relationship. First, to the extent that congressional preferences are substantively directing agency lawmaking, it is hard to see why voters would *not* hold Congress accountable for the actions of the agency. Second, the very same factors that will tend to give Congress the ability to maintain legislative power in the delegation relationship give voters the leverage to hold it

later revisions of the statute, helped provide an intelligible principle to guide the agency's exercise of discretion (emphasis added)).

[166] See supra notes 95–96 and accompanying text (discussing these types of concerns).

[167] See, e.g., Schoenbrod, supra note 11, at 8–12 (arguing that enforcement of the nondelegation principle increases legislative accountability).

[168] For the sake of argument, I will note but set aside the question why Congress could not be held accountable for the act of delegation itself. See Posner & Vermeule, supra note 66, at 1748 ("The problem with this argument is that Congress *is* accountable when it delegates power—it is accountable for its decision to delegate power to the agency.").

accountable for the actions of an agency. If Congress has the legislative power in the relationship, then its failure to exercise that power—overriding agency lawmaking of which it has notice or continuing to fund an agency after witnessing its lawmaking decisions, for example—is plainly an act for which voters could and should hold it to account.[169]

B. The Sliding-Scale Intelligible Principle Test

The motivating observation behind this two-prong theory of nondelegation is that Congress does not necessarily need to legislate specifically in order to retain substantial legislative power in a delegation relationship. Under appropriate conditions, Congress can continue to exercise legislative power, even when granting an agency broad and textually unfettered lawmaking authority.[170] Constitutional nondelegation analysis therefore needs to look beyond the text of an empowering statute to the conditions that might facilitate or frustrate Congress's retention of legislative power on nontextual grounds. Social circumstances, the presence of information-forcing procedures, monitoring and oversight of agency actions, and the expected length and flexibility of interactions between the agency and Congress are all important factors to consider. When conditions suggest that Congress could retain substantial legislative power even with uncircumscribed delegations of authority, there is simply no need for textual specificity in the empowering statute.

But what if conditions suggest that Congress would not retain much (or any) legislative power if it did not legislate specifically? As the credibility of Congress's nontextual retention of legislative power fades, the need for textual specificity rises. This is true for nearly every definition of the *legislative* side of the legislative power inquiry discussed in this Article. This is because—while none of the usual theories of nondelegation are satisfied by the presence of a *weak* intelligible principle in the empowering statute—all are satisfied by the presence of a *strong* intelligible principle. Specific congressional

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[169] Cf. Lovell, supra note 99, at 90 (commenting that it is no easier to hold Congress accountable for acts of general legislation than it is to hold it accountable for funding lawmaking agencies); id. at 89–95 (criticizing other accountability arguments against the delegation of legislative powers).

[170] E.g., Davis, supra note 50, § 2.16, at 154 ("[T]he most effective . . . expression of *legislative* will may be delegation, with virtually no standards, but with strong legislative influence upon policy creation after the delegation has been made.").

legislation is consistent with the exercise of legislative power in a textual theory, with the prototypical balance of constitutional powers in a separation-of-powers theory, with the exercise of discretion by the primary agent in an agency-law theory, and with the normative concerns underlying many antidelegation theories in normative and functional arguments theories.

The two-prong theory of the nondelegation principle thus suggests a version of the intelligible principle test that places textual specificity on a sliding scale. The need for textual specificity rises as surrounding circumstances indicate that a delegation of broad authority would otherwise give more and more legislative power to the agency; and the need for textual specificity falls as surrounding circumstances indicate that Congress could otherwise retain more and more legislative power through agency incentivization and other nontextual avenues.

This sliding-scale version of the intelligible principle test has never been expressly adopted—or even considered—by the Supreme Court. But there is fair room for interpreting existing case law in terms of it. Justice Brennan once griped that "candor compels recognition that our cases regarding the delegation by Congress of lawmaking power do not always say what they seem to mean."[171] The Court has never claimed to state precisely the demands of the intelligible principle test,[172] but where the language of the intelligible principle test has seemed particularly out of sync with its application, perhaps the reconciling principle is an unconscious balancing of needs in light of implicit legislative power inquiries. A systematic study of this hypothesis would require an entire paper in itself, but two examples, based around the anomalies of *Panama Refining*[173] and *Schechter*,[174] illustrate the potential explanatory power of this sliding-scale test.[175]

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[171] McGautha v. California, 402 U.S. 183, 273 (1971) (Brennan, J., dissenting).

[172] See, e.g., Lichter v. United States, 334 U.S. 742, 779 (1948) ("The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is *not capable of precise definition*." (emphasis added)).

[173] 293 U.S. 388 (1935).

[174] 295 U.S. 495 (1935).

[175] The point, here, is not to try to explain the outcome of these well-worn cases. Rather, the point is to show the consistency of the proposed theory with a reasonable reading of many cases, including *Panama Refining* and *Schechter* as important counterpoints. While far too large an undertaking for the present Article, another strategy for assessing the proposed theory of nondelegation would be to consider nondelegation cases in state courts, where the

1. The Sliding-Scale Test over the Centuries

One observation in support of the hypothesis that the Court's nondelegation case law can be explained by implicit sliding-scale analysis is that the model has adequate explanatory power over the entire history of nondelegation case law. From the founding of the country to modern times, a sliding-scale intelligible principle test appears consistent with the case law, at least under a few stylized assumptions.

To start at the beginning, no statute was invalidated on nondelegation grounds for decades following the ratification of the Constitution. The Framers themselves seem to have had little concern about delegations. The topic was not discussed at all during the Constitutional Convention, except in regard to a motion to give the President authority to execute powers delegated by the legislature; the motion was defeated as unnecessary.[176] This is not because federal agencies were not rapidly formed and delegated substantial discretionary authority.[177] Nor is it because delegations were not challenged for constitutionality.[178] These early challenges predated the intelligible principle test,[179] but how much would the specificity of congressional statement have mattered?

Comfort with the constitutionality of early delegations of authority was arguably owed to the expectation that Congress would retain substantial legislative power in these arrangements. Most early delegations involved an authorization of substantively, economically,

principle may have more bite. See Edward H. Stiglitz, The Limits of Judicial Control and the Nondelegation Doctrine, 34 J.L. Econ. & Org. 27, 30–32 (2018) (discussing and collecting sources on state-law applications of the nondelegation principle).

[176] Davis, supra note 50, § 2.02, at 79 ("Delegation was not discussed at the Constitutional Convention, except that a motion by Madison that the President be given power 'to execute such other powers . . . as may from time to time be delegated by the national Legislature' was defeated as unnecessary." (quoting 1 The Records of the Federal Convention of 1787, at 67 (Max Farrand ed., 1911))); see Freedman, supra note 7, at 308 ("The Constitution does not speak to [legislative delegation] explicitly, perhaps because the Framers did not consider the question a serious one.").

[177] See Davis, supra note 50, § 2.02, at 79 n.14 (commenting that "[d]elegation by legislatures before 1787 was common"); Posner & Vermeule, supra note 66, at 1735–36 (listing early delegations of ostensibly legislative power); Davis, supra note 7, at 719–20 (describing the delegations of discretionary authority made by the First Congress).

[178] E.g., Field v. Clark, 143 U.S. 649 (1892); Wayman v. Southard, 23 U.S. 1 (1825); Cargo of the Brig Aurora v. United States, 11 U.S. 382 (1813).

[179] Cf. J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (providing the first clear statement of the current intelligible principle test).

and logistically narrow scope.[180] And with a limited government discharging duties of everyday comprehension, the exercise of the delegated discretion may have been relatively easy to monitor.[181] Peter Strauss suggests as much in a summary of the eighteenth-century model of government:

> The minimalist federal government outlined in Philadelphia in 1787 envisioned a handful of cabinet departments to conduct the scanty business of government . . . . The eighteenth-century model relied heavily on the controls of politics over and among the branches of government to keep it within reach of the people, to subdue the risks of tyranny.[182]

If this early era of government did permit Congress to retain nontextual legislative power in its delegations of authority, when did circumstances start to change? The first hints of contemporary federal agencies did not appear until 1848, with the creation of the Department of the Interior,[183] or more plausibly 1887, with the creation of the Interstate Commerce Commission.[184] A few decades later, the Court handed down *Panama Refining* and *Schechter*.[185]

It is noteworthy that the high-water line of the intelligible principle test's demand for textual specificity occurred amidst a confluence of challenges to Congress's ability to retain legislative power through nontextual channels. *Panama Refining* and *Schechter* arose in the midst of (and as part of) an unprecedented expansion of the federal government. These were emergency measures[186] that conveyed

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[180] See, e.g., Barry D. Karl, Executive Reorganization and Presidential Power, 1977 Sup. Ct. Rev. 1, 12 ("Of the earlier departments—State, Treasure, War, the Attorney General's, and the Post Office—only the last had significant patronage to distribute.").

[181] Id. at 11 ("Although much can be said about the colonial experience with monarchy, royal governors, and the like, the conditions of national life at the beginning and through much of the nineteenth century simply did not raise the issues of management on the dynamic and shifting scale that followed the Civil War.").

[182] Strauss, supra note 155, at 582 (citations omitted).

[183] See Karl, supra note 180, at 12.

[184] Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383 (creating the Interstate Commerce Commission).

[185] *Panama Refining*, 293 U.S. 388; *Schechter*, 295 U.S. 495.

[186] Act of June 16, 1933, ch. 90, § 1, 48 Stat. 195, 195 (explaining in the declaration of policy that the NIRA provisions were intended to address "*[a] national emergency* productive of widespread unemployment and disorganization of industry" (emphasis added)).

rulemaking authority on a short-term basis (for which Congress could not have relied upon long-term relational incentivization),[187] in part, to private individuals (over which Congress would have even less relational control).[188] The monitoring and reactionary capacities of Congress would have been strained by domestic problems (the Great Depression) and rising international tensions (World War II).[189] *Schechter* added to these challenges the most sweeping delegation of rulemaking authority ever tested by the Court.[190] If ever there were a time that the Court might have perceived Congress as needing textual specificity to retain legislative power, this was it.

The Court's demand for textual specificity waned after *Panama Refining* and *Schechter*. And obviously the modern federal government consists of many large lawmaking agencies,[191] often empowered to act without any serious intelligible principle to guide the exercise of their lawmaking powers.[192] But just as the Court's demand for textual specificity has changed, so too has the context of Congress's delegations. As already noted, in 1935 the Federal Register Act was passed, in part to provide basic oversight on the growing body of agency lawmaking;[193] in 1946 Congress passed the Administrative Procedure Act;[194] later came yet stronger information-forcing controls on agencies.[195] This is not to say that the subjugation of agency autonomy has been uniform: judicial control over agency discretion has been

[187] A sunset provision would terminate Title I of the Act (authorizing the setting of codes of fair competition) at the earlier of two years, or the conclusion by either Congress or the President that the emergency had ended. Id. § 2(c), 48 Stat. at 196.

[188] See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 171–74 (1940) (illustrating the participation of private parties in the standard setting of an industry's "code of fair competition" under the NIRA).

[189] See the first paragraph of this Article for context.

[190] Davis, supra note 50, § 2.06, at 100 ("The Schechter case involved the most sweeping congressional delegation of all time.").

[191] Cf. Strauss, supra note 155, at 581–96 (discussing the profusion of governmental forms and inter-organizational relationships that comprise the modern administrative government).

[192] See supra notes 47–51 (discussing the weak standards that have been found to satisfy the intelligible principle test).

[193] 44 U.S.C. § 1501 *et seq.* (2012).

[194] 5 U.S.C. § 551 *et seq.* (2012).

[195] Contract with America Advancement Act of 1996, Pub. L. No. 104–121, 110 Stat. 847 (1996) (providing for the enactment of the Small Business Growth and Fairness Act of 1996).

substantially limited in recent decades,[196] as have some measures of congressional control.[197] But as described in Sections III.C and III.D of this Article, Congress now has many tools for monitoring agency lawmaking, and for incentivizing agencies in ways that may allow it to retain substantial legislative power without textual specificity in an empowering statute. While there is certainly room to debate exactly how much legislative power a given delegation might transfer to an agency, the modern context is one in which a court might reasonably conclude that great textual specificity is not needed for Congress to retain substantial legislative power. Such a court would be low on the sliding-scale demand for textual specificity.

2. Reconciling Schechter *and* Yakus

To the extent that this high-level overview shows plausible consistency between case law and the sliding-scale version of the intelligible principle test, one might wonder if the sliding-scale test can explain lower level differences in cases as well. Again, the argument is superficial, but at least a suggestion that the sliding-scale hypothesis may explain the Court's implicit reasoning in individual cases can be gleaned from a comparison of the very different outcomes in two otherwise seemingly similar cases: *Schechter* and *Yakus v. United States*.[198]

As discussed several times now, *Schechter* arose amidst a perfect storm of challenges for the retention of legislative power through nontextual channels: the case involved an emergency act that granted short-term authority, in part to private individuals with limited dependence on Congress, and empowered these individuals to regulate commerce at large through the promulgation of codes of fair

[196] E.g., Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (describing what has come to be known as "Chevron deference," often requiring courts to defer to an agency's own interpretation of its empowering statutes); Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978) (generally prohibiting reviewing courts from imposing procedures on agencies that eclipse the procedures imposed by Congress).

[197] E.g., Bowsher v. Synar, 478 U.S. 714 (1986) (prohibiting Congress from exercising direct control over the execution of a statute); Process Gas Consumers Grp. v. Consumer Energy Council of Am., 463 U.S. 1216 (1983) (affirming extension of the principle in *Chadha* to a two-house legislative veto); I.N.S. v. Chadha, 462 U.S. 919 (1983) (invalidating the general form of the legislative veto over agency action).

[198] 321 U.S. 414 (1944).

competition.[199] Finding this statutory standard—"fair competition"—too vague for the extent of the delegation at issue, the Court held Section 3 of the NIRA to be an unconstitutional delegation of legislative power.[200]

But a mere decade later, the Court blessed a surprisingly similar act of legislation in *Yakus*. Again, the case involved an emergency measure (here, the Emergency Price Control Act of 1942).[201] Again, authority was delegated on a short-term basis to an entity not expected to have a long relationship with Congress (here, the Office of Price Administration, which was temporarily created to establish maximum prices on commodities during World War II).[202] And again, the standard set by Congress was vague at best: maximum prices were to be "fair and equitable."[203] Yet in *Yakus*, the Court found this limp standard to meet the intelligible principle requirement: adequately marking the boundaries of the delegated authority.[204] What had changed?

The textual specificity of "fair and equitable" is hardly better than "fair competition." And while the Emergency Price Control Act did contain some additional detail—instructions that the agency give "due consideration" to a variety of economic factors—the detail was merely suggestive.[205] But Congress had, by this time, about a decade of experience working with the recently expanded bureaucracy. It had long ago passed the Federal Register Act, and was well along in the process of negotiating the Administrative Procedure Act.[206] The delegation was made to "a public official *responsible to Congress* or the

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[199] See supra notes 1–4, 185–190 and accompanying text (discussing *Panama Refining* and *Schechter*).

[200] *Schechter*, 295 U.S. at 541–42 ("In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, [discretion to enact] laws for the government of trade . . . is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.").

[201] Emergency Price Control Act of 1942, 50 U.S.C. app. § 901 (2012).

[202] *Yakus*, 321 U.S. at 419–20 (describing the substance of the Act, which was "adopted as a temporary wartime measure," with explicit provision "for its termination on June 30, 1943, unless sooner terminated by Presidential proclamation or concurrent resolution of Congress").

[203] Id. at 422.

[204] Id. at 423 (concluding that the "boundaries of the field of the Administrator's permissible action are marked by the statute").

[205] Id. at 421 ("So far as practicable . . . the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 . . . and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including [a list of examples].").

[206] See supra notes 129–130 and accompanying text (discussing these Acts).

Executive . . . [not to] private individuals engaged in the industries to be regulated."[207] And while the delegated authority was hardly minimal, maximum price schedules may have seemed more amenable to congressional monitoring than codes of competition at large. The implication of all this is that nontextual retention of legislative power by Congress may have seemed more plausible to the Court in *Yakus* than it did in *Schechter*.[208]

That implication can be made close to explicit. In concluding that the textual specificity of the empowering act in *Yakus* satisfied the intelligible principle test, the Court specifically considered congressional oversight of the actions of the empowered agency:

> The standards prescribed by the present Act, with the aid of the 'statement of considerations' required to be made by the Administrator, are sufficiently definite and precise to enable *Congress*, the courts and the public *to ascertain whether the Administrator*, in fixing the designated prices, *has conformed to those standards*.[209]

It is hard to imagine why a court should care whether Congress would be able to ascertain conformance with its own will, unless of course the implicit concern is with congressional retention of legislative power, in which case the ability of Congress, courts, and the public to monitor agency lawmaking becomes highly relevant. Other cases of the era were similarly explicit in their concern about congressional oversight of agency action.[210] If modern cases are less apt to emphasize this concern,

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[207] *Yakus*, 321 U.S. at 424 (emphasis added).

[208] Cf. *Schechter*, 295 U.S. at 532–34 (contrasting Section 3 of the NIRA with the Federal Trade Commission Act, which provided administrative procedures for defining "unfair methods of competition" subject to formal complaint, notice, hearing, and findings of fact, and noting that "[i]n providing for codes [of fair competition], the [NIRA] dispenses with this administrative procedure and with any administrative procedure of an analogous character").

[209] *Yakus*, 321 U.S. at 426 (emphases added).

[210] See Hirabayashi v. United States, 320 U.S. 81, 104 (1943) ("Where, as in the present case, the standard set up for the guidance of the military commander, and the action taken and the reasons for it, are in fact recorded in the military orders, *so that Congress*, the courts and the public are assured that the orders, in the judgment of the commander, conform to the standards approved by the President and Congress, there is no failure in the performance of the legislative function." (emphasis added)); Opp Cotton Mills v. Adm'r of Wage & Hour Div., Dep't of Labor, 312 U.S. 126, 144 (1941) ("[W]here, as in the present case, the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are *such that Congress*, the courts and the public can ascertain

perhaps they are simply internalizing the procedural and social frameworks that now surround most agencies and are acting on the implicit assumption that Congress *can* monitor and respond to agency lawmaking. If so, they simply fail to say what they seem to mean.[211]

V. CONCLUSION

Of all constitutional puzzles, the nondelegation principle has long been one of the most perplexing. The Court's ringing language about the importance of the principle stands in stark contrast to centuries of lax enforcement. And while many constitutional theories argue in favor of meaningful nondelegation principles, they share some odd properties in common. Existing theories are generally unable to reconcile faithful adherence to a meaningful nondelegation principle with the possibility of broad, textually unencumbered delegations of lawmaking power. Either these theories require adjustment, or the fundamental structure of government needs to change. They also cannot reconcile the objectives of nondelegation with the Court's intelligible principle test. Again, either these theories or legal practice needs to change.

The thesis of this Article is that much can be explained by recognizing that nondelegation analysis is not a one-prong inquiry, but actually a two-prong inquiry in every case. Beyond the usual question of characterizing the lawmaking authority being granted, nondelegation analysis demands inquiry into the extent of legislative power that an agency will command. Building this power inquiry into the analysis, this Article shows that faithful adherence to meaningful nondelegation principles can be reconciled with textually unfettered delegations of expansive authority—which do not offend the principle if Congress is still retaining substantial legislative power through nontextual channels of the delegation relationship. The Article also shows how this power inquiry motivates a sliding-scale version of the intelligible principle test. The sliding-scale test demands less textual specificity of Congress as the credibility of Congress's non-textual exercise of legislative power grows.

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whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function." (emphasis added)).

[211] Cf. supra note 171 and accompanying text (noting Justice Brennan's comment in *McGautha v. California* that nondelegation cases "do not always say what they seem to mean").

To address a potential criticism, and to emphasize an important point, nothing in this argument should be taken as a claim that Congress does retain substantial legislative power in every act of delegation. The point is that the distribution of legislative power is a priori uncertain and can only be answered by considering the nature of the delegation and the conditions under which it is made. This is an open-ended inquiry, but concrete factors to consider are suggested in Sections III.B, III.C, and IV.B. These include the availability and practice of congressional monitoring, the existence of information-forcing procedural frameworks, public access to the agency lawmaking process, and the availability of relational tools for congressional incentivization of agency behavior.

Nothing in this argument claims to resolve every challenge in the implementation of this two-prong nondelegation theory. Assessing an agency's legislative power is a difficult task—though probably no more difficult than trying to say what separates legislative and nonlegislative acts of lawmaking. And the timing of the power inquiry is likewise complicated in that deciding whether Congress will be able to exercise continuing legislative power is both a difficult question and one for which the answer may change over time. This raises challenging questions about the judicial manageability of the undertaking. But the difficulty of these problems is a poor excuse for not at least attempting to address them. And these difficulties, though real, are hardly greater than the equally daunting fact questions that courts face in general separation-of-powers cases,[212] in statutory interpretation cases,[213] or in any case turning on the prediction of future events from conflicting evidence. We rise to the challenge elsewhere in law; we can do so here.

[212] See, e.g., The Federalist No. 37, at 231 (James Madison) (The Belknap Press of Harvard University Press 2009) ("Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.").

[213] See, e.g., Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 401–06 (1950) (noting the basic indeterminacy of most canons of textual construction).