ARTICLES

ADMINISTRATIVE COLLUSION: HOW DELEGATION DIMINISHES THE COLLECTIVE CONGRESS

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This Article identifies a previously unexplored problem with the delegation of legislative power by focusing not on the discretion given to executive agencies, but instead on how delegations allow individual congressmen to control administration. Delegations create administrative discretion, discretion that members of Congress can influence through a variety of formal and informal mechanisms. Members have persistent incentives for delegation to agencies, because it is often easier to serve their interests through shaping administration than by passing legislation. To understand the particular problem of delegation, I introduce the concept of the "collective Congress." Collective decisionmaking is a fundamental characteristic of the legislative power. The collective Congress serves an important separation of powers principle by aligning the ambitions of legislators with the power of Congress as an institution. Although members represent distinct interests, the Constitution allows members of Congress to exercise power only collectively and specifically precludes them from exercising any type of individual or executive power. Delegation, however, provides opportunities for individual legislators to influence administration and poses a serious separation of powers concern by fracturing the collective Congress. This insight undermines the conventional view that delegations will be self-correcting because Congress will jealously guard its lawmaking power from the executive. Instead, members of Congress will often prefer to collude and to share administrative power with the executive. As a result, delegation destroys the Madisonian checks and balances against excessive delegation. This structural failure suggests a need to reconsider judicial enforcement of the nondelegation doctrine and to implement political reforms to realign Congress with its collective power.

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INTRODUCTION

The nondelegation doctrine is "unquestionably a fundamental element of our constitutional system"[1] and, despite claims of its death and general judicial indifference, it persists in legal challenges[2] and law reviews.[3] The central idea behind the doctrine is that Congress cannot delegate its "exclusively legislative" powers to the executive or

[1] Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). The modern nondelegation doctrine states that Congress cannot delegate its lawmaking powers without an "intelligible principle." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

[2] The D.C. Circuit, on the front lines of reviewing agency discretion under open-ended delegations, periodically suggests a revival of the doctrine, only to face resistance from the Supreme Court. *Compare* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (invalidating ozone regulations promulgated by the EPA as an unconstitutional delegation of congressional authority because section 109(b)(1) of the Clean Air Act lacks an "intelligible principle"), *with* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (upholding section 109(b)(1) as "well within the outer limits of our nondelegation precedents"); *see also* Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 674 (D.C. Cir. 2013) (holding that a statute that empowered Amtrak to jointly develop performance measures with the Federal Railroad Administration was an unconstitutional delegation of regulatory power to a private party), *vacated and remanded*, 135 S. Ct. 1225 (2015) (holding Amtrak to be a government entity).

[3] As Gary Lawson explains, "The reasons for the doctrine's remarkable staying power are not mysterious. The delegation phenomenon raises fundamental questions about democracy, accountability, and the enterprise of American governance." Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332 (2002). For recent critiques, see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97 (2000).

the courts,[4] because the Constitution vests lawmaking authority only in Congress.[5] The vesting of this power in a multimember legislature reflects a fundamental commitment to republican government and the representation of diverse interests in the lawmaking process. Accordingly, the prohibition on delegation is "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[6] The Constitution separates lawmaking from law execution to promote accountability and the rule of law, and thereby to safeguard individual liberty.[7]

Limits on delegation are fundamental to the constitutional structure, yet expansive delegations provide the foundation for the modern administrative state. The judicial tolerance for such delegations depends on a practical view, that they are essential in a complex society, and also on a conventional legal view, that structural checks and balances will deter excessive delegations because Congress will jealously guard its lawmaking power from the executive.

This Article argues the conventional legal understanding is wrong, or at least incomplete. Delegation undermines separation of powers, not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress. The Constitution creates what I term the "collective Congress"—the people's representatives may exercise legislative power only collectively. This serves important republican principles and aligns the myriad particular interests of congressmen with the institutional interests of Congress. Members will be invested in the difficult process of lawmaking for the public good because this is the only way to exercise power. Delegation, however, provides numerous benefits to legislators by allowing them to influence and to control administration. Individual legislators thus have persistent incentives to delegate, because

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[4] *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."); *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.").

[5] U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . . .").

[6] Field v. Clark, 143 U.S. 649, 692 (1892).

[7] Justices Samuel Alito and Clarence Thomas recently stressed the connection between the nondelegation doctrine and individual liberty. *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty."); *id*. at 1255 (Thomas, J., concurring in the judgment) (arguing the judiciary's failure to enforce the nondelegation doctrine comes at the "cost [of] our Constitution and the individual liberty it protects").

they can serve their personal interests by shaping how agencies exercise their delegated authority. By providing individual opportunities for legislators, delegation realigns the ambitions of congressmen away from Congress and the constitutional lawmaking process. Lawmakers may prefer to collude, rather than compete, with executive agencies over administrative power and so the Madisonian checks and balances will not prevent excessive delegations.

This Article identifies and analyzes this distinct and previously unrecognized constitutional problem arising from delegation.[8] In Part I, I explain how courts and scholars generally assume a conventional view of delegation as a zero-sum game in which Congress yields power to the executive and excessive delegations will be checked because Congress will jealously guard its lawmaking power from the executive. This understanding helps to explain the Supreme Court's refusal to enforce directly the nondelegation doctrine and also the framework of judicial deference to agency interpretations created under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[9] and *United States v. Mead Corp.*[10]

Part II analyzes how delegations benefit individual legislators, drawing from the political science and economics literature to demonstrate the myriad benefits members of Congress can realize from delegations, including reducing the costs of legislating, avoiding responsibility for particular regulations, and providing an opportunity to serve constituents and interest groups. Open-ended delegations give agencies discretion, and legislators can assert influence over that

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[8] The arguments here are offered *in addition* to the many trenchant criticisms raised by scholars against excessive delegations and the Supreme Court's refusal to enforce the nondelegation doctrine. They have argued the original meaning of the Constitution includes a nondelegation principle. *E.g.*, Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 236 (2005); Lawson, *supra* note 3, at 340–41; Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 303–13 (2001). Others have suggested that delegations undermine democratic accountability and the lawmaking procedures of Article I, Section 7. *E.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 109–11 (1993). Public choice theorists have observed that delegations increase the influence and control by special interests. Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 6–7 (1982).

[9] 467 U.S. 837, 842–43 (1984) (establishing a two-part test for judicial deference to administrative agency interpretations that considers first whether Congress has spoken clearly on the issue, and if not, whether the agency's interpretation is a reasonable construction of the statute).

[10] 533 U.S. 218 (2001) (limiting the application of *Chevron* deference to instances in which an agency has authority to act with the force of law and has exercised that authority).

discretion through legislative mechanisms such as oversight and appropriations, but also through individual contacts with agencies and other forms of particularized control. Moreover, party polarization exacerbates the problem by shifting the interests of legislators away from Congress as an institution and toward identification with political party. Both delegations and polarization create an asymmetry—they diminish Congress by providing members with individual opportunities, while at the same time fortifying the unitary executive and aligning the personal, institutional, and party interests of the President.

Part III introduces the concept of the "collective Congress." Just as the Constitution vests executive power in a unitary executive, it vests legislative power in a collective Congress. Members of Congress can exercise their lawmaking power only together, through deliberation and majority (or supermajority) action. Legislators represent many interests, but their goals can be achieved exclusively by working together to enact legislation. Collective lawmaking is thus the primary mechanism for aligning the interests of a multimember Congress and promoting the common good. Delegations fracture the collective Congress because they create administrative discretion that individual members can control and influence. This possibility of individual action shifts the focus, energy, and commitment of members of Congress away from lawmaking.

Thus, delegation undermines separation of powers in a very distinct way, as Part IV explains. By separating the interests of congressmen from the interests of Congress, delegations undermine the Constitution's mechanism for a multimember Congress to represent its institutional interests. Collective lawmaking ties the interests of members to Congress, but delegation allows members to satisfy their interests individually through administration. The conventional view conceives of institutional competition between the Congress and the President—but delegations fracture the collective Congress, allowing for collusion between members of Congress and administrative agencies and eroding the structural rivalry that could check excessive delegations.

Understanding the dynamic of delegation and the collusion between the political branches provides new reasons for revisiting the limits on the delegation of legislative power. Part V outlines potential judicial and political approaches to limiting excessive delegations. The importance of the nondelegation principle has been reaffirmed throughout our history, but reliance on structural checks and balances has proved unavailing. Developments within the administrative state suggest the courts should articulate and enforce a more robust

nondelegation doctrine. In addition, the political branches can also rein in delegations, which may bolster both the collective Congress and the unitary executive. Excessive delegations have undermined individual liberty by allowing for the expansion of the administrative state outside the Constitution's requirements for accountability. The collective Congress provides a way to think about the problem of delegation at its source.

I
The Conventional View of Delegations

The Supreme Court consistently affirms the importance of the nondelegation principle to the constitutional structure.[11] Yet the virtual death of the nondelegation doctrine, or at least the judicial and political tolerance of open-ended delegations to the executive, depends in part on a formalistic understanding of power in administration.[12] By focusing on Congress as a singular institution, courts and legal scholars have generally assumed that Congress relinquishes power when it delegates authority to agencies and that structural competition between the branches will prevent Congress from delegating too much power. This basic assumption provides a foundational principle for the delegations that are a precondition for the modern administrative state.[13] The conventional view explains, at least in part, the Court's steadfast commitment to the principle of nondelegation and its simultaneous unwillingness to enforce limits on Congress's delegations of lawmaking power. This Part briefly identifies the con-

[11] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests 'all legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers . . . ."); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935) ("[I]n every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend."); *Field*, 143 U.S. at 692 (explaining that nondelegation is "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution"); *see also* cases cited *supra* note 4.

[12] The traditional understanding of delegations in legal scholarship and in judicial decisions applies a kind of institutional formalism, treating Congress as a "formal black box" of legislative powers that diminish when authority is delegated to executive branch agencies. *See* Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 Sup. Ct. Rev. 1, 2 (2013) ("[I]nstitutional formalism blinds courts to any more contingent, specific features of institutional behavior, or to the particular persons who happen to occupy the relevant offices, or to the ways in which the institution actually functions in particular eras . . . .").

[13] *See* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 155 (1994) ("The Court's refusal to enforce the nondelegation doctrine seriously—to strike down broad delegations of lawmaking power to the executive—must be seen as the premise for all other checks and balances cases in the post-New Deal era.").

ventional view and explains how it animates the Court's nondelegation doctrine and also serves as part of the framework for judicial deference to agency interpretations.

A. Delegation Relinquishes Congressional Power

This pervasive and conventional view of delegations reflects an assumption that Congress's policymaking authority is diminished whenever it delegates to the executive. In this formal view, Congress's legislative power is primarily based on controlling the details of lawmaking, and delegations yield that power to the executive. The power Congress loses when delegating, the President and the executive branch pick up through the discretion vested in administrative agencies. Delegations thus constitute a loss for Congress, because Congress as a whole retains less control over the specifics of policymaking.

Furthermore, under the conventional view, political competition between Congress and the President should provide the necessary checks and incentives against excessive delegation. This understanding of nondelegation takes the Madisonian framework at face value—ambition should counteract ambition with respect to control over policymaking.[14] For example, John Manning explains that

> [B]ecause Congress cedes substantial policymaking initiative to administrative agencies when it enacts open-ended rather than precise statutes, it already has a significant structural incentive to specify statutory policies. The separation of powers, by prohibiting Congress from exercising direct control over agency lawmaking, operates in effect as a structural nondelegation doctrine.[15]

Similarly, Eric Posner and Adrian Vermeule argue that it is unlikely Congress would grant the President all lawmaking powers or even substantially greater powers than he already has because "a dominant fact of modern government is that Congress and the President are institutional rivals along many dimensions. Distrust of executive agents frequently causes Congress to attempt to control the smallest

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[14] *See* THE FEDERALIST NO. 51, at 268 (James Madison) (George W. Carey & James McClellan eds., 2001) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.").

[15] John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 259 (2000) [hereinafter Manning, *Canon of Avoidance*]; *see also* John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 725 (1997) [hereinafter Manning, *Textualism*] ("[E]xecutory delegations exact a relatively stiff structural price—a loss of legislative control over the policies left unspecified in the statutory text. For that reason, textualists feel relatively comfortable relying on structural incentives to deter delegations of lawmaking power to agencies and courts.").

details of executive action."[16] Daryl Levinson cites congressional delegations as the leading example of how branches fail to pursue their departmental ambitions or build empires.[17]

Other scholars make similar arguments, assuming that the judiciary need not enforce the nondelegation doctrine in order to maintain the necessary separation of powers between the branches. The basic premise is that Congress will protect its own interests and can choose how to exercise its powers. Thomas Merrill explains "it is implausible that Congress—the historical rival of the Executive—would give away all or even most of its powers. . . . [S]trict nondelegation is unnecessary to achieve lively checks and balances among the branches of government."[18] Similarly, the argument runs that there can be no congressional aggrandizement when Congress delegates policymaking discretion.[19] Even those sympathetic to the enforcement of the nondelegation doctrine focus on the dangers of transferring power from Congress and concentrating power in the executive.[20]

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[16] Posner & Vermeule, *supra* note 3, at 1742.

[17] *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 954 (2005) ("[T]he rise of the administrative state suggests that congressional abdication of legislative power to the executive is at least as much of a problem as congressional self-aggrandizement.").

[18] Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2148 (2004) (arguing that courts need not force Congress to make key policy judgments through the nondelegation doctrine); *see also* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 147 (2006) ("In delegating, Congress is not hindering any other branch from performing its constitutional functions and there is no danger that Congress's own power will be overly limited, since Congress can always repeal or narrow the delegation. Thus . . . delegation should not be feared by those concerned with separation of powers."); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2359 (2006) ("If the animating ideal of the nondelegation principle is to 'ensure[ ] . . . that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will,' perhaps we should rest assured that Congress will adequately police itself.").

[19] *See, e.g.*, David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 222 (2001) (observing that the assumption of congressional aggrandizement is inconsistent with the decision "to delegate broadly to agencies in the first instance, to lodge most of this power with executive rather than with independent agencies, and to accede to ever greater assertions of presidential control over the entire sphere of administrative activity"); Greene, *supra* note 13, at 155 ("[N]ow that the nondelegation doctrine no longer provides an enforceable rule against excessive delegation, the balance of power tips toward the executive every time Congress delegates lawmaking power.").

[20] *See* Rappaport, *supra* note 8, at 303–06 (defending the formalist nondelegation doctrine and focusing on the constitutional problems of transferring legislative power to the executive); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 479 (1989) ("[T]o the extent that the nondelegation doctrine is called upon to help enforce the structural commitment to separation of powers, its principal focus is the movement of power: is the authority of one branch being transferred to another, which will now possess a dangerous concentration of

Some public choice theorists have also taken the traditional view that the delegation of power imposes a sufficient institutional cost on Congress such that courts need not police delegations.[21] A few critics of delegation, such as David Schoenbrod, have recognized the dangers of congressional control over administration and the benefits individual members may realize from delegation,[22] but such work remains the exception.[23]

The predominant view of delegations assumes that Congress is an undifferentiated, institutional whole; that regulatory power is a zero-sum game in which Congress will compete for institutional power with the executive; and that, as a consequence, judicial review will generally be unnecessary to police delegations.

B. The Conventional View in Judicial Doctrine

The Supreme Court's decisions have relied on this conventional view of delegation and separation of powers, not only with respect to the nondelegation doctrine, but also in relation to the deference given to agency interpretations. The conventional view provides one rationale for the judiciary's failure to enforce directly the nondelegation doctrine, or at least not to second guess what constitutes an excessive delegation. Since the nation's founding, courts have been reluctant to

government power?"); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 142 (1995) ("The system of separation of powers was established in order to prevent undue accretion of political power in one branch. Abandonment of the nondelegation doctrine effectively permits the executive branch to accumulate an almost unlimited amount of power . . . .").

[21] *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 84 (1991) ("When Congress delegates power, it pays an institutional price because power is shifted from Congress to an agency. Whether legislators are dedicated public servants or rapacious political hacks, they cannot expect much benefit from their offices if they give all their power away."); *id*. at 84 n.65 (noting the difference between self-aggrandizing enactments and other statutes that affect the separation of powers).

[22] *See* SCHOENBROD, *supra* note 8, at 168 ("[The argument] that Congress will . . . protect its turf, fails because individual legislators gain from delegation, even if Congress as an institution loses. Individuals gain power and lose accountability. So legislators willingly delegate . . . .").

[23] *See* SOTIRIOS A. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 121–22 (1975) (discussing committee oversight as a proposed substitute for the nondelegation doctrine and arguing that "[w]hen oversight becomes control, objections on separation of powers grounds are in order"); Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 Nw. U. L. REV. 527, 537 (2012) (arguing Congress has seized significant aspects of law execution authority through oversight and appropriations committees, a development linked in part to delegations of authority to agencies that committees oversee); H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1061 (1975) (discussing the problems that arise when Congress seeks to control administrative discretion through formal mechanisms such as the one-house legislative veto).

police the boundaries of permissible delegations, in part because Congress can protect its own lawmaking power simply by withdrawing delegations or legislating more specifically.[24] The idea that delegations minimize congressional power is at the core of the constitutional analysis, and as explained below, this understanding is incomplete because it fails to account for how delegations expand the power of individual legislators.

The Court often refers to congressional delegations as an increase in the executive's power with a concomitant diminution of Congress's authority: "[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch."[25] The judicial concern has focused on the scope of authority and discretion given to the executive,[26] and, particularly in recent cases, the potential dangers of combining lawmaking and law interpreting functions in administrative agencies.[27] As Justice Scalia has explained, it was understood that

> Congress could delegate lawmaking authority only at the expense of increasing the power of either the President or the courts. Most often, as a practical matter, it would be the President. . . . Thus, the need for delegation would have to be important enough to induce Congress to aggrandize its primary competitor for political power.[28]

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[24] *See* Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1691 (2007) ("While [David] Currie's studies of constitutional debates in late-eighteenth- and early-nineteenth-century Congresses reveal that those debates were punctuated by repeated assertions of the nondelegation principle, the early Supreme Court maintained an almost studied indifference to protecting Congress from itself." (citing DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 73–74, 109, 146–49, 160, 186–87, 244–48, 255 (1997))).

[25] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928); *see also* Loving v. United States, 517 U.S. 748, 758 (1996) ("Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties."); Lujan v. Defenders of Wildlife, 504 U.S. 555, 604 (1992) (Blackmun, J., dissenting) ("Congress legislates in procedural shades of gray not to aggrandize its own power but to allow maximum Executive discretion in the attainment of Congress' legislative goals."); Mistretta v. United States, 488 U.S. 361, 395 (1989) ("[S]ince Congress did not unconstitutionally delegate its own authority, the Act does not unconstitutionally diminish Congress' authority.").

[26] *See* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 759 (D.D.C. 1971) ("The claim of undue delegation of legislative power broadly raises the challenge of undue power in the Executive and thus naturally involves consideration of the interrelated questions of the availability of appropriate restraints through provisions for administrative procedure and judicial review.").

[27] *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring in the judgment) ("[The Constitution] and the writings surrounding it reflect a conviction that the power to make the law and the power to enforce it must be kept separate, particularly with respect to the regulation of private conduct.").

[28] *Mistretta*, 488 U.S. at 421 (Scalia, J., dissenting).

The Court conceptualizes delegations in the formal way as both an increase in the power of the executive and a diminishment of congressional authority.

Assuming that delegations surrender legislative power, the Court generally does not invalidate overly broad delegations and instead leaves the remedy for such delegations to the political process. The Court asks only whether the statute provides an "intelligible principle," and has determined that even the most capacious grants of authority satisfy this requirement.[29] The Court assumes that the scope of delegations should be largely self-policing, implicitly adopting the reasoning that Congress has both the "personal motives" and the constitutional means[30] to limit excessive delegations with new legislation, and this should prevent disproportionate accumulations of power in the executive.[31] Rivalry and competition between the branches will be sufficient to enforce the interests behind the nondelegation principle. This formal understanding of how delegations work undergirds the lack of direct enforcement of the nondelegation doctrine. Unfortunately, as explained below, this understanding is incomplete, particularly as the modern administrative state has developed.[32]

Admittedly, the Court's decisions often emphasize the line-drawing problem with judicial enforcement of the nondelegation doctrine.[33] But this difficulty cannot fully explain the Court's almost complete refusal to limit open-ended delegations, particularly since the Court repeatedly has reaffirmed the importance of the nondelegation principle to the constitutional structure.[34] The refusal to review delegations relates in part to practical concerns about the necessity of

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[29] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (gathering cases in which the Court has found an "intelligible principle").

[30] THE FEDERALIST NO. 51, *supra* note 14, at 268 (James Madison).

[31] *See Mistretta*, 488 U.S. at 381–82 (internal quotation marks omitted) (upholding delegation of authority to the U.S. Sentencing Commission and explaining that separation of powers provides security against tyranny and "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other").

[32] *See infra* Part II (explaining the conventional view fails to account for incentives that individual legislators have for delegation).

[33] *See Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) ("[T]he doctrine of unconstitutional delegation . . . is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments . . . must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825) ("[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.").

[34] *See* cases cited *supra* note 11.

delegation in a complex modern society and the conventional legal view that structural checks render judicial intervention unnecessary. The courts face line-drawing problems in many other constitutional contexts, but when the concern for overreaching by one of the branches is great enough, the Court will find some judicially enforceable standards.[35] For instance, the Court has repeatedly suggested that self-aggrandizing actions by Congress (or the President) pose serious separation of powers problems.[36] The failure to enforce directly the nondelegation doctrine must turn in part on the understanding that delegations are not aggrandizing actions by Congress.

Perhaps less obviously, the conventional view of delegations provides a supporting assumption for *Chevron* and *Mead* and the Supreme Court's deference to agency interpretations of ambiguous statutes. A variety of rationales have been offered to support *Chevron*.[37] An additional explanation for the Court's decisions might be the conventional view of delegation as yielding the policymaking power of Congress to agencies. *Chevron* articulates a prodelegation background rule and reinforces the idea that ambiguities and silences in a statute should be left to reasonable agency interpretations.[38] *Chevron* thus firmly holds Congress to its choice to delegate authority to the agency and allows the agency to exercise not just specifically delegated authority, but also authority reasonably found in statutory

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[35] Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1315 (2006).

[36] *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 878 (1991) ("Our separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch."). Many scholars recognize aggrandizement as the *sine qua non* of a separation of powers violation. *See, e.g.*, M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 608 (2001) ("Courts and most commentators are also committed to assuring that no one branch of government can dominate the others, thereby preserving some rough balance of authority among the branches or, as the idea is sometimes articulated, to prevent the aggrandizement of one branch at the expense of another.").

[37] *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 863–72 (2001) (detailing various rationales for the *Chevron* doctrine, including the Constitution, federal common law, and a presumption about congressional intent); Symposium, Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475 (2014) (discussing various rationales offered to support *Chevron*).

[38] *See* King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (noting that the framework of *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps" (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)) (internal quotation marks omitted)); *see also* Farina, *supra* note 20, at 511–26 (criticizing *Chevron* on nondelegation grounds); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 834 (1991) (explaining that *Chevron* drove "the last nail in the sporadically reopened casket of the nondelegation doctrine"); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329 (2000) (referring to *Chevron* as "the quintessential prodelegation canon").

gaps. Judicial deference to agency interpretations forces Congress to bear the "cost" of delegations by assigning policymaking choices to the executive, Congress's political rival.

Justice Scalia recently articulated precisely this explanation for *Chevron*:

> Congress cannot enlarge its *own* power through *Chevron*—whatever it leaves vague in the statute will be worked out *by someone else*. *Chevron* represents a presumption about who, as between the executive and the judiciary, that someone else will be. (The executive, by the way—the competing political branch—is the less congenial repository of the power as far as Congress is concerned.) So Congress's incentive is to speak as clearly as possible on the matters it regards as important.[39]

Justice Scalia specifically considers *Chevron* a mechanism for promoting separation of powers and encouraging more specificity from Congress when it delegates authority. The Court, and particularly Justice Scalia, favors the "stable background rule" of *Chevron*,[40] in part because it maintains the competitive tension between the political branches and keeps the courts out of policymaking, allowing Congress to choose when and how it delegates authority.[41]

Judicial deference to agency interpretation thus implicitly includes a view of the competitive tension maintained by giving a delegation its full (or perhaps sometimes more than its full) consequences. The Court's preference for executive branch lawmaking over judicial lawmaking could reasonably be thought to maintain separation of powers in this way, leaving corrections of excessive delegations to the political, not judicial, process. If Congress wishes to give up power in open-ended, ambiguous, or incomplete statutes, the Court will not prevent it from doing so. Instead, it will allow the executive branch to exercise significant administrative power. The Court has adopted rules of deference that seek to maintain political rivalry between the Congress and the executive and perhaps thereby to dis-

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[39] Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013); *see also* Calabresi et al., *supra* note 23, at 545 ("[*Chevron*] worked to discourage unconstitutional delegations of power by putting Congress on notice that, if it delegated power, its institutional rival, the President, would be empowered and not the congressional oversight committees and subcommittees.").

[40] *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) ("*Chevron* thus provides a stable background rule against which Congress can legislate: . . . Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.").

[41] *See* United States v. Mead Corp., 533 U.S. 218, 257 (2001) (Scalia, J., dissenting) ("*Chevron* sets forth an across-the-board presumption, which operates as a background rule of law against which Congress legislates: Ambiguity means Congress intended agency discretion.").

courage excessive delegations. Recent opinions, however, suggest an emerging skepticism about whether expansive delegations combined with judicial deference to agency discretion adequately protect constitutional values and individual liberty.[42]

The conventional view of delegation as a self-denying power helps to explain the Court's reluctance to enforce directly the nondelegation doctrine and the framework of deference afforded to administrative agencies. Under the prevailing legal doctrine, judicial enforcement should occur rarely (and in practice, never) because the competitive separation of powers dynamic should be sufficient to protect individual liberty and to prevent the expansion of federal power.

II
Delegation Benefits Members of Congress

The conventional view correctly identifies the dramatic expansion of executive power resulting from delegations, yet it has an incomplete understanding of the political realities of delegation in Congress. Therefore, the conventional view cannot explain why structural safeguards have failed to prevent wholesale delegations of policymaking to the executive branch on many important subjects. This Part takes a more realistic view of Congress and its individual members in the context of delegation[43] and explains how delegation can serve the interests of individual legislators even as it undermines Congress as an institution. Political scientists have identified the many incentives members of Congress have to delegate to agencies. While such insights are well established in this literature, legal scholarship about separation of powers in the administrative state has largely ignored or

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[42] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1254–55 (2015) (Thomas, J., concurring in the judgment) ("We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. . . . [T]he cost is to our Constitution and the individual liberty it protects."); *City of Arlington*, 133 S. Ct. at 1886 (Roberts, C.J., dissenting) (arguing for the importance of judicial review to determine an agency's jurisdiction in part because of "the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies").

[43] Commentators with increasing frequency observe how the reality of administrative practice fails to fit with the formal view of administration. *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution 10 (2010) ("The framers expected national lawmaking to be the product of the carefully deliberative structure established by Article I, Section 7: . . . Yet in the modern administrative state, commissions and bureaus promulgate most legally binding rules."); Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 Tex. L. Rev. 1137, 1140 (2014) ("[T]he actual workings of the administrative state have increasingly diverged from the assumptions animating the [Administrative Procedure Act] and classical judicial decisions that followed.").

skimmed over this dynamic and instead stuck to the conventional view.

Here, I incorporate insights from the political science and economics literature because it sheds light on the particular separation of powers problem with delegation, which is that collective legislative power dissipates through delegations that benefit individual members. Delegation thus drives a wedge between the personal interests of legislators and the institutional interests of Congress, undermining the collective legislative process established to promote the public good. Party polarization also reinforces the dynamic by increasing delegations and by aligning the interests of congressmen to their parties rather than to Congress as an institution. This Part concludes by suggesting that delegation may ultimately prove to have diminishing benefits even to individual legislators.

A. Delegation Delights: The Individual Benefits of Delegation

Political scientists and economists offer various explanations for the incentives and dynamics of delegation.[44] This literature emphasizes the many benefits members of Congress can realize through delegation[45] and demonstrates the strong incentives individual legislators have to continue delegating, even though this might weaken the collective lawmaking power of Congress.

First, delegation reduces the costs of legislating. The Constitution deliberately erects hurdles to the exercise of legislative power, requiring bicameralism and presentment for the passage of laws. The decision costs of reaching agreement increase, inter alia, with the specificity of the legislation,[46] its complexity,[47] or the amount of con-

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[44] For a thorough overview of the literature, see DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999).

[45] Scholars may disagree about the type of benefits realized by members of Congress or about the extent of the control exercised over administration—some of those differences are discussed in this Part—but there is widespread agreement that delegations occur because they provide benefits to legislators.

[46] Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 513–15 (1981).

[47] *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 31 (2010) ("The complexity of policymaking and the rapid pace of change in the policy environment make it prohibitively costly for relatively underspecialized legislators, burdened with cumbersome processes of collective action in large-number bodies, to attempt to specify all policy choices themselves, even if they would want to."); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 267–68 (1974) ("Transaction costs tend to increase rapidly with the number of parties whose agreement is necessary for the transaction . . . . [Hence legislatures] will delegate . . . more of the legislative function to bodies that do not

troversy it generates.[48] As Epstein and O'Halloran posit, "Congress will delegate to the executive when the external transaction costs of doing so are less than the internal transaction costs of making policy through the normal legislative process via committees."[49] Delegating some choices to agencies alleviates the chronic collective action problems inherent in legislating.

Proponents of delegation such as Jerry Mashaw suggest that reducing the costs of lawmaking is a positive good, allowing Congress to provide more public goods in a manner that promotes agency responsiveness to social, political, and technological changes.[50] Others, however, have suggested that delegation disproportionately promotes private goods production by Congress—goods enjoyed by specific individuals or groups, often at the expense of the public. Peter Aranson, Ernest Gellhorn, and Glen Robinson argue: "[D]elegation reduces the legislator's marginal cost of private-goods production, which *ceteris paribus*, yields more legislation and more public-sector private-goods production."[51] Regardless of whether delegation is a net social good, delegations allow legislators to avoid specificity and therefore to reduce the cost of enacting legislation.

Second, delegation may allow members of Congress to avoid responsibility for difficult choices. "By charging an agency with implementation of the regulatory mandate, legislators . . . also avoid or at least disguise their responsibility for the consequences of the decisions . . . . Delegation of legislative authority to administrators shifts the responsibility for the costs and benefits public policies produce."[52]

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produce rules through negotiation among a large number of people—i.e., to executive and administrative agencies and to courts . . . .").

[48] *See* Ehrlich & Posner, *supra* note 47, at 267 ("[T]he costs of negotiation will be even higher when a proposed rule is controversial, that is, costly to a politically effective segment of the community.").

[49] EPSTEIN & O'HALLORAN, *supra* note 44, at 43.

[50] *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 96 (1985) ("[I]t seems likely that the flexibility that is currently built into the processes of administrative governance by relatively broad delegations of statutory authority permits a more appropriate degree of administrative, or administration, responsiveness to the voter's will than would a strict nondelegation doctrine."); *see also* Ehrlich & Posner, *supra* note 47, at 280 ("The importance of agencies, relative to courts, as sources of rules has increased dramatically, and this is consistent with the view that society is seeking to adapt to changes over time in the relative costs of different methods of producing rules."); David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 420 (2002) (arguing agencies have a type of accountability that can produce policy choices closer to voters' preferences and that also reflect the benefits of information and expertise).

[51] Aranson et al., *supra* note 8, at 56.

[52] Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, *in* REGULATORY POLICY AND THE SOCIAL SCIENCES 175, 187 (Roger G. Noll ed., 1985) [hereinafter Fiorina, *Group Concentration*]; *see also* R. DOUGLAS ARNOLD, THE LOGIC OF

Open-ended statutes provide a general solution to a pressing problem, but leave the details to an administrative agency. Therefore, members can take credit for responding, but then shift blame to the agency for imposing regulatory costs.[53]

Congress can obscure the real beneficiaries of a particular law; or can act even when both the public and members of Congress are uncertain about the best course of action.[54] Legislators can avoid disputes by passing the buck and leaving the agency to resolve conflicts between interest groups. In addition, members can benefit from delegation when their constituents' interests are divided, because the agency will make the ultimate decision.

Third, through carefully designed agency structures, Congress can both delegate and lock in a specific policy choice. It is part of the conventional understanding that delegation lowers the cost of legislating only at the expense of Congress losing control over the details of policymaking.[55] Yet even when delegating policymaking authority, Congress can structure an agency to satisfy policy preferences of legislators or key interest groups. For example, Congress can delegate to agencies insulated from political control and therefore from future political uncertainty.[56] This was the mechanism chosen by Congress in

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CONGRESSIONAL ACTION 101 (1990) ("One method of masking legislators' individual contributions [to policies that impose costs] is to delegate responsibility for making unpleasant decisions to the president, bureaucrats, regulatory commissioners . . . . Sometimes legislators know precisely what the executive will decide, but the process of delegation insulates them from political retribution."); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 46–52 (1982) (explaining that legislators may delegate to "shift the responsibility" for policy decisions).

[53] *See* SCHOENBROD, *supra* note 8, at 92–93 (arguing that "delegation enhances legislators' opportunities simultaneously to support the benefits of an action and oppose its costs, which is political heaven" and "delegation enables legislators to represent themselves to some constituents as supporting an action and to others as opposing it, which is also political heaven"); *cf.* FARBER & FRICKEY, *supra* note 21, at 81 (arguing against the "pass the buck" critique of delegations because rational voters will "predict that delegations will result in unfavorable administrative decisions" and will not be fooled by them).

[54] Aranson et al., *supra* note 8, at 60 ("Delegating legislative authority by turning over to an administrative agency with little or no direction is one manifestation of a strategy of ambiguity. The responsibility-shifting model, moreover, predicts the strategy of delegation not only when uncertainty exists in the electorate, but also when the legislator himself is uncertain.").

[55] *See supra* Part I.A. (discussing the conventional view that delegations result in a reduction of legislative power and control).

[56] *See* Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 237 (1990) ("Congress is fragmented and decentralized, and individual legislators are highly responsive to interests groups—which, fearing one another and fearing the state, often want agencies that are insulated from politics and difficult to control."); *see also id.* at 227 ("[O]ther political actors with different and perhaps opposing

the creation of the Consumer Financial Protection Bureau (CFPB), which operates under very open-ended delegations.[57] The CFPB, however, also enjoys a particularly strong form of insulation from political control.[58] Through careful choice of the first director of the CFPB, legislators could ensure that the agency implemented its broad delegations consistent with the purposes of its primary proponents.[59] The CFPB's significant independence limits a future Congress's or President's control. Thus, the Congress that created the CFPB could reap the benefits of delegation and control the agency's agenda—having its cake and eating it too.[60] Careful design might thus help the enacting Congress entrench a particular agency mandate.[61] Accordingly, Congress can sometimes delegate without losing much control.

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interests may gain that right [to exercise public authority] tomorrow, along with legitimate control over the policies and structures that their predecessors put in place. Whatever today's authorities create, therefore, stands to be subverted or perhaps completely destroyed . . . by tomorrow's authorities.").

[57] *See* 12 U.S.C. § 5511(b)(2) (2012) (stating the Consumer Financial Protection Bureau (CFPB) has the authority to protect consumers from "unfair, deceptive, or abusive acts and practices"); *see also The Administrative State v. The Constitution: Dodd-Frank at Five Years: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 114th Cong. (2015) (written testimony of Prof. Neomi Rao), *available at* http://www.judiciary.senate.gov/meetings/the-administrative-state-v-the-constitution-dodd-frank-at-five-years (discussing the independence of the CFPB and some of its consequences).

[58] *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1269–71 (2014) (detailing the combination of features that promote the unusual independence of the CFPB).

[59] Reporting about the CFPB reflects the common understanding that the CFPB responds primarily to Senator Elizabeth Warren, who developed and helped to establish the Bureau. *E.g.*, Joseph Lawler, *Incoming GOP Majority Would Target Elizabeth Warren's CFPB*, WASH. EXAMINER (Oct. 21, 2014, 5:00 AM), http://www.washingtonexaminer.com/incoming-gop-majority-would-target-elizabeth-warrens-cfpb/article/2555055; Erika Eichelberger, *10 Things Elizabeth Warren's Consumer Protection Agency Has Done for You*, MOTHER JONES (Mar. 14, 2014, 6:00 AM), http://www.motherjones.com/politics/2014/02/elizabeth-warren-consumer-financial-protection-bureau.

[60] Changing the structure of an agency by statute is very difficult, as the Republican Congress has found with the CFPB. The next President could appoint a new director of the CFPB and shift the agency's direction, but regulatory inertia is often difficult to combat.

[61] Even when members may find it beneficial not to specify the substance of policies, agency design may enable Congress to manage bureaucratic drift. *See, e.g.*, Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 100 (1992) (explaining that agency design can be used to minimize both "bureaucratic drift" and "legislative drift" and that "the politicians who create administrative agencies can limit future agency costs not only by establishing procedural and substantive rules under which such agencies must operate, but also through the initial organizational design of the agency itself"); Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111, 113–15 (1992) (arguing that bureaucratic drift and legislative drift cannot be managed simultaneously). In addition, the structure of an agency and its policy mandate essentially serve the same purposes and both can be used to exercise power and authority. *See* Moe, *supra* note 56, at 230 ("Structural items can be traded for policy items, and vice versa . . . . In the resulting package, the agency gets a structure and a mandate, but the

Fourth, and perhaps most important, members may realize a variety of individual benefits outside the legislative process. After authority is delegated to an agency, the possibility of intervening in the regulatory process gives members an important opportunity for satisfying interest groups and serving constituents, and thereby promoting political success. Because delegations reduce the cost of legislation, delegating policymaking to agencies will leave legislators with more time and resources to provide constituent services and engage in other activities that improve their chances of reelection.[62] Reelection often turns less on enacting legislation and more on satisfying certain core constituents, both individual voters and organized groups.

In addition to saving time on lawmaking, delegated authority can also provide a source of constituent service. Agencies with administrative discretion "can beneficially or adversely affect the fortunes of each legislator's constituents, and they can grant particularized favors to constituents through the congressman's good offices. . . . Thus, agencies reinforce the legislative tendency toward the public production of private goods, or the collective satisfaction of high demanders' preferences for public goods."[63] When an agency has regulatory discretion, members can "rescue" constituents from regulatory burdens. In a vast regulatory state, legislators may be most effective by securing waivers or exemptions for influential groups.[64] For instance, immediately after the passage of the Affordable Care Act, nearly 20% of exemptions granted were to businesses in House Speaker Nancy Pelosi's district.[65] Enacting "vague standards puts more . . . constitu-

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former is not designed or adopted because it is a means to the latter. From a political standpoint, they are both very much the same thing.").

[62] Aranson et al., *supra* note 8, at 43 ("[T]he goal of reelection decreases the legislator's incentives to investigate, legislate, and oversee, and increases his incentives to engage in a different set of activities designed to secure his reelection."); *cf.* Diana Evans, *Congressional Oversight and the Diversity of Members' Goals*, 109 POL. SCI. Q. 669, 670 (1994) ("[W]hen members' good public policy, influence, and reelection goals conflict, reelection does not always dominate their oversight behavior.").

[63] Aranson et al., *supra* note 8, at 51; *see also* Macey, *supra* note 61, at 517 ("The modern administrative agency lowers the cost to interest groups of influencing the political process; it conflicts in the most fundamental way imaginable with the core constitutional function of raising the transaction costs to interest groups of obtaining passage of favored legislation.").

[64] *See* Richard A. Epstein, *Government by Waiver*, NAT'L AFF., Spring 2011, at 41 ("'Government by waiver' is . . . among the most serious challenges to the rule of law in our time.").

[65] Matthew Boyle, *Nearly 20 Percent of New Obamacare Waivers Are Gourmet Restaurants, Nightclubs, Fancy Hotels in Nancy Pelosi's District*, DAILY CALLER (May 17, 2011, 12:07 AM), http://dailycaller.com/2011/05/17/nearly-20-percent-of-new-obamacare-waivers-are-gourmet-restaurants-nightclubs-fancy-hotels-in-nancy-pelosi%E2%80%99s-district/.

ents at risk of administrative action, thus creating more opportunities for members of Congress to earn their gratitude by intervening on their behalf."[66] The possibility of individual casework may provide one of the strongest benefits of delegation—especially for powerful members with control over committees and connections to agency officials.

Individual members of Congress may exercise this influence over administration through ex post controls.[67] Methods take a variety of official forms, including committee oversight, threats to reduce appropriations, investigations of administrative conduct, reporting requirements, and the confirmation process for high-level officials. Influence also occurs informally through regular contacts with agency officials. Members may focus less on lawmaking—which is difficult to accomplish and to control—and more on this individual administrative influence. Given that Congress remains in control of the decision of whether to legislate specifically or to delegate, "the decision on how to form policy will be made to maximize *legislators*' utility,"[68] however that utility may be understood.

These observations are supported by common knowledge of the regular interaction between agencies and the Hill. Although most particulars remain behind closed doors, a few examples that have received public attention demonstrate the basic point. For instance,

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[66] FARBER & FRICKEY, *supra* note 21, at 80; *see also* SCHOENBROD, *supra* note 8, at 94–95 ("If Congress proposes to delegate, the interests affected still have a direct incentive to make contributions to legislators whose votes are uncertain, if the bill's outcome is uncertain. But the interests will have a direct incentive to make contributions to any legislator who does casework on resulting agency lawmaking . . . ."); Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 230 (1984) ("Overall, oversight is uncoordinated; it is exercised by substantive and appropriations committees in both houses and by individuals . . . . Committee-based oversight often exerts pressure for the creation of private benefits flowing to the constituencies represented on the committee." (footnote omitted) (internal citations omitted)).

[67] *See* Beermann, *supra* note 18, at 144 ("Congress also engages in constant informal monitoring of, and input into, the execution of the laws. . . . From Congress's perspective, the executive branch is its agent . . . ."); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 51 (1994) ("[C]ongressional committee chairs are in many ways rival executives to the cabinet secretaries whose departments and personal offices they oversee."); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 793 (1983) (concluding that "congressional institutions play important roles in agency decisions" and specific committees have particular influence over policymaking).

[68] EPSTEIN & O'HALLORAN, *supra* note 44, at 49 (emphasis added); *see also* Fiorina, *Group Concentration*, *supra* note 52, at 196 ("[L]egislators do not delegate primarily in the good-intentioned hope that the experts will make better decisions, nor in the innocent and understandable attempt to minimize the costs of making decisions. Rather, delegation is principally a political decision.").

agency officials and congressional staffers understand that Senator Elizabeth Warren and her staff exercise substantial influence and control over the CFPB, the agency she helped design. Similarly, as chairman of the House Energy and Commerce Committee, former Representative John Dingell exercised oversized control on the regulatory process through a variety of methods, including issuing what colloquially were referred to as "Dingell-grams," letters asking agencies for information. As Dingell noted, "Oversight isn't necessarily a hearing. Sometimes it's a letter. We find our letters have a special effect on a lot of people."[69]

While legislation always requires collective action, members of Congress and committees can effectively influence administration through a variety of mechanisms that do not require legislation. Open-ended delegation creates administrative discretion that individual members can try to influence. When statutes fail to specify the relevant rules of conduct, members of Congress can claim the need for oversight and reporting, which can easily slide into stronger forms of influence and control. The creation of administrative discretion gives members the opportunity to fill in the details of legislation. Responsiveness to law sometimes becomes responsiveness to individual members. For example, Senator Al Franken recently observed that the CFPB was accountable to Congress because "I've gone to CFPB on mortgages, rules on mortgages in rural areas, and gotten them to change their rules. So I can go to them all the time and get changes."[70]

While the precise extent of Congress's ability to assert control over the bureaucracy remains a complicated empirical and political area of study, there is widespread recognition that legislators use various formal and informal means to participate in administration. Such influence occurs in all executive agencies, and the labeling of an agency as "independent" does not consistently determine the level of congressional influence.[71] Political scientists have studied congres-

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[69] Don Wolfensberger, *Long-Serving Dingell Is a Master of House Traditions*, ROLL CALL (June 11, 2013, 1:12 PM), http://www.rollcall.com/news/long_serving_dingell_is_a_master_of_house_traditions_wolfensberger-225509-1.html.

[70] *The Administrative State v. The Constitution: Dodd-Frank at Five Years*, *supra* note 57 (statement of Sen. Al Franken, Member, S. Comm. on the Judiciary).

[71] *See* Rao, *supra* note 58, at 1251–55 (arguing that Congress cannot restrict the President's removal power, but retains other mechanisms for influencing agencies); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 773 (2013) (rejecting the "binary view of agencies" as independent and executive and explaining that the "so-called independent agencies are simply a type of executive agency"); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599 (2010) (explaining that independent agencies are often responsive to presidential influence).

sional control of the bureaucracy,[72] and any agency official or congressional staffer can attest to the reality of the myriad ways members of Congress influence administration. As John Hart Ely said when explaining the propensity to delegate, "it is simply easier, and it pays more visible political dividends, to play errand-boy-cum-ombudsman than to play one's part in a genuinely legislative process."[73]

Delegating authority allows opportunities for members to assert "particularized control" over administration,[74] control that can circumvent the difficult collective action problems of legislation. The existence of administrative discretion means that legislators can work with agencies to meet specific goals or to satisfy particular interests. Such control over administration occurs not by Congress as a whole, but by members or committees acting separately. Legislators thus have persistent incentives to delegate even though this might diminish their lawmaking power and weaken Congress as an institution. This dynamic further reduces the competitive tension between Congress and agencies over how much of the legislative function is delegated.

B. Party Polarization and Delegation

Delegation provides a mechanism for legislators to pursue their personal interests apart from the legislative process. Party polarization exacerbates this dynamic in several ways. First, like delegation, polarization shifts legislators' focus away from Congress as an institution.

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[72] *See* JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 4 (Brookings Inst. ed., 1990) (providing a thorough examination of how congressional oversight works and noting that "[t]he American version of separation of powers, designed to check and tame the powers of governmental officials and institutions, gives the legislature enough freedom from the executive to allow it an independent role in the control of administration"). For specific examples, see JEFFREY M. BERRY, FEEDING HUNGRY PEOPLE: RULEMAKING IN THE FOOD STAMP PROGRAM 111–12 (1984) (documenting strategies of legislative control in the rulemaking process for food stamps, including both public and private interventions by legislators); SCHOENBROD, *supra* note 8, at 55 (discussing how members of Congress influenced a navel orange market order by delegating authority to the agency, stifling agency experts and, "appealing to agency officials in private"); Brian L. Goff & Robert D. Tollison, *The Allocation of Death in the Vietnam War: A Public Choice Perspective*, 54 S. ECON. J. 316, 321 (1987) (finding that the political influence of a serviceman's congressional delegation affected the likelihood of his death in the Vietnam War, "Congressmen with the highest seniority and closest connections to the defense industry serve as effective brokers of transfers for their constituents. . . . [T]hey are not brokering direct transfers of dollars from some citizens to others; instead, they are brokering an in-kind transfer of lives from some citizens to other citizens.").

[73] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131 (1980).

[74] Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 10 (1994) (suggesting that legislators do not have strong control, but they value "particularized control" that "can be managed" when they do have it).

As Daryl Levinson and Richard Pildes have argued, competition between the two major political parties has displaced competition between the political branches.[75] Party polarization refers to several related phenomena, including greater ideological separation between political parties and increased distance between the median Democrat and median Republican.[76] As parties have become more polarized and as preferences within parties have become more homogenous, "members will be progressively more likely to grant power to party leaders and support the use of that power. Moreover, as the two parties become more different, this tendency will be reinforced, as the consequences of losing majority control over policy become increasingly negative."[77] With the more frequent switching of majority control in the House and Senate, centralized party control can confer substantial benefits to individual members, who rely on their parties for reelection and for effectively exercising legislative power by achieving and retaining a majority.[78] Individual lawmakers may thus identify with their party more than with Congress, because party affiliation more closely allows for the acquisition and maintenance of legislative and other power.

Second, polarization may affect the rate of delegation as well as the type of oversight of delegated authority. Epstein and O'Halloran have detailed how Congress is more likely to delegate authority to executive branch agencies when the President is of the same party.[79] In addition, under divided government Congress delegates more fre-

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[75] *See* Levinson & Pildes, *supra* note 18, at 2313 (noting that political parties quickly replaced the branches of government as the channel for political discourse and that "[a]s competition between the legislative and executive branches was displaced by competition between two major parties, the machine that was supposed to go of itself stopped running").

[76] HANS NOEL, POLITICAL IDEOLOGIES AND POLITICAL PARTIES IN AMERICA 164–68 (2013); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 332 (2011) ("[O]ur radically polarized politics, and the absence of a center in American democracy today, reflect long-term structural and historical changes in American democracy that are likely to endure for some time to come.").

[77] John H. Aldrich, Brittany N. Perry & David W. Rohde, *Richard Fenno's Theory of Congressional Committees and the Partisan Polarization of the House*, *in* CONGRESS RECONSIDERED 193, 195 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2013).

[78] *See, e.g.*, GARY W. COX & MATTHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES 21–24 (2005) (explaining how centralized party authority can confer substantial benefits on individual congressmen).

[79] EPSTEIN & O'HALLORAN, *supra* note 44, at 129–35 (providing data to support the conclusion that Congress delegates more discretion to the executive under unified government); *see also* Levinson & Pildes, *supra* note 18, at 2359–62 (discussing how delegation and congressional policy is in part motivated by partisan shifts in either Congress or the executive branch).

quently to officials who are removed from presidential control.[80] Polarization has the tendency to increase delegation during same-party control of the presidency and Congress; yet polarization does not necessarily lead to greater checks on the executive during divided government. Under open-ended grants of discretionary authority, the President may seize more power than Congress intended. When parties are polarized, however, Congress will be less likely to check the expansion of presidential power. Neal Devins explains:

> Democrats and Republicans in Congress are more interested in strengthening their position vis-à-vis the other party than in strengthening Congress as an institution. Members of the President's party are loyal to their party, not Congress as an institution, and therefore, will not join forces with the opposition party to assert Congress's institutional prerogatives. Equally telling, members of Congress see little personal gain in advancing a legislative agenda that shifts power from the President to Congress.[81]

One consequence of polarization is that Congress will delegate more frequently during periods of unified government—conferring additional discretion on the President—but may be unable to restrain or unconcerned with restraining presidential initiatives during divided government. While there will be some party interest in checking the power of a President of an opposite party, legislators may find that their personal interests are better served by expending resources elsewhere, because of the costly and difficult process of reining in executive power. Delegating authority will often be easier than withdrawing power, because private interests vested in the administrative structure will work to block changes and the President can veto legislation that withdraws executive power. Perhaps most important, however, as explained in this Article, denying the President delegated authority also eliminates opportunities for individual members to exercise control over administration.[82]

Party polarization creates an asymmetry that weakens Congress in relation to the President. Although party polarization tends to align

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[80] EPSTEIN & O'HALLORAN, *supra* note 44, at 158 ("[A]s one moves more from unified to divided government, and as the percentage of seats held by members of Congress of the opposite party from that of the President increases, Congress tends to move authority away from the President's direct control . . . .").

[81] Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 413 (2009).

[82] The incentives will of course vary for individual legislators and for particular issues, but the point is that there are a variety of incentives at play and delegation can continue to serve the interests of legislators, even when the President is of a different party.

political actors with their parties, rather than their institutions,[83] polarization has different consequences for the multimember Congress than the unitary executive. Party polarization may fortify the personal, institutional, and party interests of the President. The unitary executive aligns the President's personal ambitions with the ambitions of his office and furthermore reinforces the energy and initiative to pursue those ambitions.[84] In addition, the President's personal success will usually serve his party's success. Accordingly, the President's interest in controlling administration and seizing the initiative granted to him under broad delegations will usually enhance his institutional power and also the power of his party.

By contrast, party polarization undermines the institutional power of Congress, because legislators will primarily align their interests with their parties. As explained above, legislators have a variety of goods—reelection and satisfying particular constituencies—that may be better pursued by supporting their party, rather than by promoting the institutional interests of Congress. The institutional interests of Congress and the interests of party will often be at odds, particularly when Congress and the President are of the same party.

Similarly, party polarization tends to increase the President's control over policy. Polarization makes it difficult to achieve legislative compromise and thereby reduces policy productivity in Congress.[85] When Congress fails to act, the President can move unilaterally on policy issues, taking advantage of power granted under open-ended delegations and the executive's natural ability to act expeditiously. For example, with respect to immigration, President Obama's executive actions—including exercising prosecutorial discretion and granting work permits and legal status to certain undocumented immigrants[86]—have shifted the baseline for congressional action. Whatever one thinks of the legal validity of the President's choices, the options

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[83] Levinson & Pildes, *supra* note 18, at 2326–27.

[84] *See* THE FEDERALIST NO. 70, *supra* note 14, at 363 (Alexander Hamilton) ("That unity is conducive to energy, will not be disputed. Decision, activity, secrecy, and despatch, will generally characterize the proceedings of one man, in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.").

[85] Lawrence C. Dodd & Scot Schraufnagel, *Party Polarization and Policy Productivity in Congress: From Harding to Obama*, *in* CONGRESS RECONSIDERED 440 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2013) (explaining that Congress's policy productivity tends to be low during times of both high and low polarization).

[86] Memorandum of Jeh Charles Johnson, Secretary of the U.S. Department of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

available to Congress to address immigration are dramatically different than if the President had not acted. President Obama directed the policies he wanted without congressional approval.[87] Pushing the boundaries of executive power will often (though not always) strengthen the presidency as well as the personal advantage of the President and his party. For Congress the calculus is different because "[m]embers of Congress hardly ever gain personal political advantage by embracing structural checks of presidential power. . . . Congress is more interested in responding to executive branch initiatives than in foreclosing particular types of initiatives."[88]

The cycle continues because gridlock caused by party polarization often makes delegation more attractive to members of Congress, which further shifts power to the executive and away from the institutional powers of Congress.[89] Members who may be frustrated by the inability to legislate will have incentives to delegate, both in order to address policy concerns and also to be able to assert more particularized control once discretion is delegated to the agency.

C. Diminishing Returns from Delegation?

Despite the many benefits of delegation to individual members, it is plausible that such benefits will diminish over time.[90] First, although delegation of administrative discretion may expand the power of individual members of Congress, it likely expands the power of the execu-

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[87] President Obama's justification for his unilateral actions was "we can't wait" in the face of congressional obstructionism. *See* Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 23, 2012, at A1; *see also* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 9 (2014) (identifying "interbranch self-help" as a "significant feature of our constitutional design"). "Self-help" may be more readily accessible to a unitary President than a multimember Congress.

[88] Devins, *supra* note 81, at 414 (footnote omitted).

[89] *See* Cass R. Sunstein, *Partyism*, U. CHI. LEGAL FORUM (forthcoming) (manuscript at 15–17), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536084 (suggesting "partyism," a form of hostility based on political party, provides additional reasons for delegation and greater discretion in the executive branch).

[90] Some have questioned whether members of Congress in fact assert influence or control over administration, or whether such influence is substantial, particularly in light of the expansion of executive power in recent years. While I cannot quantify the amount of power that individual members accrue through delegations, this Part has identified the persistent incentives for delegation. It also comports with common practical understandings of how members of Congress interact with agencies. *See, e.g.*, Timothy J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 884, 888 (1986) (observing that Congress sometimes had substantial influence over the Federal Trade Commission, but that the agency also responded to the White House and the courts and to shifts in the ideological character of career staff).

tive branch at a much faster rate.[91] The more Congress delegates, the more substantially the executive branch can take over entire areas of policy. Agencies effectively make binding "law" through their regulations.[92] Agencies, although frequently criticized for their delay, work at a rapid-fire pace compared to Congress. Presidents since Ronald Reagan have responded to delegated authority with greater centralization and control. While not perfect, the President has the capacity to direct and to administer important policy decisions. This leaves members of Congress with ever smaller pieces of administration.

Second, delegations may weaken Congress's ability to exercise legislative power. Legislators may focus more on influencing administration than on enacting laws. Even when inclined to legislate specifically, collective action problems make it difficult for Congress to withdraw or to modify the authority granted to agencies. Serious legislative proposals will often face a veto threat. When Congress seems incapable of serious lawmaking, this will diminish the threat of legislative action that backs the influence and control of members. To the extent that members must have some credible threat of action (legislative or nonlegislative) to influence agencies, the ineffectiveness of Congress may reduce members' formal and informal influence over administration.

Third, expansive delegated authority often allows agencies to evade more specific statutory requirements, thereby undermining the legislative process of bicameralism and presentment. For example, the Dodd-Frank Wall Street Reform Act clearly exempts financing by

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[91] *See* POSNER & VERMEULE, *supra* note 47, at 31 (arguing that the "complexity of policymaking and the rapid pace of change in the policy environment make it prohibitively costly for relatively underspecialized legislators . . . to attempt to specify all policy choices themselves," incentivizing Congress to delegate "vast powers" to the President); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 535–38 (1992) (explaining that "unpoliced delegation" alters the Article I, Section 7 preference for the status quo by conferring discretion on the executive branch that allows the President and agencies to move the status quo toward executive branch preferences without the need for additional legislation to be passed); Manning, *Textualism*, *supra* note 15, at 712 ("Although, Congress has greater control over administrative officials to whom it delegates law elaboration authority, leaving that power to such officials still cedes substantial control over the specification of statutory policies. An administrator does not answer directly to Congress, and the goals of administrators and legislators will often diverge, especially over time.").

[92] *See* United States v. Mead Corp., 533 U.S. 218, 231–33 (2001) (discussing delegation of authority to agencies to act with the "force of law"); *see also* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1219 (2015) (Thomas, J., concurring in the judgment) ("Substantive regulations have the force and effect of law. . . . Agencies and private parties alike can use these regulations in proceedings against regulated parties." (footnote omitted) (citations omitted)).

auto dealers from CFPB authority.[93] Nonetheless, the CFPB recently enacted a rule to cover nonbank auto finance companies, which are the financial institutions that back the financing initiated and overseen by auto dealers.[94] The Bureau relied on its general authority to supervise nonbank "larger participant[s] of a market for other consumer financial products or services," as the Bureau defines by rule.[95] The CFPB used its general and open-ended authority to trump specific statutory limitations against the regulation of auto lenders. Using delegated authority to evade legal requirements makes it more difficult for Congress to enact legislative deals, because such deals may be undone in the administrative process.

Perhaps paradoxically, these difficulties may only reinforce the incentives for members to delegate. One could conceptualize delegation as a kind of prisoner's dilemma.[96] When delegating, members seek to expand their individual and personal power, but this comes at the expense of Congress as an institution. Individual members may benefit from cooperation and exercising robust collective lawmaking power, but they can be more certain about taking a smaller benefit by delegating and influencing administration for their particular ends and interests. Legislators may find it expedient in the short term to trade real, formal, lawmaking power for functional influence over administration. Yet in the long term, this may further weaken Congress as an institution—individual congressmen may feel the only way to gain short-term influence and power is to relinquish even more formal lawmaking power.

Delegations may diminish the institutional power of Congress, but not in a manner that will be self-correcting, as assumed by the courts and most commentators. Because legislators can satisfy their particular interests without working through the legislative process, delegation diminishes the collective institutional power of Congress. The current state of lawmaking in Congress and the expanding scope

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[93] 12 U.S.C. § 5519(a) (2012) ("[T]he Bureau may not exercise any rulemaking, supervisory, enforcement or any other authority, including any authority to order assessments, over a motor vehicle dealer that is predominantly engaged in the sale and serving of motor vehicles, the leasing and serving of motor vehicles, or both.").

[94] Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service, 80 Fed. Reg. 37,496 (June 30, 2015) (to be codified at 12 C.F.R. pts. 1001 and 1090).

[95] 12 U.S.C. § 5514(a)(1)(B) (2012).

[96] The prisoner's dilemma may apply to the exercise of legislative power in general. *See* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 144 (1999) (arguing members of Congress are trapped in a prisoner's dilemma, because "all might benefit if they could cooperate in defending or advancing Congress's power, but each has a strong incentive to free ride in favor of the local constituency").

of executive and administrative power suggest support for this dynamic.

III
The Collective Congress and the Problem of Delegation

The influence and control individual members can exercise over delegated discretion shifts the focus and energy of legislators away from lawmaking. Contrary to the conventional view, this understanding provides a starting point for understanding why delegations are "especially bad"[97] and a new foundation for reconsidering the constitutional problem of delegation. In this Part, I introduce the concept of the collective Congress[98] and explain how delegation undermines the collective Congress and its institutional power. Collective decisionmaking is a fundamental characteristic of legislative power. The Constitution gives legislators only collective power and specifically precludes them from exercising any type of individual or executive power. Collective lawmaking is the primary mechanism for aligning the many interests of a multimember legislature.

The "collective Congress," as should be clear from the discussion that follows, is not "collectivist" or related to "collectivism," which places the interests of the group ahead of the individual. Rather, the word "collective" is used in its primary sense, as representing a number of individuals acting together.[99] The word "Congress" also means a coming together to represent distinct interests.[100] The collective Congress reflects the republican ideal of a government formed through representation, not subordination, of individual interests.[101]

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[97] *See* Posner & Vermeule, *supra* note 3, at 1753 (arguing that the critics of delegation have not explained why delegation is "special" or "especially bad").

[98] In a future Article, I plan to elaborate on the textual, structural, and historical support for a collective Congress and the implications of this for a variety of debates within administrative law. In this Article, I provide an overview of the concept.

[99] *See Collective*, Oxford English Dictionary, http://www.oed.com/view/Entry/36279 (last visited Aug. 15, 2015) (defining "collective" as "[f]ormed by collection of individual persons or things; constituting a collection; gathered into one; taken as a whole, aggregate, collected").

[100] *See Congress*, Oxford English Dictionary, http://www.oed.com/view/Entry/39158 (last visited July 11, 2015) (defining "Congress" as "[a] formal meeting or assembly of delegates or representatives for the discussion or settlement of some question").

[101] *See, e.g.*, The Federalist No. 51, *supra* note 14, at 270 (James Madison) (explaining that while federal authority "will be derived from, and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority").

As explained above, delegations create administrative discretion that allows for piecemeal policymaking by legislators. This type of individual congressional influence over administration undermines democratic accountability and can work to serve special interests as others have explained.[102] The problem with delegation, however, goes even further. By allowing legislators to satisfy individual interests, delegations disconnect the interests of congressmen from the interests of Congress and the common good. Delegations fracture the collective Congress, undermine the institutional power of Congress, and weaken the Madisonian checks and balances between Congress and the President.

A. The Collective Congress

Considering the incentives for delegation from the perspective of members of Congress draws attention to the importance of the collective Congress, a fundamental principle of separation of powers. The Constitution creates a collective Congress, a legislature that requires majorities (or sometimes supermajorities) in each house in order to enact legislation. Just as the unitary executive provides a certain type of energetic and accountable President to lead the executive branch, the Constitution establishes a multimember Congress that can exercise its legislative power only collectively, a bedrock requirement of representative government.

This simple yet fundamental requirement of collective lawmaking appears throughout the text and structure of the Constitution. Article I vests "All legislative Powers herein granted . . . in a Congress of the United States."[103] The powers vest in Congress as a whole, comprised of a Senate and House of Representatives. Legislative power must be exercised collectively through the specific process of bicameralism and presentment.[104] Congress can enact legislation without the President's concurrence only by overriding his veto with a two-thirds vote of each

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[102] *See, e.g.*, ELY, *supra* note 73, at 132 (explaining one of the problems with delegation that "it is undemocratic, in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic"); SCHOENBROD, *supra* note 8, at 168 ("[L]egislators willingly delegate, though in complicated ways that maximize their control over agency action, minimize their accountability, and generally complicate administration.").

[103] U.S. CONST. art. I, § 1.

[104] U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President . . . ."). The importance of the collective lawmaking process is reinforced by the requirement of presentment for "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary." U.S. CONST. art. I, § 7, cl. 3.

House.[105] In addition, the legislative powers enumerated in Article I, Section 8 belong to Congress as a whole.[106] Moreover, it is reasonable to conclude from the text and structure of Article I that the Constitution provided the exclusive powers that the House and Senate can exercise separately.[107] Neither the House nor the Senate can singly exercise any power other than the ones conferred in the Constitution.[108] Even these separate powers are not *legislative*, but rather pertain to impeachment and removal powers, the confirmation of presidential appointments, and the ratification of treaties.

The only legislative power that references less than majority action is an accountability measure, allowing one-fifth of members present to require the yeas and nays be entered on any question.[109] This provision merely reinforces the importance of accountability in collective lawmaking by allowing a minority to make public the votes of the majority.

The Constitution reaffirms the collective lawmaking power by not vesting *any* individual power in members of Congress. In fact, it specifically prohibits members of Congress from realizing individual benefits from their legislative service. For example, under the Ineligibility Clause, members cannot create offices or increase the salary of offices in anticipation of being appointed to those offices.[110] Moreover, the Constitution prohibits legislators from exercising executive power. The Incompatibility Clause specifically prohibits a member of Congress from simultaneously serving as an Officer of the United

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105 *Id.* § 7, cl. 2.

106 *Id.* § 8, cl. 1 ("*The Congress* shall have Power . . . ." (emphasis added)).

107 *See* INS v. Chadha, 462 U.S. 919, 956 (1983) ("These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and separately justified . . . .").

108 Only four constitutional provisions allow one house to act unilaterally "with the unreviewable force of law . . . ." *Id.* at 955. The House of Representatives has the power to initiate impeachments. U.S. CONST. art. I, § 2, cl. 5. The Senate has the power to conduct trials for removal following impeachment by the House, *id.* § 3, cl. 6, to give advice and consent to presidential appointments, *id.* art. II, § 2, cl. 2, and to ratify treaties negotiated by the President, *id.*

109 U.S. CONST. art. I, § 5, cl. 3 ("[T]he Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."); *see also* SCHOENBROD, *supra* note 8, at 102 (discussing the importance of this requirement for accountability).

110 U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time . . . .").

States.[111] As Steven Calabresi and Joan Larsen have detailed, the Incompatibility Clause serves a number of important separation of powers principles.[112] Foremost, it prevents legislators from participating in the execution of the laws. It precludes the type of parliamentary government found in England where members of Parliament serve as executive ministers. Under the U.S. Constitution, legislators cannot simultaneously make law and serve as officers who execute the law. On the flip side, the Incompatibility Clause reinforces the independence of the executive branch, by making officers directly accountable to the President, not to Congress.[113]

Similarly, the text and structure of Article II confirm that Congress has no part of execution. The Appointments Clause gives the President power of appointment over principal officers, and "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[114] Importantly, Congress cannot appoint executive officers, and the Supreme Court has consistently invalidated congressional attempts to control or to supervise executive officers through the removal power.[115] Officers remain in the chain of command to the President. The collective Congress can hold executive branch officers accountable through legislation, oversight, and *in extremis* impeachment, but they are not given any powers for directing administrative discretion.[116]

The Constitution vests the Congress with all the legislative powers of the federal government, but the power must be exercised collectively. This requirement of collective decisionmaking serves a

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[111] *Id.* ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

[112] *See* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1048 (1994) (explaining that the Incompatibility Clause is one of the cornerstones of separation of powers because it prevents parliamentary government and preserves an independent executive branch).

[113] *See id*. at 1088 (noting that the "real political power of the presidency" stems from the appointment and removal powers, but that without the Ineligibility Clause, this power would be ineffective because the President would be "forced to fill many, if not most, of the highest executive posts with powerful Members of Congress").

[114] U.S. CONST. art. I, § 2, cl. 2.

[115] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 722 (1986) ("The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."); *see generally* Rao, *supra* note 58.

[116] *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (noting that the "President alone possesses all of the executive power and . . . he therefore can direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power"); Rao, *supra* note 58, at 1217–19 (explaining the President's power to direct administration).

number of purposes and functions as an essential part of the Constitution's structure by providing a mechanism for a representative, republican government of limited powers. Through deliberation in Congress, interests across a diverse and large nation can be represented in the process of making laws. Ideally, Congress would mediate these separate interests for the public good. As the framers were aware, members of Congress would have particular and local interests and every incentive to satisfy them.[117] Lawmaking power can easily be used to serve personal or factional interests. James Madison noted that legislative power uniquely allows the lawmaker to be a kind of judge in his own case—the laws he enacts will affect his particular interests.[118] Being a judge in one's own case is, of course, the antithesis of the rule of law. To promote the rule of law, the Constitution provides many limits and safeguards, including that it does not trust lawmaking to a single person or to a small group of representatives, but instead to a sufficiently large Congress. The requirement of collective action and the difficult process for enacting legislation theoretically frustrates (if not eliminates) the ability of legislators to act purely for their individual benefit or for the benefit of narrow interests.[119] Moreover, the difficulty of legislative action was designed to safeguard individual liberty from unnecessary government intrusion. Requiring collective action by both houses of Congress reinforces the limits on the federal government, filters rash plans, and minimizes the dominance of self-interest.[120]

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[117] *See* THE FEDERALIST NO. 10, *supra* note 14, at 45 (James Madison) ("To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed."); *id.* at 44 ("The regulation of these various and interfering interests, forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government.").

[118] *See id.* at 44 ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. . . . [Y]et, what are many of the most important acts of legislation, but so many judicial determinations . . . ?").

[119] *See* THE FEDERALIST NO. 51, *supra* note 14, at 271 (James Madison) ("In the extended republic of the United States, and among the great variety of interests, parties, and sects, which it embraces, a coalition of a majority of the whole society could seldom take place upon any other principles, than those of justice and the general good . . . ."); Watson, *supra* note 23, at 1033 (noting that the framers' design was that "representational interests would be expressed only through the institutional filter of bicameralism and by placing limitations on the powers of individual legislators").

[120] THE FEDERALIST NO. 51, *supra* note 14, at 270 (James Madison) (discussing the separation of powers in relation to limiting the influence and control of factions "to guard one part of the society against the injustice of the other part").

B. Delegation Fractures the Collective Congress

The collective Congress reinforces the distinct characteristics of the legislative power as well as the prohibition on members of Congress exercising executive power. Collective lawmaking is one of the Constitution's textual and structural features that separate the legislative and executive powers. Yet open-ended delegations create conditions in which it is all too easy for legislative oversight to cross the line into the executive branch's administrative power. In part because the separation between legislative and executive power cannot easily be defined or marked, the Constitution restricts the powers of Congress to legislate on certain specific matters and prohibits delegations of lawmaking power. When the nondelegation principle is ignored, the lines between the legislative and executive power are blurred. Under delegated administrative discretion, agencies can function as lawmakers and lawmakers can function as administrators. This increases the risk of collusion between the branches and aggrandizement of both executive and legislative powers.

In the modern administrative state, delegations have allowed members of Congress to work around the collective action requirement by securing individual benefits from agencies and by directing the exercise of administrative discretion in rulemaking. As the examples in the previous Part demonstrate,[121] individual members can retain control over how delegated discretion will be exercised, including specific regulatory decisions and decisions not to regulate or act. This control for individual members may be a far greater power than most can realize through proposing and attempting to enact legislation. Delegation allows members to uncouple their personal political effectiveness from the success of Congress as an institution.

Open-ended delegations to executive agencies blur the line between legislative and executive powers in both Congress and the executive branch by creating administrative discretion that allows the political branches to share lawmaking and law interpretation power.[122] The line between legislative and executive powers, however, has never been entirely clear. This is particularly true in the executive branch, where implementation of the laws often requires interpreta-

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121 *See supra* notes 65–72 and accompanying text.

122 In this Article, I focus on the problems of the combination of lawmaking and law interpretation by members of Congress. Other scholars have identified and argued against the combination in the executive branch. *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 5 (2014) ("The power to bind is a power to constrain liberty. Although only Congress and the courts have the power to bind and thereby confine liberty, this is exactly what executive and other administrative bodies claim to do through administrative law.").

tion and some gap filling.[123] To fulfill its lawmaking function, Congress will invariably require information from the executive branch and has historically engaged in a variety of forms of oversight.[124] The difficulty of drawing a line, however, does not suggest the absence of a separation between the legislative and executive powers.

The collective Congress suggests a way of thinking about when congressional "oversight" goes too far. When individual members seek to influence the direction of policy or the application of regulatory policy to particular groups, they no longer act collectively, or in the service of collective decisionmaking. Rather, they have sought an end run around the legislative process in order to achieve their specific goals. Members of Congress should not be able to press their individual and personal interests with agencies in a manner that steps outside the legislative power and encroaches on the executive power. This is more likely to occur with open-ended delegations, because such statutes fail to resolve fundamental policy questions. When the law creates a significant space for administrative discretion, this leaves more opportunities for members of Congress to influence that discretion.[125]

The collective Congress restricts the ability of legislators to serve as administrators or executors of the law. Execution requires applying laws to specific circumstances and to particular facts, actions ill suited to a plural body.[126] The sheer number of lawmakers makes it difficult

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[123] Just as the Court has always recognized the importance of the nondelegation principle, it has similarly recognized that Congress may leave some questions to the discretion of the executive and the courts. *See, e.g.*, Pan. Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935) (invalidating a statutory delegation as unconstitutional but recognizing that Congress may be unable to address the details of complex problems and "[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits").

[124] Oversight activities have been justified as an aspect of the lawmaking power. *See* McGrain v. Daugherty, 273 U.S. 135, 161 (1927) (justifying the investigation power of Congress "as an attribute of the power to legislate"); *see also* ABERBACH, *supra* note 72, at 19 (providing an historical overview of congressional oversight).

[125] *See* Watson, *supra* note 23, at 1052 ("By retaining jurisdiction over a subject of legislation through an extra-legislative procedure, Congress may create for itself a discretionary power which allows it to make judgments in specific fact situations.").

[126] *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 100 (Richard H. Cox ed., Harlan Davidson Inc. 1982) (noting that the power to act with discretion inheres in the executive and that the legislature "is usually too numerous, and so too slow, for the dispatch requisite to execution"); MONTESQUIEU, THE SPIRIT OF THE LAWS 160 (Anne M. Cohler et al. trans., Cambridge University Press 1989) ("Nor should the representative body be chosen in order to make some resolution for action, a thing it would not do well, but in order to make laws or in order to see if those they have made have been well executed . . . .").

for Congress to interfere with execution by exercising the lawmaking power. The unitary executive should, with much greater dispatch and effectiveness, be able to direct the administration of the laws. Moreover, members of Congress by design represent narrow regional constituencies—constituencies that come together for the making of laws. By contrast, execution of the federal laws requires a national constituency, which is why it is directed and overseen by the President, a nationally elected official. If legislators singly involve themselves with administration, this creates a tension between a member's local interests and the national interests—another reason why the Incompatibility Clause explicitly forbids members from serving as executive officers.[127] Legislators face a conflict of interest when they represent local interests but attempt to control or to influence national administration.[128] Collective decisionmaking specifically provides a mechanism for mediating various local interests to enact legislation with a view to the public good. It also strongly suggests why legislators representing local interests should have no individual power over administration.

The influence and control of administration by members of Congress allows lawmakers to also serve as law interpreters, in contravention of basic separation-of-powers principles.[129] Some Supreme Court justices have become increasingly attentive to the problem of combining these functions within executive agencies. In *Perez v. Mortgage Bankers Association*, Justices Scalia, Thomas, and Alito all argued for revisiting judicial deference to agency interpretations of their own regulations, in part because agencies should not have the

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[127] *See* Calabresi & Larsen, *supra* note 112, at 1114 ("Elimination of the Incompatibility Clause, however, would allow *some* of the People's representatives in Congress to fill high executive offices, thus greatly increasing these representatives' power to influence national policy and to bring home governmental 'goodies' for their constituents.").

[128] *See* Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 514 (1988) (explaining that the Constitution was structured to minimize rent seeking); Watson, *supra* note 23, at 1036 ("Because each piece of legislation needs at least the majority support of each legislating body, local interests tend to cancel each other out. Thus, legislation passes through what is effectively a constitutional averaging process based on a specific, preestablished weighting system, designed to cut across potential factional interests.").

[129] *See* THE FEDERALIST NO. 47, *supra* note 14, at 249 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."); MONTESQUIEU, *supra* note 126, at 157 ("When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.").

power to make the law and then interpret it.[130] As Justice Scalia explained, "there are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means."[131] These concerns about the combination of lawmaking and law interpretation in the executive branch mirror problems with congressional interference in administration. Open-ended delegations allow *both* legislators and administrators to combine lawmaking with law interpretation.

Another way to consider the problem is that delegation to agencies can operate as an impermissible form of self-delegation to members of Congress. While some delegation of power to the executive or to courts is inevitable, Congress may not delegate power over law execution or law interpretation to its own agents.[132] Congress has tried various means of controlling interpretation of the laws. The Supreme Court has consistently prohibited direct attempts at self-delegation by Congress, for instance when Congress tried to check administration with the one-house legislative veto,[133] or retained removal or appointment power over an officer with executive power.[134] Yet when Congress delegates to executive agencies this may simultaneously serve as a mechanism for self-delegation to committees, subcommittees, and members of Congress. Open-ended delegations to agencies can provide members of Congress with opportunities for functional control of administration.

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[130] *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment) (arguing to abandon *Auer* deference); *id.* at 1219 (Thomas, J., concurring in the judgment) (arguing that "[i]nterpreting agency regulations calls for th[e] exercise of independent judgment" that belongs to the judicial power and cannot be left to the agencies); *see also* Kevin M. Stack, *The Interpretive Dimension of* Seminole Rock, 22 GEO. MASON L. REV. 669, 670–72 (2015) (predicting that the courts will continue to narrow *Seminole Rock/Auer* deference and setting out an interpretive method for courts reviewing the validity of agency interpretations).

[131] *Perez*, 135 S. Ct. at 1212–13 (Scalia, J., concurring in the judgment).

[132] *See* Manning, *Textualism*, *supra* note 15, at 706 (explaining that if courts give decisive weight to legislative history, then "Congress can effectively delegate law elaboration authority to its own committees or members" and "issues left unresolved by a duly enacted statute will be clarified in accordance with the view of actors firmly under congressional control, operating outside the constraints of bicameralism and presentment").

[133] *See* INS v. Chadha, 462 U.S. 919, 954–55 (1983) (invalidating the one-house legislative veto on the ground that it circumvents the Article I requirements of bicameral passage followed by presentment to the President).

[134] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 722 (1986) ("The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.").

While delegation to executive agencies does not constitute formal self-delegation,[135] many of the same concerns arise because delegation empowers parts of Congress. As explained, the Constitution assigns only collective power to Congress. When congressmen influence and control administration they are exercising a type of extraconstitutional individual power. Importantly, members of Congress can choose how and to what extent they want to influence the exercise of that discretion.[136] The practical degree of control and influence may at times be substantial. Moreover, they are interfering with the execution of the laws entrusted to the President and his administrative agencies. Allowing members of Congress to shape execution of the laws confers a discretionary individual authority at odds with the collective legislative power. The executive power by its very nature includes a variety of functions as part of implementing the law. By contrast, the legislative power is discrete, and legislators are specifically precluded from exercising executive powers or even executive functions. Although legislators may realize benefits from meddling in administration, administration is no part of Congress's collective legislative power.

Another hallmark of collective lawmaking is that any legislative power must be exercised openly and publicly—enactment of laws cannot be hidden or undertaken privately. Delegation, however, allows members of Congress to mask their involvement with adminis-

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[135] The one-house legislative veto was a formal mechanism of self-delegation that allowed a part of Congress to overturn executive action. The one-house veto had binding legal effect, making it ripe for judicial invalidation in *Chadha*. By contrast, congressional influence over an agency's delegated authority constitutes a functional or practical form of self-delegation. Members cannot formally regulate or thwart regulatory action except through legislation. Moreover, any actual congressional influence requires an agency to follow a legislator's prodding. If the President and agencies simply ignored congressional inputs, Congress would be forced to respond to administration through its formal legislative powers. There is little danger of this, however, as executive agencies have ample incentives to keep their congressional overseers happy.

[136] John Manning has argued that delegations to the executive should generally be tolerated, but that legislative history is an impermissible form of self-delegation. Yet the constitutional concerns about self-delegation arguably apply with greater force to delegation to the executive branch than to legislative history. In the context of legislative history, lawmakers may anticipate or hope that courts will use committee reports or floor statements to interpret ambiguous laws, but ultimately the choice of whether to use such history rests with the judiciary. Legislative history provides only a *suggestion* from individuals or committees in Congress about how the other branches should interpret a statute and Congress has no viable mechanism for bargaining with the judiciary. *See* Manning, *Textualism*, *supra* note 15, at 722 (acknowledging that "[i]n the case of legislative history, the agency relationship exists, if at all, by virtue of the *Court's* decision to accord special weight to certain forms of 'authoritative' legislative history"). By contrast, lawmakers remain in control of whether and to what extent they will try to influence administrative agencies in the exercise of delegated discretion.

trative policies.[137] A statute may openly delegate policymaking to executive branch agencies, yet members of Congress retain unspecified and often publicly invisible control over that policymaking. Majorities of Congress must act openly and in concert to enact legislation, but individuals and parts of Congress can influence administration behind the scenes. The founders hoped that open deliberation and the difficulty of enacting legislation would limit the ability of legislators to serve only narrow interests. Delegations push the service of special interests out of the sunshine of the legislative process and into the shadows of the congressional and executive bureaucracy.

One of the foremost checks against excessive government power was the collective decisionmaking required by Congress. The "finely wrought and exhaustively considered"[138] lawmaking process would safeguard a number of values—republican representation, careful and steady deliberation, and the mitigation of special interests and passions. By lowering the hurdles to collective action and creating opportunities for individual members and committees to exercise power, delegations have greatly weakened this check and therefore accelerated the expansion of the regulatory state outside the accountability mechanisms of the Constitution.

IV
SHARED AMBITIONS: MADISON'S NIGHTMARE[139]

In the modern administrative state, the structural checks and balances have not operated to limit delegations as the conventional understanding assumes. Delegation provides opportunities for satisfying individual interests, which shifts the ambitions of lawmakers toward exercising administrative power, rather than legislative power.

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[137] Schoenbrod provides particularly salient examples of how Congress can avoid accountability through delegation. *See* SCHOENBROD, *supra* note 8, at 103 ("The ideological poses that legislators strike and the laws that emerge from agencies often bear little resemblance to each other, as the stories of the navel orange marketing order and the Clean Air Act illustrate.").

[138] *Chadha*, 462 U.S. at 951.

[139] The concern for James Madison's dreams and the erosion of separation of powers occurs from a variety of perspectives. *See, e.g.*, Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 340 (1990) ("It is now widely understood that the processes through which national measures are adopted and enforced do not always ensure that assertions of national power serve the general interest. Instead, they can invite the very domination by faction that Madison so desired to prevent."); PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY vii (2009) (arguing that "assertive claims to unilateral presidential authority, accompanied by the occasional overreaching of the other two branches of government, add up to the subversion of constitutional checks and balances that I have dubbed 'Madison's Nightmare'").

This Part explains the particular separation of powers problems. First, delegation undermines the collective mechanism by which the 535 members represent Congress as an institution. Second, by creating significant discretionary power, delegation promotes collusion rather than competition between the executive and members of Congress.

A. Aligning the Ambitions of Congressmen with Congress

The Constitution creates a careful separation of powers in order to check the exercise of federal power and to protect individual liberty.[140] The framers understood that "parchment barriers"[141] would not suffice to control government. The Constitution thus creates a government of three separate and independent branches and "by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations be the means of keeping each other in their proper places."[142] The balance between independence and interconnectedness would provide the essential checks and balances and give to each branch "the necessary constitutional means, and personal motives, to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place."[143] The framers regarded separation of powers and checks and balances in the constitutional structure as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[144]

Madison's trenchant views about political power, however, require an account of why officeholders pursue the ambitions of their branch. A particular difficulty concerns how to align the interests of congressmen with Congress. A large multimember body will have many wills and represent different factions and interests in society, making it difficult for members to act collectively.[145] The framers

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[140] *See* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed.").

[141] THE FEDERALIST NO. 48, *supra* note 14, at 256 (James Madison).

[142] THE FEDERALIST NO. 51, *supra* note 14, at 267 (James Madison); *see also* THE FEDERALIST NO. 48, at 256 (James Madison) (emphasizing the independence of each branch from control of the others, but noting that "unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained").

[143] THE FEDERALIST NO. 51, *supra* note 14, at 268 (James Madison).

[144] Buckley v. Valeo, 424 U.S. 1, 122 (1976).

[145] *See* Devins, *supra* note 81, at 400 ("While each of Congress's 535 members has some stake in Congress as an institution, parochial interests will overwhelm this collective good. In particular, members of Congress regularly tradeoff their interest in Congress as an

understood that representatives, like all individuals, would have parochial and particular interests. Indeed, it would be proper for them to promote the interests of their constituents and localities as part of representative government—a wide diversity of interests would safeguard minority rights and individual liberty.[146] As James Madison explains, a rage for "improper or wicked project[s], will be less apt to pervade the whole body of the union, than a particular member of it."[147]

Collective lawmaking ties the interests of legislators to Congress. Since members exercise only collective power, their personal ambitions can be furthered only through the institutional strength of Congress and its power in relation to the other branches. Congress is a "they," but the Constitution allows it to exercise power only as an "it."[148] Lawmakers must come together to exercise legislative power and the constitutional rights of Congress. Collective decisionmaking connects "the interest[s] of the [men] . . . with the constitutional rights of the place."[149]

Open-ended delegations of authority undermine these structural safeguards by fracturing the collective Congress and separating the interests of individual legislators from the interests of Congress. Delegation gives members a way to exercise power and control outside the cumbersome and difficult process of enacting legislation. The possibility of individual action shifts the focus, energy, and commitment of legislators away from lawmaking and the institutional power of Congress. Delegation thus exacerbates the already tenuous alignment of institutional incentives and powers in Congress. Collective decisionmaking specifically limits the ability of individuals or groups to pursue narrow self-interest and encourages deliberation and negotiation over competing interests. By allowing each lawmaker to pursue individual interests and ambitions outside the legislative power, delegation undermines the imperative of the collective Congress.

The problem is especially acute because while delegations fracture the interests of Congress, they reinforce the confluence of

institution . . . [and] have no incentive to stop presidential unilateralism simply because the President is expanding his powers vis-à-vis Congress.").

146 *See* THE FEDERALIST NO. 10, *supra* note 14, at 46, 48 (James Madison) (explaining that a republican form of government would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens" and that in a larger republic "you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens").

147 *Id.* at 48.

148 Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

149 THE FEDERALIST NO. 51, *supra* note 14, at 268 (James Madison).

interest between the President and his office. Delegations give the President more discretionary power to shape and to centralize policymaking, dramatically expanding the role of the executive branch.[150] Agencies also make policy with relative ease compared to the rigors of bicameralism and presentment for enacting a statute.[151] They can exercise discretion under administrative procedures, which are much easier to navigate than legislative procedures. Overlapping delegations in some areas are so broad that the President sometimes acts as though he has a general lawmaking power. Consider President Obama's recent actions with respect to immigration[152]—the only way to evaluate properly the legality of many of his actions is to parse the myriad statutory schemes conferring authority in this context. Perhaps as Eric Posner and Adrian Vermeule have argued, a complex and rapidly changing society naturally favors the predominance of executive power.[153] Delegations reinforce the constitutional incentives for the President, whereas they undermine the institutional interests of members of Congress.[154] This further unravels the structural safeguards of competition between the political branches.

B. Administrative Collusion

By fracturing the collective Congress and empowering individual members, delegation also promotes collusion between members of Congress and administrative agencies. The conventional view conceives of competition between Congress and the President—indeed, it is difficult for Congress as an institution to collude with the executive. As a separate and coequal branch of government, the "it" of Congress has interests that are naturally competitive with the executive for the

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[150] *See* Moe & Wilson, *supra* note 74, at 23 ("When new statutes are passed, . . . they increase the president's total responsibilities and give him a formal basis for extending his authoritative reach into new realms. At the same time, they add to the total discretion available for presidential control . . . .").

[151] *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1522 (1992) ("An agency not bogged down by the requirement of strict separation of powers or the need for majority approval by two large bodies of elected legislators can act more quickly and efficiently than Congress.").

[152] *See supra* note 86 and accompanying text (discussing President Obama's unilateral actions with respect to immigration).

[153] POSNER & VERMEULE, *supra* note 47, at 3–4; *see also* HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 283 (1989) ("To us, the executive's problem is . . . a sluggish, unresponsive bureaucracy. The executive must make government move, so that it can care. To do this, the executive must have 'charisma.'").

[154] *See* Moe & Wilson, *supra* note 74, at 25 ("Presidents have both the will and the capacity to promote the power of their own institution, whereas individual legislators have neither, and cannot be expected to promote the power of Congress as a whole in any coherent or forceful way.").

exercise and control of government power. Yet delegations disaggregate the interests of Congress, allowing members to pursue their separate interests. Such benefits accrue only to individual legislators, not to Congress as a collective institution, which can control administration only through formal processes.

Delegation, however, allows individual members to exercise a kind of administrative power. Members of Congress will often share the interest in expanding the authority of administrative agencies because they anticipate being able to influence and control an agency's delegated authority. The President and executive branch officers generally prefer to receive delegations that expand their discretion, because this gives them a powerful role in shaping policy. The result is that members of Congress and the President can both realize benefits when statutes delegate discretionary power.[155] The capacity for individual members to exercise administrative influence means that delegations need not be a zero-sum game between Congress and the executive.[156] Instead of competing against the executive over how much lawmaking authority is delegated to the bureaucracy, the political branches may collude in favor of delegations that create discretion.[157]

Delegations thus erode one of the primary mechanisms for controlling the government by undermining the structural rivalry between

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[155] *See* Aranson et al., *supra* note 8, at 27 (noting that the competition ensures efficient delegation in the private sector "but no similar competitive constraints appear to exist on the uses of delegation in the public sector. Government often has a monopoly of production, particularly in those public-policy areas in which delegations of legislative authority most commonly occur. Competition, therefore, does not ensure an efficient level of public-sector delegation."); Beermann, *supra* note 18, at 145 ("[I]n those areas in which the President depends on Congress for discretionary authority, the powers of the two branches are symbiotic rather than competitive.").

[156] *See* Alan E. Wiseman, *Delegation and Positive-Sum Bureaucracies*, 71 J. POL. 998, 998 (2009) ("[B]ureaucratic agencies might instead be viewed as rationally designed institutions that allow both branches of government to efficiently represent different and competing constituency interests. Bureaucratic policymaking, in other words, can be conceptualized as the result of a positive-sum game between the legislative and executive branches.").

[157] *See* ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 89 (2000) ("Like horizontal mergers in industry, interbranch delegation can concentrate state powers. Concentrating powers removes obstacles to a political cartel." (emphasis omitted)); W. Mark Crain & Robert D. Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL STUD. 555, 561 (1979) ("[W]e have not a separation but a collusion of powers in our governmental system. The legislative-executive-judicial nexus becomes analogous to a vertically integrated seller of long-term legislation to special interests."). Michael Greve makes an analogous point with the inversion of federalism from competitive to cartelized, arguing that coziness between the states and the federal government frustrates fundamental principles and premises of the Constitution. MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 1–5 (2012).

members of Congress and the executive. Instead of competing over delegation, they will often agree on open-ended delegations of authority to agencies in order to expand the discretionary power of legislators and administrators.[158]

Thus, contrary to the conventional view, ambition will not counteract ambition with respect to delegating authority. The "opposite and rival interests"[159] of the President and Congress will be insufficient to check delegations. Delegations can expand the influence and control of individual congressmen who will have persistent incentives to delegate. In such an environment, the competitive tension between the branches fails. This cross-branch collusion undermines individual liberty by allowing both branches to combine lawmaking and law interpretation and to exercise government functions without the requisite constitutional checks. Courts and commentators have an acute awareness of these problems in executive agencies.[160] A similar problem occurs in the first branch of government, as delegation allows members of Congress to influence execution of the laws and exercise an unchecked power over administration. Individual legislative influence over administration lacks the visibility and accountability essential to lawmaking; and it lacks the national accountability required for administration and execution of the laws. Political competition has failed to safeguard against excessive delegations and the expansion of federal power.

V
Checking Excessive Delegations and Avoiding Administrative Collusion

The preceding discussion explains in part why structural checks have not deterred excessive delegations and why such delegations are particularly pernicious to the constitutional design. While I identify a constitutional problem with congressional influence, many commentators have defended "congressional administration" as a mechanism for limiting agency power and providing political accountability to

158 While the branches will often collude to create administrative discretion, they may still compete to control that discretion. Such competition for control of the bureaucracy, however, occurs outside the original structural checks and balances of the Constitution. *See* Calabresi, *supra* note 67, at 55 (explaining that "committees and subcommittees compete with the White House for control of the Cabinet departments and agencies" and that "the congressional committees are real contenders for the role of executor of the laws in Washington today, even if they are nowhere mentioned in the text of the Constitution").

159 The Federalist No. 51, *supra* note 14, at 269 (James Madison).

160 *See supra* notes 130–31 and accompanying text (discussing *Perez v. Mortgage Bankers*); *see also* Hamburger, *supra* note 122 and accompanying text.

Congress.[161] Even some who support enforcement of the nondelegation doctrine have nonetheless suggested that parts of Congress can provide a useful or necessary check on expansive executive power.[162] These arguments accept the existence of expansive delegations and suggest that congressional oversight and control can provide a new set of checks and balances in the administrative state.[163]

Nonetheless, the foregoing explains why congressional administration is unlikely to operate as a meaningful check on the executive. Instead, the creation of administrative discretion encourages collusion between individual legislators and agencies. Delegation results in a fundamental realignment of the collective Congress, which explains why congressional involvement with administration will not provide accountability to Congress, but only to particular interests in Congress. This understanding of how delegation affects power in the administrative state suggests a further reason for checking excessive delegations that not only leave significant lawmaking power with the

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[161] *See, e.g.*, Beermann, *supra* note 18, at 146 ("[I]nsofar as the basis for the nondelegation doctrine is to ensure that Congress maintains control over important government decisions, we should embrace the lenient nondelegation doctrine because Congress is able to keep tabs on the exercise of the delegated discretion."); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1903 (2015) ("[C]ongressional supervision not only is necessary to ensure political accountability but can also be an important mechanism for reinforcing legal accountability by investigating allegations that agencies have violated governing law."); *see also* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 153–54 (1997) ("Those who abhor the policies of any administration, for example, might surely be attracted to a system that would have required that particular President to act almost exclusively through proposals for legislative change."); Greene, *supra* note 13, at 176 ("In a new world in which Congress gives away legislative power, additional congressional efforts to control the now-enlarged executive are faithful to, rather than in tension with, the Constitution of 1787."); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 782–83 (1999) (explaining how regulatory agencies can be more responsive to the public interest and better allow for public participation than Congress).

[162] *See* REDISH, *supra* note 20, at 160 (criticizing the Supreme Court's invalidation of the one-house legislative veto in *INS v. Chadha* because it "seriously compromises a potential congressional safety valve for this abandonment of the nondelegation doctrine" and "undermines both the accountability and checking values that are central to the American governmental system").

[163] Scholars have raised a number of "second-best" approaches to providing checks and balances in the administrative state, accepting that the original constitutional arrangements pose few constraints. Greene, *supra* note 13, at 137; *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–64 (2003) (arguing that legitimacy for administrative actions depends not on increasing accountability but on decreasing arbitrariness); Farber & O'Connell, *supra* note 43, at 1141 ("Because we doubt a return to the lost world [of administrative law] is possible, we also propose some possible reforms in all three branches of the federal government to make the match between current realities and administrative law stronger.").

executive, but also allow individual legislators a share of administration, in contravention of the legislative power. In this Part, I argue that the judiciary should develop a more robust doctrine for enforcing the nondelegation principle. Moreover, the political branches should also take steps to minimize the problems of excessive delegations.

A. Judicial Limits on Delegations

The nondelegation doctrine forms a core background principle of our constitutional structure and our commitment to representative government. Despite almost complete nonenforcement of the doctrine, the Supreme Court has repeatedly reaffirmed the importance of the nondelegation principle.[164] Developments in the modern administrative state suggest the time has come to articulate judicially manageable standards for identifying delegations of legislative power. The reasons for judicial restraint in this area have largely collapsed and the costs of judicial toleration of such delegations have grown unacceptably high. Delegations have weakened accountable government in both political branches, allowing agencies to initiate policy and congressmen to serve as shadow administrators. This brings things too far out of alignment with the vesting of legislative and executive powers in separate branches. Perhaps the administrative state cannot be rolled back, but restraining open-ended delegations can help to preserve individual liberty by restoring constitutional limits on the legislative and executive powers.

The modern Court has repeatedly expressed concern about the lack of manageable standards for enforcing the nondelegation doctrine, and 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."[165] Hesitant to intrude in policymaking, the Court applies the "intelligible principle" test, which finds nearly all statutory standards to be "intelligible." This is a classic case in which a gap exists between constitutional meaning and the judicial standards for enforcement. As Richard Fallon has explained, courts often leave constitutional norms under enforced for a variety of reasons, including institutional concerns about judicial manageability, as well as the costs and benefits of judicial enforcement.[166] With respect to the nondelegation doctrine, the Court's concerns about vigorous judicial enforcement relate not to the importance of nondelegation,

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[164] *See* cases cited *supra* note 11.

[165] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (internal quotation marks omitted)).

[166] Fallon, *supra* note 35, at 1278.

but to a series of related practical concerns, including the importance of delegation to agencies in a complex society[167] and, as discussed throughout this Article, the pervasive assumption that there will be few benefits of judicial intervention since the political process will limit excessive delegation of lawmaking power.[168]

This Article suggests, however, that the constitutional "costs" of delegation may be significantly higher than generally understood by the Supreme Court. New understandings should prompt the Court to reconsider articulating and enforcing a more robust nondelegation doctrine. Here, the circumstances are similar to other situations in which the Court has managed to find judicially enforceable standards.[169] The principle that legislative power cannot be delegated derives from the text and structure of the Constitution. The application of the principle, however, depends on background understandings of what is meant by the "legislative power" and what type of discretion may properly be exercised as part of the "executive power." The precise contours are not provided in the Constitution and the Court has left the enforcement of the nondelegation principle to political checks and balances.

Similarly, the Court has often suggested that the balance between the federal government and the states should be left to political safeguards.[170] Yet in *New York v. United States*, the Supreme Court articulated a federalism limit on national legislation, holding that Congress may not commandeer state legislatures.[171] The Court explained that federalism, like separation of powers, served to protect individual liberty and could not be waived by consenting states.[172] In

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[167] *See 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.").

[168] *See supra* Part I.

[169] When political and structural safeguards fail, the Court has sometimes stepped in to preserve the constitutional balance of powers. *See* Bradford R. Clark, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 80 TEX. L. REV. 327, 331–32 (2001) (arguing that "[u]pholding the exclusivity of federal lawmaking procedures is thus crucial to any effort to safeguard federalism" and including the nondelegation doctrine as one of those procedures).

[170] *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) (emphasizing the importance of protecting states from overreaching by Congress by concluding that "[s]tate sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power").

[171] New York v. United States, 505 U.S. 144, 182 (1992).

[172] *Id*. ("The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.").

addition, deviations from the constitutional allocation of power should not be tolerated as "expedient solution[s] to the crisis of the day."[173] Moreover, Justice Scalia noted in *Printz v. United States* that federal commandeering of state executive branch officials would affect political accountability, because citizens would not know whom to hold accountable for federal programs, their federal or state representatives.[174] And finally, disruption in the federal balance would also affect the balance between Congress and the executive, if Congress could augment its power by impressing into service the officers of the fifty states.[175]

Parallel concerns suggest strong reasons for judicial enforcement of the prohibition on delegation of lawmaking authority by Congress. First, the willingness, often eagerness, of members of Congress to delegate authority to the executive should not foreclose judicial concern. The limitation against delegation exists not to protect Congress, but rather to ensure that laws are passed through a collective and representative process that best preserves individual liberty. As with the States in *New York* that benefitted from federal programs regarding toxic waste, members of Congress can reap substantial benefits from delegating discretion to administrative agencies. The "give away" of lawmaking power actually operates to empower legislators to exercise functional control over administration. Thus, judicial enforcement of the nondelegation doctrine may be important to ensure individual congressmen exercise only collective legislative power and do not impede on executive power.

Second, the political safeguards against excessive delegation have failed to operate as anticipated. Because members can realize individual benefits from influencing delegated authority, their interests will often be misaligned, and sometimes directly at odds, with Congress as an institution. This dynamic erodes what courts and commentators assume will be the primary structural check on delegations—Congress's jealous protection of its lawmaking power. The case law emphasizes that delegations allow executive branch officials (or courts) to exercise discretion and to apply the law set by Congress to specific facts.[176] Discretion inheres in the executive and judicial

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[173] *Id*. at 187.

[174] Printz v. United States, 521 U.S. 898, 920 (1997).

[175] *Id.* at 922 ("That unity [in the executive] would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.").

[176] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406, 409, 411 (1928) (articulating the "intelligible principle" test but repeatedly stating that delegated authority will be exercised by agencies and executive officers who make regulations, interpret statutes, and direct the details of execution).

powers—acting under delegated authority, administrators and judges will sometimes set policy.[177] The permissibility of delegation turns on its assignment of power to either the executive or the courts, which implicitly assumes that delegations do not empower components of Congress. Focused on the scope of discretion given to the executive, the courts refuse to second guess the breadth of delegation.[178]

Yet, as explained above, delegation allows members of Congress to share administrative discretion and so the political competition between the branches will not adequately protect the important interests behind the nondelegation principle. Delegations unravel the competition between the President and members of Congress. If the "Constitution's structural restrictions that deter excessive delegation"[179] cannot provide the necessary deterrence, this provides greater urgency for judicial review of nondelegation challenges. Judicial review can help to preserve the collective Congress and Congress's role as an independent branch of government. This in turn will maintain the integrity of Congress as a representative and deliberative institution (and also protect the independence and unitariness of the executive).

Moreover, delegations often operate as self-delegations to parts of Congress, and the Court has consistently identified a problem with legislative self-delegation.[180] Creating open-ended discretion allows individual members of Congress to influence policymaking and the regulatory process, which may be viewed as a form of self-delegation. Agencies can fill in the gaps under delegated authority because some discretion is inherent in the executive power. By contrast, discretion to interpret and to apply the law is no part of the legislative power. As Justice Stevens explained, "If Congress were free to delegate its policymaking authority to one of its components . . . it would be able to evade 'the carefully crafted restraints spelled out in the

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[177] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475–76 (2001) (upholding a broad delegation and noting that a "certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action") (quoting Mistretta v. United States, 488 U.S. 361, 417 (1989)).

[178] *See, e.g.*, *id.* at 474 (upholding a delegation because the scope of discretion it confers is "well within the outer limits of our nondelegation precedents"); Loving v. United States, 517 U.S. 748, 772 (1996) (upholding a delegation in part because it did not call "for the exercise of judgment or discretion that lies beyond the traditional authority of the President").

[179] *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting).

[180] *See supra* notes 132–38 and accompanying text (discussing constitutional problems with legislative self-delegation); *see also* Dep't of Transp. v. Ass'n of Am. R.Rs. 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring in the judgment) ("[Congress] also improperly 'delegates' legislative power to itself when it authorizes itself to act without bicameralism and presentment.") (citing INS v. Chadha, 462 U.S. 919 (1983)).

Constitution.' . . . That danger—congressional action that evades constitutional restraints—is not present when Congress delegates lawmaking power to the executive."[181] Seen as a problem of self-delegation, the constitutional concern is that open-ended delegations give members of Congress the chance to influence policymaking outside of the collective decisionmaking process.

Third, as in the federalism context, delegations erode the accountability of members of Congress as well as of executive branch agencies. Functional lawmaking by the executive branch undermines democratic accountability and the lawmaking procedures of Article I, Section 7.[182] Delegated discretion gives agencies wide scope to craft rules and exceptions to those rules. Once they have a broad legislative mandate, agencies have relatively few constraints to expand their reach—the creation of legal rules in the executive branch lacks the accountability of the legislative process. Members of Congress, on the other hand, can also avoid responsibility for difficult choices by delegating them to agencies and then influencing agency choices behind the scenes. When agencies and members collude to exercise administrative power, members of the public will not know whom to hold responsible for the regulations that increasingly reach all areas of human activity. Citizens should be able to hold the President accountable for execution of the laws, but influence by members of Congress, often invisible to the average citizen, frustrate the proper channels of accountability.

These factors all suggest the imperative of a more robust nondelegation doctrine enforceable by courts. Articulating such a doctrine, however, has proved difficult. The Supreme Court's current formulation, that Congress must provide an "intelligible principle,"[183] has been practically toothless, with the Court finding even the most capacious principles to be intelligible.[184] Supporters of constitutional

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[181] Bowsher v. Synar, 478 U.S. 714, 755 (1986) (Stevens, J., concurring in the judgment) (quoting INS v. Chadha, 462 U.S. 919, 959 (1983)).

[182] *See* SCHOENBROD, *supra* note 8, at 167–70 (arguing that courts should not leave limits on congressional delegations to the political process in part because delegation "interferes with democratic accountability" and with "the Constitution's procedural protections of liberty"); *see also* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1311 (2014) (rejecting the nondelegation rationale for reviewability of agency action, but observing "lingering nondelegation concerns might . . . animate the presumption [of reviewability] in a looser sense [and that p]erhaps the presumption makes it harder for Congress to preclude judicial review on the theory that such review encourages good behavior from executive agencies").

[183] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1932).

[184] *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (upholding the Federal Communications Commission's power to regulate airwaves in the "public interest").

limits on delegations generally reject the "intelligible principle" test and have proposed other standards that focus on the meaning of the legislative power.[185] This Article has advanced additional reasons for reconsidering the nondelegation doctrine, but a full-scale articulation of the contours of such a doctrine will require further work. Some useful guideposts, however, have been provided by the Supreme Court and by commentators, and these can be the starting point for shaping a doctrine that provides greater protection against delegations of the legislative power.

Chief Justice Marshall in *Wayman v. Southard*, provided a formulation that Congress could not delegate "important subjects":

> 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.[186]

Following Chief Justice Marshall's formulation, Gary Lawson has argued that Congress must make "the central fundamental decisions, but Congress can leave ancillary matters to the President or the courts."[187] Justice Thomas has recently taken aim at articulating the beginnings of a doctrine, focusing on the principle that only Congress may enact "generally applicable rules of private conduct."[188]

These approaches all focus on the separation between legislative and executive powers. They require courts to articulate some fundamental and qualitative difference between the powers, no easy task. James Madison cautioned that

> [N]o skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces,

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185 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("[T]here are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"); SCHOENBROD, *supra* note 8, at 181–83 (proposing a test for delegation that requires Congress to establish rules that include "a meaningful statement prohibiting some conduct" so that legislators are "accountable for at least the major outlines of the laws that they impose on society").

186 23 U.S. (10 Wheat.) 1, 43 (1825).

187 Lawson, *supra* note 3, at 376–77; *see also id.* at 377 ("[I]n the end, one cannot really get behind or beneath the fact that law execution and application involve discretion in matters of 'less interest' but turn into legislation when that discretion extends to 'important subjects.' That is the line that the Constitution draws and there is no escape from it.").

188 Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring in the judgment) ("The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.").

> 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.[189]

The difficulty of locating the qualitative difference between the legislative and executive powers has only increased with the expansion of the modern administrative state.

Nonetheless, the Constitution undoubtedly draws some line between these powers.[190] The collective Congress provides one fundamental characteristic of the legislative power—it is a power to be exercised by majorities (or sometimes supermajorities) of lawmakers. Moreover, our Senators and Representatives have no constitutional powers they can exercise individually, nor do they have a share in the executive power. Similarly, energetic execution must occur "by a single hand."[191] Open-ended delegations to the executive can fracture both the collective Congress and the unitary executive by allowing legislators to meddle in administration. The more discretion left to the agency, the more opportunities for lawmakers to interpret and to apply the law.

Although it is difficult to state how precisely the doctrine should be shaped, focusing on the degree of discretion left to the executive agency has failed to provide a judicially manageable standard. Judges are loath to draw a line based on a question of degree that some executive discretion goes too far or that some congressional interference crosses the line into execution. Just as courts cannot eliminate executive discretion, they cannot easily monitor congressional control of administration. As discussed earlier, some oversight and interaction with agencies is a legitimate incident of the legislative process. When there is no formal self-delegation, like a one-house veto, courts have been unwilling to draw a line between permissible oversight and impermissible congressional control.[192] When a member of Congress

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189 THE FEDERALIST NO. 37, *supra* note 14, at 182–83 (James Madison).

190 *See* Lawson, *supra* note 3, at 340–41 ("The Constitution clearly . . . contemplates some such lines among the legislative, executive, and judicial powers. . . . The Constitution does not merely create the various institutions of the federal government; it vests, or clothes, those institutions with specific, distinct powers. The Constitution reflects a separation of *powers* in addition to a separation of personnel."); *cf.* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2020–21 (2011) (arguing that the content of the Vesting Clauses is not obvious and "will *never* be evident from the raw text of the Vesting Clauses themselves").

191 THE FEDERALIST NO. 37, *supra* note 14, at 182 (James Madison).

192 The Court has invalidated only formal congressional controls of the executive, and examples of formal legislative self-delegation and direct control are relatively rare. It is difficult to meet the standard for overturning an administrative decision based on

cajoles or seeks to persuade an administrator, the member does not exercise formal control, as the decision remains with the administrator.[193] The courts have generally declined to review claims of impermissible congressional interference with agency decision-making,[194] and the rare exceptions have been confined to administrative adjudication.[195] Yet the D.C. Circuit has maintained that an agency's justification for a rule cannot depend solely on the interpretation of members of Congress, because "members of Congress have no power, once a statute has been passed, to alter its interpretation by post-hoc 'explanations' of what it means . . . ."[196] Although members can represent their constituents' interests in agency policymaking, the D.C. Circuit has indicated that such representation is proper only "so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute."[197] I am not aware of any cases, however, in which a court has invalidated a regulation for being excessively influenced by a member of Congress. Parsing the degree of discretion exercised in a particular case will likely prove unavailing.

Nonetheless, the principle of nondelegation is a fundamental aspect of our constitutional republic and courts can begin to shape a

congressional interference. *See* Sierra Club v. Costle, 657 F.2d 298, 409 (D.C. Cir. 1981) (noting that before overturning administrative rulemaking "simply on the grounds of Congressional pressure" two conditions must be met: "First, the content of the pressure upon the Secretary is designed to force him to decide upon factors not made relevant by Congress in the applicable statute," and "[s]econd, the Secretary's determination must be affected by those extraneous considerations").

193 *See* Watson, *supra* note 23, at 1061 ("Though the effects of informal congressional pressures are effects the Framers strove to avoid through careful definition of government structure, it is nevertheless difficult to conclude that such activity, however improper, is unconstitutional. It is inconceivable that the Framers intended no informal contacts between legislators and administrators.").

194 *See, e.g.*, Gravel v. United States, 408 U.S. 606, 625 (1972) ("Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute . . . ."); *Sierra Club*, 657 F.2d at 409 ("We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking . . . .").

195 *See, e.g.*, Pillsbury Co. v. FTC, 354 F.2d 952, 962–65 (5th Cir. 1966) (holding it was a deprivation of procedural due process for Senators during a subcommittee proceeding to question Commissioners about the merits and approach to a case pending before the Federal Trade Commission); *id*. at 964 (limiting the decision to agency adjudications and not including congressional investigations or hearings about Commission policies).

196 Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 365 (D.C. Cir. 1989); *see also id.* (finding the EPA's adopting of a proposed rule inadequate, despite being a reasonable interpretation of the statute, because eleven members of Congress pushed for a specific interpretation and the agency cited this as the reason for the rule they adopted). This decision will not necessarily deter congressional interference with rulemaking, but only provide a guide for agencies to include other reasons for adopting a particular rule.

197 *Sierra Club*, 657 F.2d at 409.

doctrine that enforces it.[198] Judicial enforcement may also spur greater responsibility by the political branches to restrain excessive delegations. Our political branches, unfortunately, often avoid independent constitutional analysis, preferring to rely on the courts.[199] When the courts underenforce constitutional norms, political actors may take a similar path relying on their own institutional concerns and practical limitations.[200]

Without judicial enforcement, the pace of delegations will likely continue to escalate, allowing members of Congress to collude with executive branch agencies. The net result is policymaking and execution unmoored from the accountability of the Constitution. The pursuit of second-best checks and balances cannot cure the underlying pathology, because delegation unravels the separation of powers designed to protect individual liberty. Such liberty is undermined by the dramatic expansion of the regulatory state without the Constitution's requirement for deliberation and representation in lawmaking and absent the unity and energy required for execution of the laws.

B. Interpretation and Limits on Executive Power and Discretion

Even if the Court continues to resist direct enforcement of the nondelegation doctrine, the failure of structural checks and balances to limit delegation may nonetheless justify more exacting interpretation of agency authority under broad delegations. The Court already takes delegation concerns into account when interpreting regulatory statutes.[201] The possibility of collusion between members of Congress and agencies supports this practice.

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[198] *See* Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 504 (2014) (arguing that the Constitution includes standards as well as rules and that courts should enforce standards such as the nondelegation doctrine).

[199] For arguments that assertive judicial review leads to the enervation of Congress's constitutional deliberations, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893) ("The checking and cutting down of legislative power . . . cannot be accomplished without making the government petty and incompetent. . . . Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.").

[200] *See* Fallon, *supra* note 35, at 1324 (arguing that if "a court can take practical costs into account in not fully enforcing the constitutional norm forbidding Congress to delegate its legislative powers," Congress may similarly "determine for 'institutional' reasons that they have no obligation" to enforce the constitutional norm).

[201] *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that otherwise would be thought to be unconstitutional.").

The Court enforces nondelegation norms through statutory interpretation in a variety of ways. For example, Cass Sunstein has identified a series of nondelegation canons.[202] John Manning has argued that the nondelegation doctrine often serves as a canon of avoidance by narrowly construing broad delegations that would otherwise raise constitutional concerns.[203] The Supreme Court used this approach in *Food and Drug Administration v. Brown & Williamson Tobacco Corporation*,[204] which held that the FDA did not have jurisdiction to regulate tobacco under the Food, Drug, and Cosmetic Act, despite its arguably clear statutory language.[205] The Court has often vindicated nondelegation values by presuming that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[206]

The nondelegation canons and the related elephants-in-mouseholes doctrine serve nondelegation concerns without directly enforcing the nondelegation doctrine. They allow courts to reiterate the basic principle that Congress, not the executive, should make key policy decisions.[207] Agencies should not assume jurisdiction over issues and policies that cannot fairly be derived from a statutory delegation.[208] In addition, members of Congress should not be able to

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202 Sunstein, *supra* note 38, at 330–32.

203 *See* Manning, *Canon of Avoidance*, *supra* note 15, at 228 ("[T]he Court typically narrows constitutionally doubtful delegations by restricting a broad statute in light of an imputed background purpose.").

204 529 U.S. 120 (2000), *superseded by statute*, Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

205 *Compare id*. at 159, 161 ("Deference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." (internal citations omitted)), *with id.* at 163 (Breyer, J., dissenting) ("[T]he most important indicia of statutory meaning—language and purpose—along with the FDCA's legislative history . . . are sufficient to establish that the FDA has authority to regulate tobacco.").

206 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001); *see also* King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (finding there was no "implicit delegation" to the IRS to determine whether tax credits under the Affordable Care Act were available on Federal Exchanges because it was a question of "deep 'economic and political significance' that is central to this statutory scheme"); *see generally* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010) (identifying the "elephants-in-mouseholes doctrine" and critiquing the practice because it fails to provide a principle for consistent application by courts).

207 Sunstein, *supra* note 38, at 342.

208 *See* Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1500 (2009) ("[P]rinciples drawn from the Court's *Chevron* jurisprudence and familiar public-choice considerations both suggest that deference to agency determinations of their own authority should be disfavored . . . .").

push agencies to decide significant policy issues that were not enacted through the legislative process. Another advantage of narrow interpretation is that it may favor the negotiated compromise that most statutes reflect—i.e. the collective legislative deal.[209] It diminishes democratic accountability when agencies pursue major policy shifts under ambiguous statutory language. Narrow judicial interpretations of statutes might force Congress to grapple with new problems, rather than allowing agencies to shoehorn new regulatory solutions under old statutes.[210]

It is a reasonable interpretive principle that a majority of Congress did not vote for an elephant when it enacted a mousehole. This principle illustrates one of the problems with the Supreme Court's decision in *City of Arlington v. Federal Communications Commission*, which upheld the application of *Chevron* deference to an agency's interpretation of its jurisdiction.[211] When an agency pushes at the boundaries of its jurisdiction, it is likely to be working with key legislators, who either desire expansion or are willing to tolerate it. Those members may be the gatekeepers to any formal legislative response to the agency. Allowing the agencies to expand their jurisdiction or to push on the boundaries of their delegated power can empower individual legislators in contravention of the enacting Congress. In this context, agencies are responsive not to Congress as an institution and its collectively negotiated laws, but instead to individual members or parts of Congress representing particular interests. Such collusion over the delegated authority of an agency suggests an additional reason for leaving questions of agency jurisdiction to the courts.[212]

Nonetheless, enforcing nondelegation through statutory interpretation has run into a variety of criticisms, including concerns about consistent judicial administrability and respect for congressional intent. John Manning has argued that "nondelegation canons present the same line-drawing problems as the traditional nondelegation doc-

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[209] *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 894 (1975) ("[T]he courts do not enforce the moral law or ideals of neutrality, justice, or fairness; they enforce the 'deals' made by effective interest groups with earlier legislatures.").

[210] *But cf.* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 71–73 (2014) (arguing against a "democracy-forcing" view and suggesting that the agency's best judgment is "democratically superior" to keeping the status quo, particularly in times of congressional dysfunction).

[211] City of Arlington v. FCC, 133 S. Ct. 1863, 1874–75 (2013).

[212] The more common concern about unchecked executive power is, of course, also an important reason for judicial review of an agency's jurisdiction. *See City of Arlington*, 133 S. Ct. at 1886 (Roberts, C.J., dissenting) (discussing the Court's duty to "police the boundary between the Legislature and the Executive").

trine because they require courts to identify when an interpretive decision is properly attributed to 'a Law' passed by Congress or to policymaking discretion exercised by an agency or court."[213] Yet courts must also draw difficult lines when engaging in *Chevron* analysis.[214] Similarly, Jacob Loshin and Aaron Nielson explain that the elephants-in-mouseholes doctrine assumes that Congress would not intend to alter fundamental regulatory details in broad terms, even though in reality Congress may intend to allow for such fundamental changes.[215]

Arguments against enforcing nondelegation norms through interpretation also emphasize legislative supremacy,[216] which admittedly may be defeated by narrow interpretations. Yet legislative supremacy is hardly the only constitutional value. Congress has limits on its lawmaking power, both procedural and substantive, that courts should enforce. The critics of interpretation in light of nondelegation values generally follow the conventional view of delegations as a self-denying power of Congress. Delegations, however, will often operate to expand the power of individual members of Congress at the expense of Congress as an institution and collective representation in lawmaking. It hardly serves as a defense to a challenged statute that Congress *intended* to make an overbroad delegation to an agency. Instead, the potential for both Congress and the executive to expand power from such delegations provides additional support for narrow interpretations of delegated authority.

Finally, textualists have argued that nondelegation canons arguably conflict with the clear background rule of *Chevron*, which

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213 John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1548–49 (2008).

214 *See* Sales & Adler, *supra* note 208, at 1557–58 (noting that in administrative law "courts are called upon to draw fuzzy lines all the time" and such difficulty does not relieve them of their obligation to draw those lines); Sunstein, *supra* note 38, at 342 ("[T]he real lack of clarity comes not from nondelegation canons, but from general uncertainty about *Chevron* itself, which different courts, and panels, apply with noticeably different degrees of enthusiasm."); *see also* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1447–48 (2005) ("*Mead* generates uncertainty and confusion among lower courts . . . ." when determining whether *Chevron* deference applies to various agency interpretations); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 353–56 (2003) (reviewing and critiquing the uncertainty of applying *Chevron* deference in lower courts post-*Mead*).

215 *See* Loshin & Nielson, *supra* note 206, at 63 ("[R]eading a statute in an unusual way to achieve normative goals apart from those selected by Congress imposes costs on the lawmaking process.").

216 *See, e.g.*, Manning, *Canon of Avoidance, supra* note 15, at 256 (arguing that narrowing a broad delegation in light of nondelegation concerns "creates the perverse result of attempting to safeguard the legislative process by explicitly disregarding the results of that process").

respects Congress's decision to leave future questions to the agency.[217] But of course *Chevron* is the "quintessential prodelegation canon,"[218] and relies on many of the same assumptions offered for nonenforcement of the nondelegation doctrine, including importantly the formal view that delegations yield power to the executive.[219] Justice Scalia assumes that "Congress cannot enlarge its *own* power through *Chevron*";[220] however, individual members of Congress may be doing precisely this when they control the administrative discretion created through broad delegations.

When applying *Chevron* deference, the courts may be reinforcing the collusion between agencies and members of Congress over the exercise of administrative discretion.[221] This violates a fundamental separation of powers principle "that the power to write a law and the power to interpret it cannot rest in the same hands."[222] Delegation to agencies primarily gives interpretive power to executive branch agencies, but it can leave important interpretive control in the hands of individual lawmakers. Members of Congress thus may be writing vague laws and then filling in their preferred interpretations, applications, and exemptions. Although outside the scope of this Article, these insights about how delegation benefits members of Congress and undermines separation of powers can provide a foundation for reevaluating the deference regimes of *Chevron* and *City of Arlington.*

In a similar vein, in *Perez v. Mortgage Bankers Association*, Justices Scalia, Thomas, and Alito all wrote separately arguing for the Court to reconsider the heightened deference given to an agency's interpretation of its regulations under *Bowles v. Seminole Rock & Sand Co.* and *Auer v. Robbins.*[223] An agency's interpretation of its rules may be another point of discretion over which particular members of Congress can have influence. Rather than going through the

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217 *See* Loshin & Nielson, *supra* note 206, at 46–52 (noting tension between *Chevron* and application of elephants-in-mouseholes doctrine); Manning, *Canon of Avoidance*, *supra* note 15, at 251–52 (explaining that *Chevron* reflects the assumption that Congress "cannot always foresee and provide for a statute's detailed applications," and therefore "a reviewing court risks unsettling a legislative choice to leave a problem for another day when it imposes upon a statute determinacy that Congress itself did not supply").

218 Sunstein, *supra* note 38, at 329; *see also* Farina, *supra* note 20, at 511–26.

219 *See supra* notes 37–41 and accompanying text.

220 Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1341 (2013).

221 Courts thus may fail to perform their "boundary maintenance" function with respect to the scope of agency authority, which allows agencies to shift statutory boundaries for particular issues and applications that arise in administration. Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 753–54 (2014).

222 *Decker*, 133 S. Ct. at 1341.

223 Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211 (Scalia, J., concurring in the judgment); *id.* at 1213 (Thomas, concurring in the judgment).

cumbersome process of reissuing a new regulation, agencies, in collaboration with committees or individual lawmakers, may simply reinterpret their existing rules. The most visible and primary problem is excessive executive authority to make rules and also interpret them. Less visible, but also problematic, delegated discretion may allow legislators to be involved with the interpretation of regulations. Such agency "interpretations" allow both administrators and members of Congress to essentially rewrite regulations, avoiding not only the rigors of bicameralism and presentment, but even the procedural safeguards of notice-and-comment rulemaking.

Interpreting statutes and rethinking deference regimes in light of the nondelegation principle thus may serve important values, an alternative approach to more direct enforcement of limitations against delegation of lawmaking power.

C. Political Checks on Congressional Administration

Despite the imperative for greater judicial oversight of delegation, only a few members of the current Supreme Court show interest in more vigorous enforcement of the nondelegation doctrine.[224] Yet the absence of judicial review does not exempt the political branches from the requirements of the Constitution. Nondelegation remains an important constitutional principle, and the political branches could take actions to curb delegations or to mitigate the symptoms of delegation. Admittedly, carrying out such reforms requires overcoming the major difficulty highlighted in this Article: the incentives that both legislators and administrators have for continuing to create administrative discretion and to collude in the exercise of administrative power.

But members of Congress also have an interest in restoring collective lawmaking power. As lawmaking power diminishes, their control over administration may similarly diminish.[225] I make a few proposals for political reforms, recognizing that there are many potential approaches that could be considered by scholars and government officials with institutional expertise.

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[224] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring in the judgment) (explaining the importance of the nondelegation doctrine and arguing for judicial enforcement); *id.* at 1237 (Alito, J., concurring) (stressing the importance of the nondelegation doctrine and noting "Congress, vested with enumerated 'legislative Powers,' Art. I, § 1, cannot delegate its 'exclusively legislative' authority at all" (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825))).

[225] *See supra* Part II.C (explaining why in the long run delegations may erode members' control over administration).

First, the executive branch could take measures to discourage individual congressmen from interfering in administration. One approach would be to require agencies to disclose publicly all contacts with members of Congress or their staff.[226] This would not prohibit such contacts from occurring, but would place such contacts on the record. In the 1980s, the Department of the Interior implemented a policy of documenting all contacts with members and committees of Congress.[227] Unsurprisingly, Congress immediately tried to end the practice by defunding the preparation of reports on such contacts.[228] Despite likely congressional disapproval, an executive branch practice of documenting contacts with members of Congress and their staff would allow individuals, interest groups, and the media to see which members sought to influence an agency. The public could hold members accountable for their actions with administrative agencies. Such openness may discourage agency contacts or at least limit such contacts to issues that could stand up to public scrutiny. Requiring disclosure might also discourage individual contacts in favor of communication with committees or subcommittees. This could have some benefit in encouraging Congress to act at least through its institutional parts when conducting oversight of agencies. Committee oversight of agencies may be more open to public scrutiny and accountability than ad hoc regulatory interventions by individual members. The disclosures would provide a political mechanism for checking how members seek to influence and control administration.

Requiring public disclosure of congressional contacts could also reinforce unitariness in the executive, by allowing agency leadership and the White House to monitor the influence of members of Congress on administrative agencies. The President can hardly control and direct all the activity of an ever-expanding executive branch, but a disclosure requirement would at least provide some information about congressional influence and control of administration. The White House could use this information to keep members of Congress restricted to their oversight and information gathering functions and

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[226] C. Boyden Gray discussed with me how when serving as Counsel to President George H.W. Bush he suggested such an approach only to be met with significant resistance from other White House advisors. Interview with C. Boyden Gray, former Counsel, White House.

[227] *See* Susan M. Davies, *Congressional Encroachment on Executive Branch Communications*, 57 U. CHI. L. REV. 1297, 1297 (1990) (describing how the Department of the Interior began to record all contacts with members of Congress and congressional committees).

[228] *See id*. at 1297 (noting that members expressed concern in debate that the practice of documenting contacts would "really muzzle employees" of the Department of the Interior in their communications with Congress).

to reinforce that executive officials answer to presidential direction. The disclosure requirement respects Congress's legitimate oversight role—it would allow agency contacts, but require transparency, reinforcing a key hallmark of the legislative power.

Disclosure allows for a political check on congressional involvement. Since the boundaries of legitimate oversight are fuzzy, a political judgment can be made about whether a particular action is genuinely in service of the legislative process, or is instead impermissibly interfering in execution. In some instances, disclosure requirements may discourage open-ended delegations to agencies if members are concerned they will not be able to easily control the exercise of delegated authority on particular matters.

Second, congressional leadership should consider how internal structural changes could improve institutional power and realign the incentives of individual members with the collective Congress.[229] Oversight and the committee system have not always been organized as they are today and different approaches could be tried.[230] Reforms should emphasize collective decisionmaking and greater responsiveness to lawmaking when a social or economic need exists.

A stronger collective or institutional Congress would be able to exercise not just the niggling powers of administration, but also the constitutional power to enact legislation and to offer meaningful and effective oversight of the executive. This Article has detailed incentives that members have for delegation to the executive.[231] But such incentives push members of Congress toward relatively small-scale influence—serving constituents or special interests in specific ways. Involvement with administration will usually include sporadic actions by members, rather than sustained shaping of policy. Such actions are inherently limited in their scope. Individual cajoling, persuasion, and browbeating are unlikely to serve as the foundation for major agency policy. Under delegated authority, the White House and the political leadership of an agency will direct major regulatory policy. Delegation

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[229] For one suggestion, see Calabresi et al., *supra* note 23, at 546 ("[R]eal reform of the pathologies caused by the congressional committee system and its involvement in oversight can only come from Congress itself. . . . Congress should assign its members to committees randomly, . . . [and] adopt strict term limits for the number of years a member of Congress can serve on any one committee.").

[230] *See, e.g.*, CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS 25–52 (3d ed. 1997) (examining the origins and development of congressional committees); William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 804–05 (discussing the delegation of oversight and investigation to committees of the House and Senate and explaining "the House and Senate originally exercised its power to investigate by passing specific resolutions rather than delegating the power").

[231] *See supra* Part II.A.

thus leaves (as it should) the primary administrative power with the President and executive branch officials.

Unsurprisingly, members of Congress ultimately cannot serve as effective administrators. Thus, members have an interest in redirecting their attention to the legislative process and the institutional power that they lawfully possess by virtue of their election to Congress. Collective lawmaking is required by the Constitution and serves important constitutional values of accountability and limited government. Yet the arguments here do not depend on legislators to be "enlightened Statesmen."[232] Rather, they require only that members of Congress appreciate how exercising collective power—the legislative power—may ultimately provide a firmer foundation for satisfying self-interest and ambition.

The precise content of political reforms is beyond the scope of this Article; yet recognizing a root cause of collective weakness should spur reform efforts. Many commentators have assumed and predicted perpetual congressional dysfunction, but government institutions can recover their authority and power. One analogy may be the response following the weakness of the presidency in the 1970s. Edwin Meese, as President Reagan's Attorney General, and various scholars identified and defended the centrality of a unitary executive to separation of powers.[233] These ideas were translated into reforms, including the creation of the Office of Management and Budget and regulatory review that centralized administrative policy.[234] These reforms could have gone further. For instance they did not attempt to bring independent agencies into their purview—a prudential, not legal, limit that has persisted through to the current administration.[235] Nonetheless, these changes brought about a meaningful shift to more presidential respon-

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232 THE FEDERALIST NO. 10, *supra* note 14, at 45 (James Madison) ("It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm . . . .").

233 *See* Executive Memorandum, Separation of Powers: Legislative-Executive Relations (Apr. 30, 1986) (setting forth the defense of the unitary executive in a memorandum commissioned by Attorney General Meese); *see also* Calabresi & Rhodes, *supra* note 116, at 1158 ("Unitary executive theorists claim that all federal officers exercising executive power must be subject to the direct control of the President.").

234 *See* Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013) (explaining the operation of the Office of Information and Regulatory Affairs and the Office of Management and Budget).

235 *See* Rao, *supra* note 58, at 1261 (explaining that "no President has required independent agencies to submit to [Office of Management and Budget] review, despite the fact that executive branch lawyers have concluded the President could constitutionally do so").

sibility and control over execution and administration of the laws.[236] Similarly, reforms could focus on asserting the collective power of Congress, encouraging a more robust legislative process.

The vast and varied bureaucracy undermines both the unitary executive and the collective Congress. But it is possible to push back. With respect to Congress, the time is ripe to reconsider what specific reforms would bolster its institutional power. Institutional reforms could experiment with structures designed to reinforce collective lawmaking power. There needs to be a public and persuasive account of how Congress's institutional power can benefit individual members. An effective and strong Congress can realign the interests of congressmen with Congress and shift congressional action toward its collective legislative power.

Conclusion

The conventional approach leaves nondelegation concerns to the political rivalry between Congress and the executive. Yet the conventional understanding is incomplete. If delegations simply shifted power away from Congress, then interbranch rivalry might provide a check on excessive delegations, as commentators and courts have maintained. But delegations erode the institutional operation of Congress in a manner that cannot be checked by ordinary separation of powers incentives. Delegation upsets the major structural principle of the collective Congress. This means not only that "lawmaking" occurs outside of Congress in administrative agencies, but also that lawmakers become shadow administrators, threatening the independence of both Congress and the executive. The Constitution bars congressmen from executing the laws or exercising any powers other than legislative ones. Delegations allow members of Congress to interfere with the executive power, which shifts their energy and focus away from their collective legislative power.

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[236] Scholars with different views of the constitutional content of the "executive power" have explained myriad benefits of presidential control. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 664 & n.563 (1994) (describing the President's "authority to superintend the administration of federal law" as motivated by the goal of "promot[ing] an energetic and accountable administration"); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2327–32 (2001) (arguing that the President's exercise of directive authority advances accountability, effectiveness, transparency, and responsiveness); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 103 (1994) ("[A] strong presumption of unitariness is necessary in order to promote the original constitutional commitments [to accountability and avoidance of factionalism]."); Rao, *supra* note 58, at 1266–69 (describing the President's removal power as a constitutional necessity that promotes both accountability and legitimacy of agency action).

Understanding the failure of structural checks and balances to prevent excessive delegations, courts should reconsider enforcement of constitutional limits on delegation. At the same time, the political branches should undertake reforms to realign Congress with its collective power. This Article has focused on delineating a particular problem of delegation and has provided a sketch of some solutions to direct further inquiry. Congress is the source of delegations that create the pathologies of administrative discretion and so we need some account of how Congress can reestablish its independence and effectiveness. Thinking through the requirements of collective lawmaking might be one approach. Our dynamic political system can accommodate new understandings of legal forms and respond accordingly. The political branches may be far removed from the constitutional ideal, but they can recalibrate closer to the constitutional limits that define their powers.