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Delegation and Time

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CSAS Working Paper 19-14
The Constitution's First Branch: Rediscovering the Legislative Power,
May 2, 2019

Antonin Scalia Law School
C. BOYDEN GRAY CENTER
FOR THE STUDY OF THE
ADMINISTRATIVE STATE
George Mason University

DELEGATION AND TIME

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Working Draft—July 2019

Most concerns about delegation are put in terms of the handover of legislative power to federal agencies and the magnitude of the legislative policy decisions made by such agencies. Likewise, most reform proposals, such as the Congressional Review Act and the proposed REINS Act, address these gap-filling, democratic-deficit concerns. The same is true of the judicially created nondelegation canons, such as the major questions doctrine and other clear-statement rules. This Article addresses a different, under-explored dimension of the delegation problem: the temporal complications of congressional delegation. In other words, broad congressional delegations of authority at one time period become a source of authority for agencies to take action at a later time that was wholly unanticipated by the enacting Congress or could no longer receive legislative support. This problem has taken on added significance in the current era of congressional inaction.

To address this distinct, temporal problem of delegation, we suggest that Congress revive the practice of regular reauthorization of statutes that govern federal regulatory action. In some circumstances, this will require Congress to consider adding reauthorization incentives, such as sun-setting provisions. In other regulatory contexts, Congress may well decide the costs of mandatory reauthorization outweigh the benefits. Nevertheless, we argue that Congress should more regularly use this longstanding legislative tool to mitigate the democratic deficits that accompany broad delegations of lawmaking authority to federal agencies and spur more regular legislative engagement with federal regulatory policy. A return to reauthorization would also strengthen the partnership between Congress and the administrative state as well as mitigate some of the major concerns that have been raised in recent years regarding Chevron *deference.*

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INTRODUCTION

This Term, in *Gundy v. United States*, the Supreme Court once again considered whether a statutory grant of authority to a federal agency or executive branch official (here, the Attorney General) violates the nondelegation doctrine.[1] Article I of the Constitution commands that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States."[2] The Court has long interpreted Article I as prohibiting Congress from delegating legislative powers to the other branches of government (or anyone else).[3] It has also held, however, that Congress can delegate discretion to federal agencies to implement legislation if the legislation provides an "intelligible principle"[4]—"clearly delineat[ing] the general policy, the public agency which is to apply it, and the boundaries of that delegated authority."[5] And, once again, in *Gundy*, a majority of the Court rejected the constitutional challenge, with the plurality concluding that the statutory "delegation easily passes constitutional muster."[6]

Although the nondelegation doctrine technically remains the law of the land, the Supreme Court has only struck down two (or maybe three) statutory delegations as unconstitutional—all back in the 1930s.[7] Since

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[1] Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

[2] U.S. CONST. art. I, § 1.

[3] *See* Mistretta v. U.S., 488 U.S. 361, 371-72 (1989) ("[W]e long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." (quoting Field v. Clark, 143 U.S. 649, 692 (1892)).

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

[5] American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)

[6] *Gundy*, 139 S. Ct. at 2121 (plurality per Kagan. J.); *cf. id.* at 2131 (Alito, J., concurring in judgment) ("Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.").

[7] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). As Cass Sunstein quipped,

then, there have been many unsuccessful challenges, of which *Gundy* is but the most recent.[8] These nondelegation challenges, like the challenge in *Gundy*,[9] have focused almost entirely on the breadth and substance of legislative delegation and whether it complies with the intelligible principle test. In other words, the judicial inquiry has examined the substantive transfer of lawmaking authority from Congress to the administrative state.

Gundy, however, is also noteworthy because only four Justices were willing to continue to embrace a toothless nondelegation doctrine. Justice Alito cast the fifth and decisive vote because "it would be freakish to single out the provision at issue here for special treatment."[10] Justice Alito made clear, however, that "[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."[11] Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented, arguing that the statute at issue did not pass the intelligible principle test and, moreover, the current, "mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked."[12] Although Justice Kavanaugh did not participate in the case, scholars are already predicting that "perhaps we will not need to wait another twenty years for that next case raising the nondelegation doctrine."[13]

"We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting)." Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000). *Panama Refining* and *Schechter Poultry* are the two cases usually cited as the only successful nondelegation doctrine challenges, but the Court in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), seemed to invalidate one provision of the Bituminous Coal Conservation Act on nondelegation grounds in an opinion that struck down the rest of the law for violating the Commerce Clause. *But see* Alexander "Sasha" Volokh, *The Shadow Debate over Private Nondelegation in* DOT v. Association of American Railroads, 2014-2015 CATO SUP. CT. REV. 359, 372 (2014) (arguing that "when the *Carter Coal* Court talks about 'legislative delegation in its most obnoxious form,' it's much more plausible that this refers to the Due Process Clause").

[8] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001) (surveying unsuccessful nondelegation challenges).

[9] *See Gundy*, 139 S. Ct. at 2148 (Gorsuch, J., dissenting) (arguing that the nondelegation doctrine should not permit Congress to "hand off to the nation's chief prosecutor the power to write his own criminal code").

[10] *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring in judgment).

[11] *Id.*

[12] *Id.* at 2139 (Gorsuch, J., dissenting).

[13] Kristin E. Hickman, Gundy*, Nondelegation, and Never-Ending Hope*, REG. REV. (July 8, 2019), https://www.theregreview.org/2019/07/08/hickman-nondelegation/; *accord* Mila Sohoni, *Opinion Analysis: Court Refuses To Resurrect Nondelegation Doctrine*, SCOTUSBLOG (Jun. 20, 2019) ("For the nondelegation doctrine, the significance of *Gundy* lies not in what the Supreme Court did today, but in what the dissent and the concurrence portend for tomorrow."),

The Supreme Court has not invalidated a statute on nondelegation doctrine grounds in more than eight decades, but the Court has embraced a number of normative canons or clear-statement rules that address nondelegation concerns through statutory interpretation.[14] Or, as Justice Gorsuch put it in his *Gundy* dissent:

> When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.[15]

Clear statement rules and various canons of construction serve to address nondelegation concerns.

The statutory challenge to the Affordable Care Act, *King v. Burwell*, is illustrative. There, Chief Justice Roberts, writing for the Court, applied the major questions doctrine to refuse the IRS *Chevron* deference. This was due to the economic or political significance of the question and the IRS's lack of expertise in answering such questions.[16] Reflecting nondelegation concerns, Chief Justice Roberts concluded: "Whether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly."[17] Like the nondelegation doctrine itself, the nondelegation canons of statutory interpretation focus on the breadth of delegation to presume, as Justice Scalia colorfully put it, that Congress "does not . . . hide elephants in mouseholes."[18]

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https://www.scotusblog.com/2019/06/opinion-analysis-court-refuses-to-resurrect-nondelegation-doctrine/.

[14] *See, e.g.*, Sunstein, *supra* note 7, at 315–16 ("I believe that the [nondelegation] doctrine is alive and well. It has been relocated rather than abandoned. . . . Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so. The relevant choices must be made legislatively rather than bureaucratically. As a technical matter, the key holdings are based not on the nondelegation doctrine but on certain 'canons' of construction.").

[15] *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting) (footnote omitted).

[16] King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015); *see also* Jonathan H. Adler & Michael F. Cannon, King v. Burwell *and the Triumph of Selective Contextualism*, 2015 CATO S. CT. REV 35, 48–50; Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer*, 2015 PEPP. L. REV. 33, 39–46.

[17] *King*, 135 S. Ct. at 2489 (quoting Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444 (2014).

[18] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (per Scalia, J.); *see also* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010) (reviewing literature and providing summary of doctrinal development).

Legislative responses to nondelegation concerns have also largely focused on addressing the breadth of statutory delegations to federal agencies and federal agencies' authority to address questions of deep political and economic significance. One obvious example is the Congressional Review Act (CRA), which allows Congress to invalidate a major agency rule with only a simple majority in both chambers (and presidential approval).[19] The CRA has played a major role in the Trump Administration, with Congress having invalidated fourteen major agency rules that were promulgated at the end of the Obama Administration.[20] The proposed Regulations of the Executive in Need of Scrutiny (REINS) Act would take the CRA one step further by requiring congressional action before any "major" agency rule went into effect.[21] Congress has also, at times, used the appropriations process to constrain prior delegations of regulatory authority, such as through substantive appropriations riders. Such interventions are a blunt tool, however, and are more able to prevent regulatory action than to expand or update prior grants of regulatory authority.

Absent from these attempts to address nondelegation is any focus on the temporal problems of congressional delegation. Specifically, broad congressional delegations of authority at one time period become a source of authority for agencies to take later action that could no longer receive legislative support or that was not adequately contemplated, let alone considered, at the time of enactment.[22] This problem has taken on added significance with the fall of lawmaking by legislation and the rise of

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[19] *See generally* Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2162–64 (2009).

[20] *See* GEO. WASH. U. REG. STUD. CTR., CONGRESSIONAL REVIEW ACT—115TH CONGRESS (last updated June 1, 2018), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs1866/f/downloads/CRA%20Tracker%205-23-18.pdf; In addition, Congress also used the CRA to invalidate two regulations promulgated by the Consumer Financial Protection Bureau (CFPB) after President Trump assumed office. *See infra* notes __, and accompanying text.

[21] H.R. 26, 115th Cong. § 3 (2017) (defining "major rule" as one that the Office of Information and Regulatory Affairs has deemed would result in "(1) an annual cost on the economy of $100 million or more (adjusted annually for inflation); (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises"). *See generally* Jonathan H. Adler, *Placing "REINS" on Regulations: Assessing the Proposed REINS Act*, 16 NYU J. LEG. & PUB. POL'Y 1 (2013); *see also* Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 NYU J. LEG. & PUB. POL'Y 131 (2013).

[22] *See* Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 502 (2015) (noting Congress "consistently fails to update or revise old statutes even when those statutes are manifestly outdated or, as actually administered, have assumed contours that the original Congress never contemplated and the current Congress would not countenance").

lawmaking by regulation.[23] Congressional inaction has exacerbated the problems of open-ended, broad statutory delegations. Even when the existing statutory schemes fail or reach their limits, Congress rarely acts.[24] Without regular legislative activity, agencies are forced to get more creative with stale statutory mandates to address new problems and changed circumstances.[25] What little legislative activity occurs often comes in reactive spurts, triggered by apparent emergencies or crises. This dynamic encourages Congress to delegate broad authority before focusing on an appropriate regulatory response.[26]

To be sure, even without regular legislative activity, Congress retains some powerful tools to oversee agencies and shape regulatory activities.[27] But federal agencies may come to view such congressional oversight as just the cost of doing business, not a meaningful constraint on regulatory activity.

To address this distinct, time problem of delegation, Congress should return to passing laws on a regular basis. And, in particular, Congress should revive the practice of regular reauthorization of statutes that govern federal regulatory action. This legislative engagement would include regular assessment of agency action and regular recalibration if the agency's regulatory activities are inconsistent with the current Congress's policy objectives. In some regulatory contexts, this may require Congress to consider adding reauthorization incentives, such as sun-setting provisions or so-called "hammer" provisions designed to induce legislative engagement. In others, Congress may decide the costs of mandatory reauthorization outweigh the benefits. Nevertheless, Congress should more regularly use this longstanding legislative tool to mitigate the democratic deficits that come with broad delegations of lawmaking authority to federal agencies.

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[23] *See, e.g.*, Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1000 (2015) (observing that "the focus and function of lawmaking have shifted from judge-made common law, to congressionally enacted statutes, and now to agency-promulgated regulations").

[24] *See, e.g.*, Roberta Romano, *Regulating in the Dark*, *in* REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 86, 87 (Cary Coglianese ed. 2012) ("Congress tends not to move nimbly to rework financial legislation when it becomes widely acknowledged as flawed or seriously deficient"); Phillip Wallach, *Congress Indispensable*, NAT'L AFF., Winter 2018, https://www.nationalaffairs.com/publications/detail/congress-indispensable ("Congress is a mess. It seems incapable of passing major legislation").

[25] *See, e.g.*, Greve & Parrish, *supra* note 22; Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014); Philip Wallach, *When Can You Teach an Old Law New Tricks?*, 16 NYU J. L. & PUB. POL'Y 689 (2013).

[26] *See* Romano, *supra* note 24, at 90 ("[D]elegation enables legislators to 'do something' in a crisis, by passing 'something' and thereby mollifying media and popular concerns, while at the same time shifting responsibility to an agency for potential policy failures.").

[27] *See generally* JOSH CHAFETZ, CONGRESS'S CONSTITUTION, LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017).

This Article proceeds as follows: Part I surveys the nondelegation doctrine debate and how that doctrine addresses the democratic deficits in lawmaking by regulation. Part II examines the judicial and legislative responses to nondelegation, emphasizing how they primarily address the scope of open-ended congressional delegation, not the temporal aspect. Part III turns to the temporal problems with excessive delegation. Part III.A develops the theoretical case for regular reauthorization to address the temporal aspects of delegation's democratic deficits. Part III.B examines the history of reauthorization practices in Congress, surveying the breadth of such practices before providing a snapshot of eight current reauthorization efforts—including reauthorization of three agencies (Commodity Futures Trading Commission, Export-Import Bank, and Federal Aviation Administration) and five federal programs (FDA user-fees programs, the Farm Bill, No Child Left Behind, PATRIOT Act, and Pipeline Safety Act). Part IV fleshes out how Congress could use reauthorization as a legislative tool to advance democratic values. It examines the mechanisms that could encourage a regular reauthorization process and responds to potential objections. The Article concludes with a few thoughts on how a regular reauthorization process would strengthen the partnership between Congress and the administrative state, while affecting judicial review in terms of both *Chevron* deference[28] and statutory stare decisis.

I. NONDELEGATION AND CONGRESSIONAL INACTION

Delegation lies at the foundation for the modern administrative state.[29] Federal administrative agencies have no inherent power to issue regulations, administer programs, or enforce federal law. Rather, through legislation Congress grants agencies that power to act.[30] In various statutes, Congress has granted agencies the authority to implement—and oftentimes direct—federal policy across a wide range of policy areas, and this practice of delegation has increased over time.[31]

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[28] Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984).

[29] *See* Gillian E. Metzger, *Foreword—1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) (noting "broad delegations of authority to the executive branch . . . represent the central reality of contemporary national government"); *id.* at 24 ("Broad delegations of policymaking power represent the backbone of the modern administrative state").

[30] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *see also* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."); *see also* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2101 (2004).

[31] *See, e.g.*, Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J. L. ECON. & ORG. 27, 39 (2018) (noting empirical support for claim that "the quantity of delegations increased dramatically during

Congress often has good reasons to delegate substantial policymaking and implementation to administrative agencies.[32] Some would say broad delegation is "necessary."[33] Legislators, even those with longstanding service on relevant committees, tend to lack the same degree of subject-specific expertise as do administrative agencies. The same is true for legislative staff. Agencies may also be free of some of the temporal and political constraints faced by elected officials, particularly members of the House of Representatives who need to stand for reelection every two years.[34] It may also be easier to develop coherent policies on complex or controversial matters within a hierarchical structure than in a legislative committee.[35] Agencies may also be able to act with greater speed and dispatch than a bicameral legislature, making them more suited to address urgent problems.

However necessary the practice of delegation, it is not without its costs, including a potential loss of democratic accountability.[36] Concerns

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the New Deal"). For histories of the growth of the regulatory state tailing the increase in delegation, particularly in the 1960s and 1970s, see WILLIAM F. WEST, ADMINISTRATIVE RULEMAKING 16–31 (1985); CORNELIUS M. KERWIN, RULEMAKING 8–20 (3d ed. 2003); MARC ALLEN EISNER, JEFF WORSHAM & EVAN J. RINGQUIST, CONTEMPORARY REGULATORY POLICY 35–44 (1999). This expansion in delegation has been "a bipartisan enterprise." Christopher DeMuth, *The Regulatory State,* NAT'L AFF., Summer 2012, at 70; *see also Over-regulated America*, THE ECONOMIST, Feb. 18, 2012, at 9, 9 ("Governments of both parties keep adding stacks of rules, few of which are ever rescinded.").

[32] *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) (noting that "in our increasingly complex society, . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives"); *see also* Jerry L. Mashaw*, Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

[33] *See, e.g.*, Metzger, *supra* note 29, at 7 (claiming broad "delegations are necessary given the economic, social, scientific, and technological realities of our day").

[34] *See, e.g.,* DAVID H. ROSENBLOOM, BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION 133–34 (2000) ("Congress can delegate its legislative authority to the agencies at its discretion for a wide variety of reasons: to alleviate its workload; to avoid a particularly nettlesome political issue; to focus highly specialized administrative expertise on a particular problem; for convenience; or simply because the agencies do not face the constraints of a legislature that is reconstituted every two years."). For additional arguments in support of delegation, see Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

[35] *See* DeMuth, *supra* note 31, at 72 ("A hierarchy can make decisions with much greater dispatch than a committee can.").

[36] *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 109–11 (1993); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465 ("The Constitution separates lawmaking from law execution to promote accountability and the rule of law, and thereby safeguard individual liberty.").

about delegation motivate much contemporary criticism of the administrative state. To some critics, the widespread delegation of regulatory and other power to federal agencies represents an unconstitutional delegation of legislative power.[37] To others, widespread delegation represents Congress's shirking of its fundamental responsibilities and undermines the democratic legitimacy of regulatory policy.[38] As John Hart Ely observed, the concern with delegation is not necessarily that "'faceless bureaucrats' necessarily do a bad job as our effective legislators." Rather, it is that "[t]hey are neither elected nor reelected, and are controlled only spasmodically by officials who are."[39] In this way, broad delegation can be viewed as a threat to deliberative democracy.[40]

Then-Professor Elena Kagan observed that delegation enables Congress to pass the buck to the executive branch,[41] even though it may increase the power and influence of individual legislators.[42] Other Justices have identified broad delegation as a threat to individual liberty.[43] As Justice Gorsuch explained in his dissent in *Gundy* this Term, "Some occasionally complain about Article I's detailed and arduous

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[37] *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW LAWFUL? (2014); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); 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 (2001); SCHOENBROD, *supra* note 36.

[38] *See* Lawson, *supra* note 37, at 332 ("The delegation phenomenon raises fundamental questions about democracy, accountability, and the enterprise of American government.").

[39] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131 (1980); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2347 (2001) ("Congress rarely is held accountable for agency decisions . . . .").

[40] *See* Sunstein, *supra* note 14, at 7. Indeed, as John Hart Ely observed, "[t]hat legislators often find it convenient to escape accountability is precisely the reason for a non-delegation doctrine." ELY, *supra* note 39, at 133.

[41] *See* Kagan, *supra* note 39, at 39.

[42] *See* Rao, *supra* note 36 (explaining how delegation may create opportunities for individual legislators to "collude" with agencies or influence regulatory policy through oversight, appropriations, and direct involvement with agencies); *see also* Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1407–19 (2017) (exploring how the role of federal agencies in statutory drafting may exacerbate the risks of administrative collusion). [perhaps expand to incorporate political science literature on committees, Congress, and delegation]

[43] *See* Dep't of Transportation v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, __ (2015) (Alito, J., concurring); *id.* at __ (Thomas, J., concurring in the judgment); *see also* Metzger, *supra* note 29 at 23 ("Both justices expressed concern that delegations make lawmaking too easy and threaten individual liberty."); Rao, *supra* note 36, at 1465 ("The Constitution separates lawmaking from law execution to promote accountability and the rule of law, and thereby safeguard individual liberty.").

processes for new legislation, but to the framers these were bulwarks of liberty."[44]

Much criticism of unbridled delegation focuses on the volume, range, and expansiveness of the legislature's delegation of authority. Some statutes grant federal agencies the authority to make broad policy decisions with tremendous economic consequences, such as the acceptable level of air pollution in urban areas[45] or how to regulate emerging telecommunications technologies.[46] Others give agencies minimal constraints on whether to adopt regulatory measures and what policy objectives such measures should pursue.

While judges and academics have focused on the breadth and scope of delegation, less attention has been paid to the time element of delegation. Agencies using their delegated power are often drawing on statutory authority granted many years (or decades) earlier. Yet agencies quite often rely on long-standing—and even long-dormant—authority when creating new regulations. This time dimension is largely absent from delegation debates and discussions.

A few examples illustrate the importance of time. When the Federal Communications Commission (FCC) first sought to adopt an "open internet" order, it relied on a 1934 statute that Congress had not substantially revisited in fourteen years.[47] Even with these revisions, the statute was "woefully outdated" within a decade.[48] The 1996 amendments to the Communications Act preceded "Wi-Fi" networks, let alone Facebook, Wikipedia, Netflix, or even Google. These amendments responded to time-specific technologies and market pressures, and presumed a desire for a "stovepipe" regulatory framework separating telecommunications and information services.[49] However appropriate such ideas were in 1996, they are obsolete today.[50] Yet the FCC draws its authority to regulate internet service providers from this outdated statute, with its outdated assumptions.

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[44] Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

[45] *See* 42 U.S.C. §7409.

[46] <insert citations>

[47] *See* In re Preserving the Open Internet, 25 F.C.C.R. 17905 (2010), *order vacated in part*, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014); *see also* U.S. Telecom. Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc) ("[B]ecause Congress never passed net neutrality legislation, the FCC relied on the 1934 Communications Act, as amended in 1996, as its source of authority for the net neutrality rule.").

[48] See Randolph J. May, Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy, 58 FED. COMM. L.J. 103, 103 (2006).

[49] *See id.* at 104.

[50] *See id.* at 106–07 ("However serviceable these definitional constructs may have been at an earlier time, . . . they are no longer serviceable in a world in which digital technology is rapidly displacing analog.").

Environmental law is replete with statutes based on outdated or mistaken assumptions that limit their effectiveness. In some cases, these statutes relied on then-current scientific understandings of environmental problems and their causes.[51] Yet as scientific understanding and technical expertise concerning pollution and other environmental concerns have advanced, the statutory regimes have not kept pace.[52] Much of the Clean Water Act focuses on pollution from point sources; relatively little of the Act concerns non-point sources. However well-justified this emphasis may have been in 1972, it is obsolete today, as nonpoint source pollution now presents the far greater threat to water quality. Yet the Environmental Protection Agency (EPA) has been delegated relatively little authority to address that.

The Clean Air Act (CAA) is arguably the most expansive federal environmental law. It is also the source of authority for recent regulations adopted to limit greenhouse gas emissions in an effort to reduce the threat posed by global warming.[53] Congress erected the basic architecture in 1970,[54] and made significant modifications in 1977[55] and 1990.[56] As originally constructed, the CAA focused most acutely on localized air pollution. The "centerpiece" of the Act defines acceptable ambient concentrations of regulated air pollutants and direct states to adopt plans to ensure compliance with the designated National Ambient Air Quality Standards (NAAQS).[57] Relatively little of the CAA's core architecture concerned interstate air pollutants. Global climate change, in particular, was not yet a serious concern within Congress.[58]

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[51] *See* A. Dan Tarlock, *The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law*, 27 LOY. L.A. L. REV. 1121, 1122-23 (1994) (noting how much environmental law was based upon an equilibrium paradigm that is no longer accepted by scientists); *see also* DANIEL B. BOTKIN, THE MOON IN THE NAUTILUS SHELL: DISCORDANT HARMONIES RECONSIDERED ix (2013).

[52] *See* Craig Anthony (Tony) Arnold & Lance H. Gunderson, *Adaptive Law & Resilience*, 43 ENVTL. L. REP. 10426, 10426 (2013) ("The foundational assumptions of U.S. environmental law are questionable."); BOTKIN, MOON, *supra* note __, at 6.

[53] For a critical overview of the development of these regulations, see Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421 (2011).

[54] Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

[55] Clean Air Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

[56] Clean Air Act Amendments of 1990, Pub. L. No. 101–549, 104 Stat. 2399. The CAA's express authorization expired in 1998.

[57] *See*, e.g., Lisa Heinzerling, The *Clean Air Act and the Constitution*, 20 ST. LOUIS PUB. L. REV. 121, 121 (2001) ("The National Ambient Air Quality Standards (NAAQS) form the centerpiece of what many consider to be this country's single most important environmental program."); *see also* Union Elec. Co. v. EPA, 427 U.S. 246, 249 (1976) (characterizing provisions requiring state implementation plans to meet NAAQS standards the "heart" of the CAA).

[58] *See* Richard Lazarus, *Environmental Law without Congress*, 30 J. LAND USE & ENVTL. L. 15, 30 (2014) ("Climate change is perhaps the quintessential

When Congress last modified the CAA in 1990, it tightened and revised the NAAQS provisions.[59] Congress also expanded the statute's scope to address non-localized air pollutants, such as those that contribute to acid precipitation and the depletion of stratospheric ozone.[60] Separate provisions addressed each of these concerns. However, no provisions expressly addressed greenhouse gas emissions.[61] Nor have any such measures been adopted since.[62] Nonetheless, seventeen years later in *Massachusetts v. EPA*, the Supreme Court concluded that the plain language of the CAA was broad enough to cover greenhouse gases as air pollutants.[63] Whether the Court was correct to interpret the CAA in this fashion,[64] it is fair to say that *Massachusetts v. EPA* set in motion a series of regulatory initiatives that Congress never contemplated,[65] let alone endorsed, and forced the EPA to retrofit a twentieth-century statutory regime to address a twenty-first century problem.[66]

This temporal problem is not limited to regulatory programs. Older extant statutes often enable the executive branch to take actions Congress did not anticipate. For instance, Congress enacted the International Emergency Economic Powers Act in 1977 (IEEPA) to empower the President to take concrete actions in response to any "unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States" arising from outside the country.[67] This statute grants broad authority that has been invoked to address a wide

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example of a new environmental problem that the Clean Air Act did not contemplate."); *see also* ARNOLD W. REITZE, JR., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 419 (2001).

[59] *See* Clean Air Act Amendments of 1990, Pub. L. No. 101–549, 104 Stat. 2399.

[60] *Id.*

[61] This was not for a lack of trying, however, as Congress did consider whether to grant the EPA regulatory authority over greenhouse gases. *See* S. REP. No. 101-228, at 439 (1990), reprinted in 1990 U.S.C.C.A.N. 3385, 3819 (discussing provisions contained in proposed Senate amendments to the CAA that would have authorized EPA to regulate carbon dioxide emissions from automobiles)

[62] *See* Arnold W. Reitze, Jr., *If Carbon Dioxide Is a Pollutant, What Is EPA to Do?*, *in* RESOURCES DEVELOPMENT AND CLIMATE CHANGE (Rocky Mtn. Min. L. Found. 2008) ("Since 1999 more than 200 bills were introduced in Congress to regulate [greenhouse gases], but none were enacted.").

[63] Massachusetts v. EPA, 549 U.S. 497 (2007).

[64] One of us is on record arguing that the Court was incorrect in *Massachusetts v. EPA*. *See* Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 3 VA. L. REV. IN BRIEF 61 (2007).

[65] *See* Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421 (2011).

[66] This disjunction is readily evident in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), in which the Court struggled to reconcile the CAA's text with the obligation to regulate greenhouse gases as air pollutants.

[67] *See* 50 U.S.C. § 1701(a).

range of foreign policy concerns.[68] While Congress did not seek to delineate the precise circumstances under which the IEEPA could be used, it is quite unlikely the 1977 Congress intended to delegate authority to impose tariffs on Mexico in response to an alleged illegal migration crisis.[69] Yet that is how it was used in 2019.[70]

The temporal lag between legislative delegation and utilization of delegated authority raises distinct concerns about whether delegation is consistent with democratic governance. As already noted, agencies only have that power delegated to them by Congress.[71] Thus, when an agency exercises such power, we may assume this is democratically legitimate because the political branches authorized it, satisfying the requirements of bicameralism and presentment. Yet when decades pass between the enactment of statutes delegating authority to agencies and the exercise of that authority, there is a risk that the delegated authority will be used for purposes or concerns that the enacting Congress never considered. This may lead to situations where Congress has not provided the proper tool for the problem the agency is addressing.[72] More broadly, agencies may be exercising power granted for one purpose to pursue another aim that Congress had never contemplated. This was arguably true with both the FCC's initial effort to impose "net neutrality" and the EPA's use of the CAA to address climate change.

When agencies rely on regulatory authority delegated to them in the past, there is also a risk that the power exercised is no longer in line with contemporary legislative majorities. The inertia inherent in the legislative process makes it difficult to revise delegations of authority and can entrench the dead hand of a past Congress.[73] Consequently, agencies

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[68] *See*, *e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding broad authority under the IEEPA to resolve diplomatic and financial disputes with Iran). For a brief overview of the IEEPA, see Stephanie Zable, *What Comes After Tariffs: An IEEPA Primer*, LAWFARE (July 19, 2018), https://www.lawfareblog.com/what-comes-after-tariffs-ieepa-primer.

[69] *See* Statement from the President Regarding Emergency Measures to Address the Border Crisis" (May 30, 2019), https://www.whitehouse.gov/briefings-statements/statement-president-regarding-emergency-measures-address-border-crisis/.

[70] *See* Scott R. Anderson & Kathleen Claussen, *The Legal Authority Behind Trump's New Tariffs on Mexico*, LAWFARE (June 3, 2019), https://www.lawfareblog.com/legal-authority-behind-trumps-new-tariffs-mexico.

[71] *See infra* notes __ and accompanying text.

[72] *See* Greve & Parrish, *supra* note 22, at 502 (noting the "old statute" problem); Freeman & Spence, *supra* note 25 (same); *see also* Lazarus, *supra* note 58, at 29 (noting that in environmental law "statutory language, drafted years ago, often does not fit with . . . new problems"); David Schoenbrod, *How REINS Would Improve Environmental Protection*, 21 DUKE ENVTL L. & POL'Y F. 347, 347 (2011) (noting that "statutes that empower the agencies are increasingly obsolete").

[73] *See* Rui J.P. de Figueiredo, Jr., *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321, 322 (2002) ("Because of the multiplicity of veto points in the legislative process under a

may often have the power (or even the obligation) to act based upon a prior Congress's preferences that no longer command popular support. In this respect, the lag between delegation and regulation may create a particularly concerning democratic deficit. The values ascendant at the time of enactment may no longer command widespread support. Particular policy concerns, much like given statutory language, may be obsolete.

The problem of temporal lag appears to be worsening.[74] Yet the particular concerns for democratic legitimacy engendered by this temporal lag are important but under-explored in the relevant literature. As detailed in Part II, moreover, these concerns have not received significant attention from either the courts or Congress in the form of efforts to curb, constrain, or control delegated regulatory authority.

II. CONVENTIONAL RESPONSES TO NONDELEGATION

A. Delegation in the Courts

Time and again the Supreme Court has proclaimed that Article I, section 1 of the Constitution vests "all legislative powers" in Congress, and that such power may not be delegated to other branches.[75] Yet this principle has not prevented Congress from delegating substantial policymaking authority to administrative agencies, including the authority to promulgate prescriptive regulations.[76] Rather, as long understood and applied by the Supreme Court, the non-delegation

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separation of powers system, new laws are extremely difficult to pass, for a minority can block new legislation."); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720 (1992) (discussing phenomenon of "vetogates").

[74] *See* Suzanne Mettler, *The Policyscape and the Challenges of Contemporary Politics to Policy Maintenance*, 14 PERSP. ON POL. 369, 379-82 (2016)(noting that frequency of legislative updating or reauthorizing of major statutes appears to have slowed in last few decades).

[75] *See* 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."); Field v. Clark, 143 U.S. 649, 692 (1892) ("That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."); Rao, *supra* note 36, at 1468 ("The Supreme Court consistently affirms the importance of the nondelegation principle to the constitutional structure.").

[76] According to Eric Posner and Adrian Vermeule, this is evidence that "[t]here just is no constitutional delegation rule, nor has there ever been." Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002). Under this view, the only unconstitutional delegation of legislative power would be if Congress sought to delegate the power to vote on legislation or engage in other legislative acts. "A statutory grant of authority to the executive isn't a transfer of legislative power, but an exercise of legislative power." *Id.*at 1723.

doctrine merely requires Congress to articulate an "intelligible principle" to guide an agency's exercise of delegated power.[77]

In principle, this doctrine ensures that Congress remains responsible for the major policy judgments that drive regulatory decisions.[78] In practice, the "intelligible principle" requirement has not done much to constrain delegation to administrative agencies. While Congress may not grant an administrative agency a "blank check" to do anything and everything, virtually anything short of that will do.[79] The Supreme Court has found an "intelligible principle" in statutes authorizing federal agencies to set "generally fair and equitable" prices[80] and to regulate in the "public interest."[81] As Justice Scalia summarized, the Court 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."[82] To the contrary, in the nation's history the Supreme Court has only invalidated two (or maybe three) statutes on non-delegation grounds; both decisions were handed down way back in the 1930s.[83] Thus, it can be said, "the nondelegation doctrine has had only one good year and over two hundred bad ones."[84]

While the nondelegation doctrine has not led to the invalidation of federal statutes, nondelegation concerns appear to have influenced various administrative law doctrines.[85] Most notably, nondelegation

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[77] *See Whitman*, 531 U.S. at 472; *see also* J.W. Hampton Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (holding that delegation is permissible provided that "Congress . . . lay down by legislative act an intelligible principle" to guide the agency).

[78] *See* Loving v. United States, 517 U.S. 748, 757 (1996) ("[T]he delegation doctrine [was] developed to prevent Congress from forsaking its duties."); *see also* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (the doctrine ensures "that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will").

[79] *See, e.g.*, Merrill, *supra* note 30, at 2099 (noting that Congress only may not grant "something approaching blank-check legislative rulemaking authority").

[80] Yakus v. United States, 321 U.S. 414, 420, 426 (1944).

[81] Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943).

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

[83] *See* A.L.A. Schechter Poultry Corp v US, 295 U.S. 495 (1935); Panama Refining Co v Ryan, 293 U.S. 388 (1935). As discussed in note 7 *supra*, some may view *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), as a third instance of a successful nondelegation doctrine challenge.

[84] Posner & Vermeule, *supra* note 76, at 1740 (citing Sunstein, supra note 14, at 322); *see also* Christopher DeMuth, *Can the Administrative State Be Tamed?* 8 J. LEG. ANALYSIS 121, 128 (2016) ("nondelegation was a one-year, two-case wonder").

[85] *See generally* Sunstein, *supra* note 14; *see also* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223; Cass R.

concerns appear to have influenced how the Court interprets statutes that may be understood to delegate authority to regulatory agencies. In particular, under various common canons of construction, courts are not to lightly presume that Congress has delegated authority to agencies that might implicate constitutional concerns, such as by intruding on state prerogatives or infringing upon constitutional rights.[86]

Delegation concerns may also be observed in the Court's application and refinement of the rule announced in *Chevron USA v. Natural Resources Defense Council.*[87] Under the *Chevron* doctrine, courts are to defer to agency interpretations of ambiguous statutory provisions they administer.[88] This doctrine gives agencies the power to define the scope of statutory prohibitions and determine whether given activities are subject to various regulatory schemes. As a consequence, the *Chevron* doctrine would seem to be the source of substantial agency authority, and some have criticized the doctrine on just that basis.[89]

An unconstrained *Chevron* doctrine might raise substantial delegation concerns. Yet, as refined by later decisions, the doctrine actually accommodates nondelegation values. Most notably, *Chevron* deference is only available where courts can conclude that Congress has actually delegated such authority to the agency in question, albeit implicitly or explicitly.[90] As the Court explained just a few years after *Chevron*, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority."[91] This delegation is understood to be connected to an underlying grant of policymaking and implementation authority.[92] Yet just as Congress cannot be presumed to

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Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181 (2018).

[86] Sunstein, supra note 14, at __.

[87] 467 U.S. 837 (1984).

[88] *Id.* at 842-43.

[89] *See*, e.g., HAMBURGER, *supra* note 37.

[90] *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 855 (2001) ("A finding that there has been an appropriate congressional delegation of power to the agency is critical under Chevron."); *see also* Jonathan H. Adler, *Restoring* Chevron*'s Domain*, 81 MISSOURI LAW REVIEW 983 (2016) (discussing the delegation foundation of Chevron and the implications of this approach).

[91] *See* Adams Fruit Co. v. Barrett, 494 U.S. 638, 649 (1990); *see also* U.S. v. Mead Corp., 533 U.S. 218, 226–27 (2001). As Eskridge & Baer observe, "Mead appears to have partially settled the debate within the Court about the conditions for triggering Chevron deference . . . ." William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1123 (2008).

[92] *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016) ("A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme.").

"hide elephants in mouseholes,"[93] delegation must be demonstrated, not merely presumed.

The so-called "major questions" doctrine provides a useful example of how nondelegation concerns have influenced the Court's approach to *Chevron*. As Chief Justice Roberts explained in *King v. Burwell*, *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."[94] Yet not just any gap will do. Where a proffered statutory interpretation would seem to give an agency unnecessarily broad authority, the Court has cautioned that *Chevron* may not apply. Specifically, in cases such as *FDA v. Brown & Williamson* and *King v. Burwell*, the Court has cautioned against deferring to agencies on questions of major economic or political significance.[95] The reason for this, as the Court has explained, is that it would be extremely unlikely that Congress would delegate the responsibility for resolving such questions to administrative agencies.[96] Indeed, Justice Gorsuch explained in his dissent in *Gundy* this Term: "Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[97]

While the nondelegation doctrine itself is not used to invalidate the delegation of such questions to federal administrative agencies, the so-called "major questions" doctrine ensures that broad and consequential delegations are not merely assumed to have implicitly occurred due to a statutory gap or ambiguity. Courts will only recognize such a delegation where Congress has explicitly granted it. In this way, the "major questions" doctrine helps protect against the potential loss of democratic accountability resulting from unduly broad delegations.

However much the "major questions" doctrine may compensate for the potential democratic deficit caused by delegation, it does little to address the time concerns. The "major questions" doctrine focuses on the size and

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[93] *See* Whitman v. American Trucking Ass'ns, 531 U.S. 4567, 468 (2001).

[94] *See* King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 159 (2000)).

[95] *King*, 135 S. Ct. at 2488–89.

[96] *Id*. (holding that the availability of tax credits on exchanges established by the federal government is "a question of deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly").

[97] Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting). Justice Gorsuch also suggested that the "void for vagueness" doctrine is another tool the Court has developed to address nondelegation concerns, illustrating how "[i]t's easy to see, too, how most any challenge to a legislative delegation can be reframed as a vagueness complaint." *Id.; see also* Nathan A. Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1539-40 (2009) (arguing that the delegation of some such major questions might raise constitutional questions).

nature of a delegation. It asks whether the matter in question is of major economic and political significance, or whether it implicates matters beyond the usual concerns and expertise of a given regulatory agency.[98] It does not, however, pay much (if any) attention to how long ago the delegation occurred.

B. Delegation in Congress

Congress has shown little interest in curbing delegation directly, thus foregoing the benefits delegation may provide. Congress, however, has considered, and even adopted, measures to address some of the accountability concerns raised by expansive delegation or to otherwise compensate for the loss of legislative control and political accountability that expansive delegation may bring. Some of these measures address a number of the democratic legitimacy concerns delegation's critics have raised. They do little, however, to address the specific temporal concerns we have identified.

The Legislative Veto

The legislative veto was an early effort to constrain the potential adverse consequences of expansive delegation.[99] Between the 1930s and 1980s, Congress enacted dozens upon dozens of legislative veto provisions within nearly 300 statutes.[100] These provisions enabled Congress to delegate broad legislative-like authority to administrative agencies while retaining the unilateral authority to overturn administrative decisions through legislative action absent presidential assent or a veto-proof majority.[101] The legislative veto also ensured that a later Congress would retain that same ability, should it no longer support the agency's

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[98] Thus, for example, the Court in *King v. Burwell* appeared to be concerned not merely with the magnitude of the question of whether tax credits would be available in federal exchanges, but also whether the Internal Revenue Service, in particular, would be delegated the authority to address such a question. *See* King v. Burwell, 135 S. Ct. 2480, 2489 (2015) ("It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. . . . This is not a case for the IRS." (internal citation omitted)).

[99] JAMES R. BOWERS, REGULATING THE REGULATORS: AN INTRODUCTION TO THE LEGISLATIVE OVERSIGHT OF ADMINISTRATIVE RULEMAKING 20 (1990).

[100] INS v. Chadha, 462 U.S. 919, 944 (1983) (noting the existence of nearly 300 legislative veto provisions) (internal citation omitted).

[101] *See id.* at 974 ("[T]he Executive has . . . [generally] agreed to legislative review as the price for a broad delegation of authority.") (White, J., dissenting); *see also* Michael Herz, *The Legislative Veto in Times of Political Reversal:* Chadha *and the 104th Congress*, 14 CONST. COMMENT. 319, 324 (1997) (noting that the legislative veto was developed "as a means for allowing massive concessions of authority *to* the executive" by ensuring Congress would retain the ability to review and control such delegations).

actions.[102] In this way, the legislative veto addressed the time lag between legislative authorizations and agency actions.

Legislative vetoes, however, are no longer a permissible tool to rein in delegation. In 1983, the Supreme Court in *INS v. Chadha*, invalidated the legislative veto as incompatible with the Constitution's requirement of bicameralism and presentment for legislative action.[103] Overturning an administrative action constitutes a legislative act under the Constitution, and is thus subject to the requirement of bicameralism and presentment.[104] A single chamber of Congress, acting alone, cannot invalidate an action taken by a federal agency pursuant to an otherwise lawful delegation of authority. That is because, the *Chadha* Court held, Article I's bicameralism and presentment clause "represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[105]

Although a unicameral legislative veto is unconstitutional, nothing stops Congress from repealing or overturning regulations, either because Congress prefers different policies or because it believes a given action is improper. The threat of a presidential veto merely increases the vote threshold for taking such actions. Traditional legislative procedures, however, can stymie Congress, even when a majority supports overturning an agency action. "veto gates" and other procedural hurdles may stop Congress from enacting measures altering, redirecting, or rescinding authority previously delegated to an agency.[106] Yet at the same time Congress would be unable or unlikely to reenact the previously delegated authority. After *Chadha*, Congress has more difficulty controlling an agency's actions.

The Congressional Review Act

Concerned that federal agencies may adopt regulations opposed by current legislative majorities, Congress enacted the Congressional Review Act of 1996 (CRA).[107] The CRA created an expedited process for considering joint resolutions to overturn regulations, making it easier for Congress to reject agency actions of which it disapproves.[108] In effect, the

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[102] *Cf.* Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1371 (1977) (analyzing five case studies of the use of legislative vetoes to cabin agency action and arguing against legislation that would make the legislative veto generally available to Congress for any agency rulemaking).

[103] *Chadha*, 462 U.S. 919

[104] U.S. CONST. art. I, § 7, cl. 2–3.

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

[106] *See, e.g.*, William N. Eskridge Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756 (2012); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992).

[107] 5 U.S.C. §§ 801–808 (2006).

[108] 5 U.S.C. § 801(a)(3)(B).

CRA created a means through which Congress can police an agency's exercise of its delegated authority.[109] While it remains difficult for Congress to repeal prior grants of delegated authority, with the CRA Congress can more easily overturn specific exercises of such power. This modestly checks the temporal democratic deficit broad delegations may produce, particularly during the transition between presidential administrations.

But the CRA's ability to address time concerns is limited. This is because Congress can only use the CRA within a relatively short window of time after the promulgation of a major regulation.[110] Under the CRA, before any new rule may take effect the agency must submit a report on the rule to each house of Congress and the Comptroller General.[111] If the regulation is deemed a "major rule"—defined as any rule that the White House's Office of Information and Regulatory Affairs (OIRA) concludes will likely have an annual effect on the economy of $100 million or more, or otherwise have significant effect on consumer prices or the economy[112]—it may not take effect for at least sixty days after its submission to Congress.[113] This waiting period provides Congress with an opportunity to review major rules and consider whether to overturn them. For this purpose, the CRA creates a streamlined procedure for Congress to overturn a major regulation by enacting a joint resolution.[114]

Enacted in 1996, the CRA remained almost completely dormant for its first two decades.[115] Because the CRA resolutions are subject to presidential veto, Congress's only real opportunity to use the CRA is to rescind "midnight regulations" adopted at the end of a presidential administration.[116] Consequently, prior to the election of President Trump,

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[109] *See generally*, Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187 (2018).

[110] The window for congressional action may be extended by an agency's failure to comply with the CRA's reporting requirements. Under the CRA, a new rule is not to take effect until after the rule has been submitted to both houses of Congress and the Comptroller General. *See* 5 U.S.C. § 801(a)(1)(A). Agency submission also starts the review period in which Congress may invoke the CRA's procedures to enact a resolution of disapproval. Were an agency to fail to submit a newly promulgated regulation, as required by the CRA, Congress would appear to retain the ability to revoke that regulation under the CRA. *See* Larkin, *supra* note 109, at 214–15.

[111] 5 U.S.C. § 801(a)(1)(A).

[112] 5 U.S.C. § 804(2).

[113] 5 U.S.C. § 801(a)(3)(A).

[114] 5 U.S.C. § 802.

[115] *See* MORTON ROSENBERG, CONG. RESEARCH SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 6 (2008) (noting through 2008, joint resolutions of disapproval were introduced for fewer than five percent of the regulatory actions to which the CRA procedure could be applied).

[116] *See generally* MAEVE P. CAREY, CONG. RES. SERV., R42612, MIDNIGHT RULEMAKING (2012); Susan E. Dudley, *Reversing Midnight Regulations*, REGULATION, Spring 2001, at 9 [https://perma.cc/7MF2-HFVC].

the CRA was only used once to repeal a regulation: the ergonomics rule adopted by the Occupational Safety and Health Administration during the Clinton Administration.[117] And this regulation was only repealed because it was created at the end of the Clinton Administration, allowing a Republican Congress and the Bush Administration to use the CRA.

As the ergonomics rule illustrates, only those rules adopted near the end of a President's term are vulnerable to CRA repeal.[118] This is because a President is likely to veto any legislative effort to overturn a regulation issued by his own administration.[119] An outgoing administration can protect regulations by ensuring new rules are not issued in the final months of a presidential term. During the last year of the Bush Administration, for example, agencies were instructed to finalize new regulations early enough that they would not be subject to repeal under the CRA during the next administration.[120]

Despite its early quiescence, Congress used the CRA extensively during the first year of the Trump Administration.[121] In 2017, Congress enacted, and the President signed, fifteen resolutions of disapproval revoking major regulations.[122] Fourteen of these rules were "midnight regulations" adopted during the closing months of the Obama Administration. The fifteenth was a rule created in 2017 by the Consumer Financial Protection Bureau (CFPB). A sixteenth resolution of

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[117] Joint Resolution Providing for Congressional Disapproval of the Rule Submitted by the Department of Labor Under Chapter 8 of Title 5, United States Code, Relating to Ergonomics, Pub. L. No. 107-5, 115 Stat. 7 (2001).

[118] Beyond revoking major rules of which Congress disapproves, the CRA can also be used as a political tool to force a vote on potentially controversial regulations, or even to force a presidential veto of a resolution of disapproval. So, for example, Senate Democrats used the CRA to force the Senate to vote on a Trump Administration regulation expanding the definition of short-term health insurance plans and the FCC's final rule rescinding the Open Internet Order, aka "net neutrality."

[119] *See* Nick Smith, *Restoration of Congressional Authority and Responsibility over the Regulatory Process*, 33 HARV. J. ON LEGIS. 323, 326 (1996); *see also* Herz, *supra* note 85, at 323 ("Requiring presidential approval (or a two-thirds majority to override) is hardly a formality.").

[120] *See* Memorandum from Joshua B. Bolten, Chief of Staff, White House, to Heads of Exec. Dep'ts & Agencies (May 9, 2008), http://www.ombwatch.org/files/regs/PDFs/BoltenMemo050908.pdf; *see also* Charlie Savage & Robert Pear, *Administration Moves to Avert Late Rules Rush*, N.Y. TIMES, May 31, 2008, at A1 (noting effect of memo would be to make it more difficult for new Administration to reverse course).

[121] *See generally*, Paul J. Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 16 GEO. J.L. & PUB. POL'Y 505 (2018); *see also* Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1102 (2018) ("[O]utside of the tax reform legislation enacted at the close of the year, Congress's most significant legislative achievement in 2017 may well not be a new law at all. Instead, it is arguably Congress's invocation of the Congressional Review Act . . . .").

[122] *See* Larkin, *Trump and CRA, supra* note 121, at 509.

disapproval—targeting another CFPB rule—was passed, and signed by the President in 2018.[123]

While the CRA may be a useful tool to quickly roll back regulatory measures adopted at the end of one administration, it remains a particularly limited tool for restoring democratic accountability to regulatory policy. The CRA makes it easier for Congress to rescind major rules that are opposed by a contemporary legislative majority, provided the White House agrees or there are enough votes to override a Presidential veto. Even so, with the CRA Congress can better prevent agencies from using prior delegations of authority to enact policies that no longer enjoy political support.

The CRA also gives Congress a targeted means of rescinding prior delegations of authority to regulatory agencies. This is because once a resolution of disapproval is enacted, the rejected rule "may not be reissued in substantially the same form" unless it is subsequently authorized by Congress.[124] In other words, a resolution of disapproval not only rescinds a rule, it also rescinds the specific delegation of authority upon which the agency relied.[125]

The REINS Act

Dissatisfied with the CRA's limited potential to constrain major agency actions that lack political support within Congress, some members of Congress have considered reforms to strengthen the CRA. One such reform is the REINS Act—for "Regulations of the Executive in Need of Scrutiny." This legislation would require congressional authorization for new major rules before they may take effect.[126] Such resolutions of approval would be subject to expedited consideration and streamlined legislative procedures, much like resolutions of disapproval under the CRA.[127] The primary difference is that, while the CRA creates an expedited process for the *disapproval* of major agency rules that would otherwise become final regulations, REINS creates an expedited process for the *approval* of major agency rules that is a precondition for final promulgation, and effectively disables traditional means of obstruction or delay. Specifically, whereas traditional legislation can be bottled up in

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[123] *Id.*

[124] *See* 5 U.S.C. § 801(b)(2).

[125] The precise scope of the CRA's limitation on the promulgation of rules on related subject matter after the adoption of a resolution of disapproval has not yet been tested. *See* Stephen Santulli, *Use of the Congressional Review Act at the Start of the Trump Administration: A Study of Two Vetoes*, 86 GEO. WASH. UNIV. L. REV. 1373 (2018) (discussing potential conflict over what constitutes a rule that is "substantially the same" as one rescinded under the CRA).

[126] For a discussion of the REINS Act, see Adler, *supra* note 21. For a less favorable view, see Siegel, *supra* note 21.

[127] Different versions of the REINS Act have been introduced. For a summary and analysis of the precise legislative language introduced in 2011, see Adler, *supra* note 21, at 21–24.

committee or held up by a determined legislative minority, resolutions of approval under the REINS Act cannot be disposed of without a majority vote.

The REINS Act would address delegation concerns, and the loss of democratic accountability due to the passage of time, in much the same way as a unicameral legislative veto.[128] It would do this, in effect, by rescinding prior delegations of authority to regulatory agencies, so as to eliminate agency authority to promulgate major rules without legislative approval. Instead, agencies would be required to submit "final" rules as proposals for legislative action.

Adopting the REINS Act would make it much more difficult for agencies to rely upon "old statutes" to adopt new policies without legislative approval. In this regard, the REINS Act would begin to address the problem of obsolete or outdated legislative authorizations. It would, however, do this in a purely reactive manner, placing Congress only in the position to reject agency actions. The REINS Act would do little to encourage more proactive or forward-looking legislative engagement with new, emerging, or changing circumstances that might justify federal regulation. This reform would enable Congress to stop new regulatory initiatives that lack sufficient democratic support, but would do nothing to help facilitate a realignment of agency authority with contemporary political preferences. So, for instance, the REINS Act would empower a legislative majority to reject the proposed regulation of greenhouse gases under provisions of the Clean Air Act enacted to address different types of air pollution concerns, but could not be used to amend the statute or create new sources of authority more functionally aligned with the threat posed by the accumulation of greenhouse gases in the atmosphere.

Appropriations and Oversight

Even in the absence of judicial enforcement of the limits on delegation, or legislative enactments to constrain the scope or duration of prior delegations, Congress retains some ability to constrain and direct how agencies use their delegated power. In particular, Congress may use appropriations, the appointments process, and the oversight process to discipline agencies. The function of delegation also provides individual legislators, particularly those on the relevant appropriations committees, with additional opportunities to influence agency behavior.[129]

In his recent book *Congress's Constitution*, Josh Chafetz categorizes Congress's tools outside of regular legislation into six main powers: (1) the power of the purse; (2) the personnel power; (3) contempt of Congress;

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[128] Then-Judge Stephen Breyer and Professor Laurence Tribe both suggested that a congressional approval requirement, such as that proposed in the REINS Act, would be a constitutional way of recreating the unicameral veto mechanism invalidated in *Chadha*. *See* Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785, 793–96 (1984); Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?,* 21 HARV. J. ON LEGIS. 1, 19 (1984).

[129] *See* Rao, *supra* note 36.

(4) freedom of speech or debate; (5) internal discipline; and (6) cameral rules.[130] This congressional toolbox provides Congress with substantial power to monitor, constrain, and shape agency regulatory activity and merit some attention here.

First and perhaps most importantly, there is Congress's power of the purse.[131] While Congress does not regularly revisit past statutes authorizing agency action, Congress still approves the annual appropriations necessary to keep agencies operating. In the process, Congress often enacts measures limiting or directing how agencies may spend appropriated funds.[132]

The appropriations tool is particularly powerful because each chamber of Congress has a veto on federal agency funding in the annual budget process. The appropriations process, moreover, is not subject to the same legislative procedures.[133] Nor do the details of appropriations bills receive as much public attention or debate as substantive legislation.[134] Indeed, the appropriations committees themselves rarely have the same degree of policy expertise as those committees with jurisdiction to enact substantive legislation in a given area.[135] Congress's power of the purse, however, has weakened over the years. This is largely due to the rise of mandatory spending not subject to annual appropriations (69% of the 2016 fiscal year budget), the decline of the House's central appropriations role in the mid-1900s, and Congress's decision to grant some agencies fee-setting authority.[136]

The use of the appropriations process to limit agency action is no substitute for affirmative legislation. Appropriations riders may prevent agency departures from legislatively approved paths, but they cannot

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[130] *See* CHAFETZ, *supra* note 27.

[131] *See id.* at 45–77.

[132] *See id.* at 66–73; *see also* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 111–28 (2012) (explaining the evolution of the appropriations and budget processes into a prominent and "unorthodox" form of legislating).

[133] *See* Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 653 (2006) ("[T]he appropriations process is procedurally distinct from the authorization process in several significant respects. These differences, moreover, have significant ramifications for the kind and substance of the laws that are produced.").

[134] *Id.*

[135] Lazarus, *supra* note 134, at 654; *accord* CHRISTOPHER J. WALKER, FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING 10–11, 38–39 (Admin. Conf. of U.S. ed. 2015); *see also* Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,162 (Dec. 16, 2015) ("Appropriations legislation presents agencies with potential coordination problems as substantive provisions or 'riders' may require technical drafting assistance, but agency processes for reviewing appropriations legislation are channeled through agency budget or finance offices. It is crucial for the budget office to communicate with an agency's legislative counsel office to anticipate and later address requests for technical assistance related to appropriations bills.").

[136] *See* Walker, *supra* note 121, at 1108.

wholly redirect regulatory programs. When Congress sought to complete the Tellico Dam, continued appropriations were not enough to trump the regulatory strictures of the Endangered Species Act.[137] Legislative action was required.[138] Limiting appropriations is an effective way to limit an agency's exercise of delegated power, but it takes more than an appropriation of federal funds to authorize agency action.

Nor does limiting appropriations permanently strip an agency of delegated power. For instance, Republican Congresses in the 1990s repeatedly passed appropriations riders prohibiting the EPA from taking steps toward the regulation of greenhouse gases under the Clean Air Act.[139] While these measures were effective when adopted, they did not eliminate whatever reservoir of authority the EPA retained under the CAA. Prohibiting the EPA from regulating greenhouse gases would require amending the underlying statute. Failure to renew the appropriations riders freed the EPA to apply the CAA to greenhouse gas emissions, but did not make it any easier to turn the decades-old statute into an effective climate change policy instrument. Nor could more climate-concerned congresses use appropriations to upgrade the CAA so as to enable more effective climate policies.

Second, Congress has a potent personnel power. This consists of a suite of tools that includes Congress's role in appointing agency officials, limitations on the president's ability to use acting officers or recess appointments, and Congress's ability to remove officials in the other branches of government.[140] These tools extend beyond approving the president's choice to run a federal agency. For instance, the Senate holds a committee hearing on each nominee and can extract pledges from the nominee about how she will run the agency, including commitments on congressional oversight cooperation. Nominees often have one-on-one meetings with senators, during which additional discussions about the agency's regulatory activities can take place. The Senate can withhold consent, forcing the president to choose a nominee with a different agenda. It can also delay consenting until the agency complies with certain oversight requests or completes (or commits to complete) certain regulatory activities. Alternatively, the Senate committee can refuse to hold the nomination hearing at all.[141]

The final four tools in the congressional toolbox all relate to Congress's ability to conduct oversight of federal agencies. Congress's Article I cameral rules powers allow Congress to set up committees and to grant

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[137] *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

[138] The entire saga of the snail darter and the Tellico Dam is recounted in Zygmunt Plater, *Classic Lessons from A Little Fish in A Pork Barrel-Featuring the Notorious Story of the Endangered Snail Darter and the TVA's Last Dam*, 32 UTAH ENVTL. L. REV. 211 (2012).

[139] See Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000).

[140] *See* CHAFETZ, *supra* note 27, at 78–151.

[141] *See* Walker, *supra* note 121, at 1108–12.

certain investigatory powers, such as subpoena and hearing powers, to those committees and subcommittees.[142] These oversight powers are enhanced by Congress's power to hold Executive Branch officials in contempt for failure to comply with congressional oversight inquiries.[143] That members of Congress have an Article I freedom of speech and debate also allows Congress to make public nonconfidential information from the Executive Branch.[144] Oftentimes the threat of public release alone encourages federal agencies to comply with oversight requests, and can even change agency behavior.[145]

Congress's appropriations and oversight powers are important, and can have a significant effect on how agencies exercise their delegated powers. Indeed, it may be true that today "congressional oversight of agency action is one of the most powerful tools that Congress has to exercise some measure of control over administrative policymaking."[146] Yet the oversight power is inherently limited and, equally important, is necessarily reactive. These tools can help constrain agency actions at odds with contemporary congressional preferences, but are ill suited to effectively update obsolete statutory frameworks.[147] Upgrading or modernizing statues to ensure agencies have those powers necessary to address contemporary concerns requires actual lawmaking.

III. REAUTHORIZATION IN THEORY AND IN PRACTICE

Statutory frameworks need to be revisited if they are to be effective and if they are to reflect contemporary preferences and present understandings. Statutory obsolescence is a perpetual concern (or, at least it should be). The problem of outdated statutory frameworks is particularly acute for those authorizing complex regulatory programs

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142 *See* CHAFETZ, *supra* note 27, at 267–301.

143 *See id.* at 152–98.

144 *See id.* at 201–31. Congress may still constrain the ability of individual members of Congress to leak nonpublic information through Article I's internal disciple powers. *See id.* at 232–66.

145 *See* Walker, *supra* note 121, at 1112–13.

146 *See* Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN . L. REV. 259, 265 (2017); *see also* Alex Acs, *Congress and Administrative Policymaking: Identifying Congressional Veto Power*, AM. J. POL. SCI. (June 2019) (exploring empirically how Congress can use its oversight and appropriations powers to exercise a legislative veto power over agency policymaking).

147 *See* Walker, *supra* note 121, at 1105 (arguing that lawmaking via congressional oversight, as opposed to legislation via the collective Congress, risks "administrative collusion" between individual members of Congress and committees and the federal agencies being overseen); *see also* Rao, *supra* note 36, at 1504 ("By fracturing the collective Congress and empowering individual members, delegation also promotes collusion between members of Congress and administrative agencies."); Walker, *supra* note 42, at 1415–16 (exploring the problem of "administrative collusion" with respect to the role of federal agencies in the legislative process).

operating within ever-changing and evolving contexts. Congressional failure to revise and reconsider the premises on which such programs are based and the ways in which they operate inevitably undermines democratic accountability and compromises effective governance.[148] Either regulatory agencies learn to reinterpret and stretch their existing authority, the underlying statutory framework becomes obsolete, or both.

The distinct temporal problem of broad delegation and related concerns over statutory obsolescence would be addressed if Congress were to return to the practice of enacting substantive legislation on a regular basis. Yet this is easier said than done. Presumably, legislators would legislate if that was their preference. That is, if members of Congress believed the benefits of regular legislating outweighed the costs, then that is how they would behave. For a variety of reasons, including competing demands on legislators' time and alternative ways to invest their political capital, legislators choose not to legislate on a regular basis.

The surest way to change legislative behavior is to change the incentives legislators face, and this is something self-conscious legislators may seek to do. In a wide range of contexts, Congress already enacts laws and adopts procedures with an eye toward altering or ameliorating the incentives future legislators may face.[149] If, as we argue, Congress does not revisit and reevaluate existing statutory frameworks as often as it should, Congress may be able to help solve this problem.

One way Congress may encourage future legislators to revisit existing statutory frameworks on a more regular basis is through the use of "temporary" legislation.[150] Legislation that "sunsets," expires, or otherwise requires regular reauthorization could induce Congress to revisit, reassess, and recalibrate existing programs, so as to ensure that such programs reflect current knowledge, focus on the most salient concerns, and are more in line with contemporary voter preferences.

Limiting the duration of legislative authorization can have broad effects on the incentives faced by legislatures and the actions taken by administrative agencies.[151] Most obviously, limiting the duration of legislation reduces the ability of legislative majorities to entrench their policy preferences and benefits contemporary majorities relative to their predecessors. In the context of regulatory programs, limiting legislative duration tends to strengthen the hand of the legislature relative to the

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[148] *See* Mettler, *supra* note 74, at 370 ("The lack of policy maintenance undermines laws' ability to achieve the purposes for which they were created."); *id.* at 375.

[149] *See generally*, Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

[150] *See generally* Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007).

[151] *See id.* at 248; *see also* Brian Baugus & Feler Bose, *Sunset Legislation in the States: Balancing the Legislature and the Executive* 8–18 (Mercatus Research, Mercatus Center at George Mason University, 2015).

executive.[152] Regular reauthorization, where it occurs, is one way to help keep agency authorizations current and responsive to changing circumstances, evolving understandings, and shifting political coalitions.

Part III.A traces the history of temporary legislation in the United States, whereas Part III.B examines the state of reauthorization today, providing a number of snapshots of legislation that is reauthorized on a regular basis.

A. Temporary Legislation, Sunsets, and Reauthorizations

The idea of temporary legislation is not new. "Temporary legislation," Jacob Gersen has observed, "is a staple of legislatures, both old and modern."[153] Well before the birth of the modern regulatory agency, prominent voices extolled the virtue of legislation that needs to be renewed or revisited. Thomas Jefferson, for instance, argued that vices such as corruption make statutory expiration preferable to relying on the possibility of repeal.[154] In *Federalist No. 26*, Alexander Hamilton argued two-year limits on military appropriations would require periodic deliberation and thereby check potentially unwise policy decisions.[155] Temporary legislation was embraced by colonial legislatures and the early Congress.[156] The Sedition Act of 1798, as enacted, expired in 1801[157] and the first two national banks were created with time-limited charters and allowed to expire as well.[158]

During the New Deal, when Congress set about creating a range of new federal agencies, William Douglas urged consideration of limiting how long Congress's new creations could operate without renewed legislative authorization. Prior to his appointment to the Supreme Court, Douglas advised President Roosevelt to include sunset provisions due to the risk that a new agency would have exhausted its "great creative work" within a decade, and risked falling prey to "inertia" and becoming "a prisoner of bureaucracy."[159] Sunset provisions, in Douglas's view, limit rent-seeking within the administrative state. Theodore Lowi echoed this view in *The End of Liberalism*, in which he urged adoption of a "tenure of statutes" act that would require statutes authorizing administrative

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[152] *See* Gersen, *supra* note 150, at 248.

[153] *Id.* at 298. *See generally* FRANK FAGAN, LAW AND THE LIMITS OF GOVERNMENT: TEMPORARY VERSUS PERMANENT LEGISLATION (2013).

[154] Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *reprinted in* 6 THE WORKS OF THOMAS JEFFERSON 3, 9 (Paul Leicester Ford ed., 1904).

[155] Alexander Hamilton, *The Federalist* No. 26, 139 (ABA ed., 2009).

[156] *See* Gersen, *supra* note 150, at 252–53.

[157] Sedition Act, ch. 74, §4, 1 Stat. 596, 597 (1798).

[158] *See* Act of Feb. 25, 1791, ch. 10, 1 Stat. 191 (1791); Act of Apr. 10, 1816, ch. 44, 3 Stat. 266 (1816).

[159] *See* William O. Douglas, GO EAST, YOUNG MAN, THE EARLY YEARS: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 297 (1974).

agencies to be periodically renewed.[160] The idea was to require periodic reevaluation and review of administrative agencies, so as to provide opportunities to eliminate wasteful or unneeded programs, and bring wayward bureaucracies to heel.

Interest in sunset provisions for administrative agencies peaked in the 1970s, largely in reaction to widespread mistrust of government institutions.[161] Inspired by Lowi, Common Cause pushed for the adoption of "sunset" clauses at the state level.[162] Beginning in Colorado in 1976, this movement quickly spread across the United States.[163] Within five years, sunset statutes of one sort or another had been adopted in thirty-six states.[164] The details of these states varied from state to state, as did the success of these measures.[165] As a general matter, the various state sunset laws required periodic review and reauthorization of state agencies. Some required extensive (and costly) review and evaluation prior to the sunset.[166]

Proposals to adopt an across-the-board sunset provision, such as that proposed by Lowi and (more recently) Philip Howard, have not gotten very far[167]—though earlier this summer the state of Idaho apparently let its entire regulatory code sunset.[168] Yet temporary legislation or time-limited authorization is common. The Voting Rights Act of 1965 and the USA-PATRIOT Act are but two prominent examples of statutes initially enacted with expiration dates; subsequent Congresses revised both during reauthorization.[169] Congress also enacts tax provisions on a time-

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[160] *See* THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES, 309-310 (2D ed. 1979).

[161] *See* Mark B. Blickle, *The National Sunset Movement*, 9 SETON HALL LEGIS. J. 209, 210-11 (1985); *see also* THAD HALL, AUTHORIZING POLICY (2004).

[162] *Id*. at 212; *see also* Chris Mooney, *A Short History of Sunsets*, LEG. AFFAIRS, Jan-Feb 2004.

[163] *See* Blickle, *supra* note 161, at 217.

[164] *See* Richard C. Kearney, *Sunset: A Survey and Analysis of the State Experience*, 50 PUB. ADMIN. REV. 49, 49-50 (1990).

[165] *See* Baugus & Bose, *supra* note 151.

[166] *See* Blickle, *supra* note 161 at 228-29. In some cases, the cost of the periodic review approached or exceeded the cost savings from the termination of unnecessary programs. *Id*.

[167] *See* Philip K. Howard, *Starting Over with Regulation: Why Are Government Rules so Complex? A Guide to a Radically Simpler System*, WALL ST. J. (Dec. 3, 2011), http://online.wsj.com/article/SB10001424052970203833104577070403677184174.html; *see also* PHILIP K. HOWARD, TRY COMMON SENSE: REPLACING THE FAILED IDEOLOGIES OF RIGHT AND LEFT (2019).

[168] *See* James Broughel, *Idaho Repeals Its Regulatory Code*, BRIDGE (May 9, 2019), https://www.mercatus.org/bridge/commentary/idaho-repeals-its-regulatory-code.

[169] *See, e.g.*, Frank H. Easterbrook, et al., *Showcase Panel IV: A Federal Sunset Law*, 16 TEX. REV. L. & POL.339, 353–58 (2012) (comments of William Eskridge) (discussing the Voting Rights Act reauthorization history); John E. Finn, *Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation*, 48 COLUM. J. TRANSNAT'L L. 442, 460–70

limited basis, though this is often done to game the relevant budget rules. In such cases, Congress limits the authorization of new programs when unsure whether a given program or requirement will prove wise or to encourage legislative reconsideration within a given period of time.

There are a host of arguments in favor of sunset provisions in organic statutes. The most obvious—and one championed by now-Judge Guido Calabresi in *A Common Law for the Age of Statutes*—is that sunset provisions increase the likelihood of culling outdated laws, programs, and agencies.[170] Over time things change, and what was once necessary may no longer be. In the alternative, an agency may remain necessary, but in dire need of reform. Sunset provisions *can* serve as an effective oversight tool when properly employed.[171]

Time-limiting statutory authorizations may also facilitate rapid congressional response to apparent crises where there is a perceived need for Congress to act quickly in response to urgent threats, but where Congress may also lack the information necessary to develop the most appropriate response.[172] As Roberto Romano notes, "sunsetting mitigates the predicament of legislating with minimal information and therefore running the risk of getting things seriously and, for all practical purposes, permanently wrong."[173] If anything, Romano understates the value of sunsets, in that even a purportedly well-informed Congress may be misinformed or mistaken. The best understanding of many social problems at the time of legislative action may prove to have been based on faulty premises, erroneous analyses or limited information. Legislation is never enacted with perfect knowledge, enhancing the value of legislative procedures or norms that incentivize regular reengagement with complex statutory regimes.

Being vested in certain instances with some form of legislative, executive, *and* judicial powers, agencies pose a new and unique threat to the separation of powers. Sunset provisions shift the burden of inertia from those in favor of repeal, to those in favor of reauthorization. One result of this is that—provided Congress does not blindly reauthorize an agency—if the agency has drifted from its intended purpose, Congress can modify its authorizing statute. Agency drift can thus be checked.[174]

(2010) (detailing history of USA PATRIOT Act and its reauthorization). *See also* Stephen I. Vladeck, Ludecke*'s Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SEC. L. & POL'Y 53, 59 (2006) (arguing for mandatory reauthorization for statutory Authorization for Use of Military Force (AUMF)).

[170] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). *Compare* Guido Calabresi, *The Nonprimacy of Statutes Act: A Comment*, 4 VT. L. REV. 247 (1979), *with* Jack Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203 (1979).

[171] *See* Blickle, *supra* note 161, at 228-230.

[172] *See* Romano*, supra* note 24, at 96.

[173] *Id.*

[174] *See* Baugus & Bose, *supra* note 151, at 13–18; *see also* George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint,* 84 N.Y.U. L. REV. 174, 182 (2009) (arguing that, in the context of tax and spending

For better or worse, the use of the sunset provision could also increase the probability of an organic statute's passage in the first place. Because sunset provisions increase the probability that an agency or given statutory provision will have a limited lifespan—or at least increase the belief that the agency will have a limited lifespan—legislators may be more willing to allow such measures to pass.[175]

B. Reauthorization Today

When we talk about reauthorization today, we are actually referring to two distinct yet related concepts. First, there is temporary legislation: enabling statutes that authorize a particular federal program or agency to operate for a set time period.[176] Second, there is the authorization of appropriations, which, as the Congressional Budget Office (CBO) has explained, functions to

> authorize the appropriation of funds (generally discretionary) to carry out a program or function established in an enabling statute. An authorization of appropriations constitutes guidance to the Congress about the funding that may be necessary to implement an enabling statute; it may be contained in that enabling statute or provided separately. An authorization of appropriations may be annual, multiyear, or permanent. Such an authorization also may be definite or indefinite: It may authorize a specific amount or "such sums as may be necessary."[177]

As for the former, perhaps more classic version of reauthorization, there is no federal repository that tracks and documents these various forms of temporary legislation—though some scholars have explored specific statutory contexts.[178]

As for the latter, however, Congress requires the CBO to prepare a report each year that documents all federal programs and activities for which authorization of appropriations has already expired prior to, or will

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legislation, "increased use of temporary-effect legislation enhances political accountability and may lead to greater fiscal restraint").

[175] *See* Easterbrook et al., *supra* note 169, at 359 (comments of Frank Easterbrook) (noting "possibility that the same reasons that make laws more likely to expire under a general sunset regime— as the special prosecutor statute eventually did under its statute-specific clause—make it easier to pass laws in the first place").

[176] Gersen, *supra* note 150, at 247 ("[T]emporary legislation merely sets a date on which an agency, regulation, or statutory scheme will terminate unless affirmative action satisfying the constitutional requirements of bicameralism and presentment is taken by the legislature.").

[177] CONG. BUDGET OFFICE, UNAUTHORIZED APPROPRIATIONS AND EXPIRING AUTHORIZATIONS 2 (Mar. 2019) [hereinafter CBO REPORT], https://www.cbo.gov/system/files/2019-03/55015-EEAA.pdf.

[178] *See* Gersen, *supra* note 150, at 255–58 (providing examples and collecting sources); Mettler, *supra* note 74, at 379–83.

expire during, the fiscal year.[179] For instance, in its March 2019 report, CBO identified 971 expired statutory authorizations of appropriations with more than $300 billion for which Congress had appropriated funding for fiscal year 2019.[180] Among the major sources of expired authorizations that have nevertheless been funded are programs under the Veterans' Health Care Eligibility Reform Act of 1996, Housing and Community Development Act of 1992, and the Violence Against Women and Department of Justice Reauthorization Act of 2005.[181] As reported in its searchable data supplement to the 2019 CBO report, nearly two dozen of these 971 authorizations expired in the 1980s, including the Equal Access to Court Act as well as certain authorizations for the Federal Election Commission, the Federal Energy Regulatory Commission, and the Department of Energy's power marketing administration.[182] The CBO, however, does not even attempt to "identify whether an enabling statute governing the relevant program or activity has expired."[183]

The process of (re)authorization of appropriations should not be confused with the appropriations process itself. These are separate legislative processes that originate from distinct committees in Congress.[184] The authorization of appropriations generally goes through the Senate and House subject-matter authorizing committees—the same committees that conduct oversight and consider substantive legislation relating to the particular subject matter, including creating new federal agencies and programs, amending agency governing statutes, and reauthorizing federal agencies and programs when general authorization has expired.[185] The CBO annual report breaks down the details of the

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[179] Congressional Budget Act of 1974, Pub. L. No. 93–344, § 202(e)(3). Copies of these reports, dating back to January 2000, are available here: https://www.cbo.gov/about/products/major-recurring-reports#13.

[180] CBO REPORT, *supra* note 177, at 1.

[181] *Id.* at 6 tbl.4.

[182] The CBO's searchable supplemental data file is available here: https://www.cbo.gov/publication/55015.

[183] CBO REPORT, *supra* note 177, at 2.

[184] *See* GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-54–2-56 (4th ed. 2016) [hereinafter GAO RED BOOK] (differentiating authorization, authorization of appropriations, and appropriations), https://www.gao.gov/legal/appropriations-law-decisions/red-book. For a classic account of the differences between authorization, authorization of appropriations, and appropriations, see Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U.L. REV. 51 (1979).

[185] *See* GAO RED BOOK, *supra* note 184, at 2-55 ("Like organic legislation, authorization legislation is considered and reported by the committees with legislative jurisdiction over the particular subject matter, whereas appropriation bills are exclusively within the jurisdiction of the appropriations committees."); CBO REPORT, *supra* note 177, at 2. *See generally* CHAFETZ, *supra* note 27, at 267–301 (detailing how Congress has used its cameral rules powers to create standing committee to legislate on specific subject matters and oversee the administrative state).

expiration of appropriations by authorizing committee. In the 2019 CBO report, for instance, the Committees on Natural Resources (57 laws; 287 expired appropriations) and Energy and Commerce (49; 135) had the most expired authorizations in the House, whereas the Committees on Health, Education, Labor, and Pensions (40; 227) and Energy and Natural Resources (20; 159) led the way in the Senate.[186] As illustrated below in a number of contexts, this (re)authorization of appropriations process often leads to major substantive modifications of the organic statutes that govern federal agencies and programs.

Appropriations legislation, by contrast, does not go through these authorizing committees. Instead, the House and Senate Committees on Appropriations have exclusive jurisdiction over all discretionary spending legislation in each chamber.[187] Appropriations committees have no authority to authorize federal agencies and programs; indeed, they have an obligation under chamber rules to expressly identify any federal programs to be funded by proposed appropriations legislation that lack an authorization.[188] But in the modern Congress, as Barbara Sinclair, among others, has chronicled, the appropriations and budget processes have evolved into a new and predominant form of unorthodox substantive lawmaking, through the insertion of substantive riders in appropriations legislation that constrain agency action.[189]

Not only do different committees in Congress handle appropriations and authorizations, but it is also generally the case that different officials at the federal agencies handle appropriations (and budgeting) than those who deal with Congress on a regular basis with respect to agency oversight, substantive and technical statutory drafting, and the reauthorization process.[190] Indeed, the Administrative Conference of the United States has identified this agency structure as problematic, recommending that federal agencies "should strive to ensure that the [agency] budget office and [agency] legislative counsel communicate so that legislative counsel will be able to provide appropriate advice on

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[186] *See* CBO REPORT, *supra* note 177, at 3–4 & tbls.1–2.

[187] *See* CHAFETZ, *supra* note 27, at 45–77 (providing an overview of Congress's appropriations "power of the purse").

[188] CBO REPORT, *supra* note 177, at 2.

[189] SINCLAIR, *supra* note 132, at 111–28; *accord* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84–91 (2006) (detailing the use of appropriations riders to substantively constrain federal agency action); Lazarus, *supra* note 134. *See also* GAO RED BOOK, *supra* note 184, at 2-59 (discussing how "despite the occasional comment to the contrary in judicial decisions . . ., Congress can and does 'legislate' in appropriation acts").

[190] One of us documents and explores this agency organizational phenomenon in CHRISTOPHER J. WALKER, FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING 30–31, 38–39, 48–89 (Admin. Conf. U.S. ed., (2015), http://ssrn.com/abstract=2655901.

technical drafting of substantive provisions in appropriations legislation."[191]

If nearly one thousand federal programs lack reauthorization of appropriation, how do they continue to operate? After all, since the 1800s, both chambers of Congress have adopted rules that prohibit the appropriation of funding for unauthorized or expired purposes.[192] For instance, current House rules detail that "[a]n appropriation may not be reported . . . for an expenditure not previously authorized by law . . . ."[193] The Senate has a similar rule.[194] To block unauthorized appropriations, however, a point of order must be raised.[195] Apparently these points of order are never raised during the legislative proceedings. And, if they were, the Speaker of the House and the Presiding Officer of the Senate, respectively, would have to rule on whether the appropriation lacks authorization.[196]

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[191] Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,163 (Dec. 16, 2015); *see also id.* at 78,162 ("Appropriations legislation presents agencies with potential coordination problems as substantive provisions or 'riders' may require technical drafting assistance, but agency processes for reviewing appropriations legislation are channeled through agency budget or finance offices. It is crucial for the budget office to communicate with an agency's legislative counsel office to anticipate and later address requests for technical assistance related to appropriations bills. Agencies have taken a variety of approaches to address this issue, ranging from tasking a staffer in an agency legislative counsel office with tracking appropriations bills; to holding weekly meetings with budget, legislative affairs, and legislative counsel staff; to emphasizing less informally that the offices establish a strong working relationship.").

[192] *See* Walt Lukken, *Reauthorization: Let the Debate Begin*, 24 NO. 6 FUTURES & DERIVATIVES L. REP. 1 (2004) ("Dating back to the 19th century, House and Senate rules have generally banned appropriating monies for non-authorized purposes and have subjected the legislation containing an unauthorized appropriation to a procedural point of order on the House and Senate floors."); *accord* CBO REPORT, *supra* note , at 2 n.3. *See generally* JAMES V. SATURNO & BRIAN T. YEH, CRS REPORT, AUTHORIZATION OF APPROPRIATIONS: PROCEDURAL AND LEGAL ISSUES (Nov. 30, 2016).

[193] H.R. Rule 21(2)(a)(1) (116th Cong., Jan. 11, 2019).

[194] Senate Rule 16, https://www.rules.senate.gov/rules-of-the-senate.

[195] *See, e.g.*, Lukken, *supra* note 192, n.3 ("Rule 21 of the House of Representatives and Rule 16 of the Senate generally prohibit the inclusion of unauthorized appropriations in appropriation and other legislation. However, these rules are not self-enforcing. Members of each body must raise a point of order at the appropriate time to enforce the rules. If a point of order is not raised, the unauthorized appropriation will continue through the legislative process."); *accord* GAO RED BOOK, *supra* note 184, at 2-55–2-56.

[196] *See* CBO REPORT, *supra* note 177, at 2 ("Whether an appropriation lacks authorization and whether it is in violation of a House or Senate rule are determined by the Speaker of the House or the Presiding Officer of the Senate on the basis of advice from the relevant chamber's Office of the Parliamentarian."); SATURNO & YEH, *supra* note 192, at 4–7 (detailing House and Senate procedures for raising a point of order with respect to appropriation without authorization).

That many lapsed authorizations of appropriations are still funded does not mean Congress never engages in reauthorization. The remainder of this part details eight prominent reauthorizations that continue to take place.

Farm Bill. Perhaps the most-known reauthorization legislation is the Farm Bill. A product of the Great Depression,[197] this omnibus bill delegates a wide range of authority to the U.S. Department of Agriculture (USDA).[198] Typically, the Farm Bill requires reauthorization every five years.[199] The most recent reauthorization occurred last year, in the form of the Agriculture Improvement Act of 2018.[200] The Act includes some reforms[201] and repeals,[202] while reauthorizing many provisions by simply amending their dates of expiration.[203] For some provisions, reauthorization came after expiration.[204] Lately, such lapses are not uncommon. For instance, the previous iteration of the Farm Bill, the Agricultural Act of 2014, passed two years after the expiration of its predecessor.[205] In the interlude, Congress first partially extended the 2008 Farm Bill through an appropriations continuing resolution, then extended the full Act in unaltered form through 2013.[206]

When Congress fails to reauthorize the Farm Bill, expiration has various consequences. Discretionary provisions and the food stamps SNAP program can be continued through appropriations bills.[207] For most mandatory provisions of a Farm Bill, however, expiration can halt new activities and even cause operations to entirely cease.[208] A long enough expiration will lead to a "permanent law" reset.[209] This means that all the provisions and amendments that required reauthorization lose the force of law, leaving in effect only the permanent provisions on which the modern Farm Bill was built.[210] This is a poison pill for all affected parties, as the statutory and regulatory scheme essentially reverts back to that dictated by the first Farm Bill, the Agricultural Adjustment Act of 1933.

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197 NORKIEWITZ & NITSHE, *supra* note 140, at 1.

198 National Institute of Food and Agriculture, *The Farm Bill*, UNITED STATES DEPARTMENT OF AGRICULTURE, https://nifa.usda.gov/farm-bill (last visited June 21, 2019).

199 NORKIEWITZ & NITSHE, *supra* note 140, at 1.

200 Agriculture Improvement Act of 2018, H.R. 2, 115th Cong. (2018).

201 *E.g.*, *id.* tit. VI, § 6503.

202 *E.g.*, *id.* tit. II, § 2812.

203 *E.g.*, *id.* tit. I, § 1402.

204 *E.g.*, *id.* tit. I, § 1402(a) (amending 7 U.S.C. § 8772(e)(1) (2014)).

205 Food, Conservation, and Energy Act of 2008, H.R. 2419, 110th Cong. (2008) (enacted) (preamble).

206 JIM MONKE, RANDY ALISON AUSSENBERG, MEGAN STUBBS, CONG. RESEARCH SERV., R42442, EXPIRATION AND EXTENSION OF THE 2009 FARM BILL 5-6 (2013).

207 *Id.* at 1, 3.

208 *Id.* at 3.

209 *Id.* at 3, 7.

210 *Id.* at 7.

This broadly undesirable default baseline appears to provide ample incentive for the regular reauthorization of the Farm Bill.

Federal Aviation Administration. Last year Congress recently reauthorized the Federal Aviation Administration (FAA) for five years.[211] This reauthorization contains a mix of power reauthorizations and appropriations reauthorizations.[212] These reauthorizations occurred in a somewhat similar way to the Farm Bill. Specifically, the FAA Reauthorization Act of 2018 simply amended the relevant subsections of title 49 of the United States Code by striking "2018," and inserting "2023" into the text.[213] Certain sections also amended the maximum authorized appropriations for each given year.[214]

And, like the Farm Bill, the FAA Reauthorization Act includes substantive changes. Some changes seem minor, such as authorizing the Secretary of Transportation to conduct a study assessing the future of airport financing and infrastructure.[215] Other changes, however, aim at updating agency authority to address new technologies, including the establishment of new conditions for recreational drone use.[216] Other legislative reforms, moreover, appear to respond to democratic wishes, such as the reauthorization's articulation of standards to improve passenger experience on commercial airlines.[217]

No Child Left Behind. Unlike the Farm Bill or the FAA reauthorization, the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001, does not contain any general authority sunset provisions; it is only constrained by its limited appropriations authorization period.[218] When Congress passed the No Child Left Behind Act of 2001, it amended ESEA by extending various appropriations authorizations through 2007,[219] while also substantively modifying the ESEA, most notably by implementing standardized tests as a means of assessing student development.[220] But when it came time to reauthorize appropriations, Congress failed to do so. Therefore, in 2008, the ESEA received a one-year automatic extension of the 2007 appropriation level pursuant the General Education Provisions

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211 FAA Reauthorization Act of 2018, H.R. 302, 115th Cong. div. B. tit. I (2018) (enacted).

212 *Compare id.* div. B. tit. I, § 111(a), *with id.* div B. tit. I, § 111(b).

213 *E.g.*, *id.* div. B. tit. I, § 111(b).

214 *E.g.*, *id.* div. B. tit. I, § 113(a).

215 *Id.* div. B. tit. I, § 122.

216 *See* Fed. Aviation Admin., *FAA Reauthorization Bill Establishes New Conditions for Recreational Use of Drones* (Oct. 18, 2018), https://www.faa.gov/news/updates/?newsId=91844.

217 *See* Ashley Halsey III, *Senate Gives Final Approval for FAA Reauthorization, Sends Bill to White House*, WASH. POST (Oct. 3, 2018), https://www.washingtonpost.com/transportation/2018/10/03/senate-gives-final-approval-faa-reauthorization-sends-bill-white-house/?utm_term=.a6857e565732.

218 No Child Left Behind Act of 2001, H.R. 1, 107th Cong. (2001) (enacted).

219 *Id.* at tit. VIII, § 805.

220 20 U.S.C. § 6311(b) (2002).

Act.[221] After that, and without reauthorizing appropriations for ESEA, Congress simply continued to provide the programs with funding through appropriations legislation.[222] Not until Congress passed the comprehensive Every Student Succeeds Act of 2015, reauthorizing appropriations through 2020, did these unauthorized appropriations come to an end.[223]

Pipeline Safety Act. Beginning with the Natural Gas Pipeline Safety Act of 1968, Congress authorized the Secretary of Transportation to regulate pipeline safety standards.[224] While this authority has no sunset, the Act only authorized appropriations for three years.[225] Congress routinely amends the appropriations authorization date, while also periodically including substantive changes, most notably in the Pipeline Safety Act of 1979,[226] the Pipeline Safety Reauthorization Act of 1988,[227] and the Pipeline Safety Improvement Act of 2002.[228] In 2004, Congress also created the Pipeline and Hazardous Materials Safety Administration.[229] This administration's enabling statute likewise lacks a sunset provision for its general authority, but also lacks an appropriations authority sunset.[230]

FDA User-Fee Programs. The FDA user-fee programs exemplify how regular reauthorization can run smoothly. Beginning in the 1990s, Congress passed several Acts authorizing the FDA to implement user-fee programs, which provide funds to improve the efficiency of relevant operations.[231] These programs must be and have been reauthorized every five years.[232] Most recently, with the FDA Reauthorization Act of 2017, four of these user-fee programs were reauthorized into 2022 as a

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[221] CONGRESSIONAL RESEARCH SERVICE, RL 33749, THE NO CHILD LEFT BEHIND ACT: AN OVERVIEW OF REAUTHORIZATION ISSUES FOR THE 111TH CONGRESS 19 (2009).

[222] *Id.*; *accord* CONGRESSIONAL RESEARCH SERVICE, R44297, REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT: HIGHLIGHTS OF THE EVERY STUDENT SUCCEEDS ACT 1 (2015).

[223] CONGRESSIONAL RESEARCH SERVICE, R44297, REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT: HIGHLIGHTS OF THE EVERY STUDENT SUCCEEDS ACT 1 (2015); Every Student Succeeds Act, S. 1177, 114th Cong. §§ 1002, 3002, 7013, 9106 (2015) (enacted).

[224] Natural Gas Pipeline Safety Act of 1968, S. 1166, 90th Cong. (1968) (enacted) (preamble).

[225] *Id.* at § 15.

[226] Pipeline Safety Act of 1979, S. 411, 96th Cong. (1979) (enacted).

[227] Pipeline Safety Reauthorization Act of 1988, H.R. 2266, 100th Cong. (1988) (enacted).

[228] Pipeline Safety Improvement Act of 2002, H.R. 3609, 107th Cong. (2002) (enacted).

[229] 49 U.S.C. § 108 (2004).

[230] *Id.*

[231] *See, e.g.*, CONG. RESEARCH SERV., RL33914, THE PRESCRIPTION DRUG USER FEE ACT: HISTORY THROUGH THE 2007 PDUFA IV REAUTHORIZATION 1 (2008).

[232] *E.g.*, 49 U.S.C. § 108 (2004).

collective.[233] The Act also updated the enabling statutes for these and other programs through clarifying revisions[234] and some substantive modifications.[235] While none of the revisions appear to be comprehensive, the routine reauthorizations keep these user-fee programs fine-tuned and in good working order.[236] Reauthorization occurs regularly because the failure to reauthorize would revert the FDA drug approval process based solely on congressional appropriations—wholly inadequate to timely process drug approval requests—and would require the FDA to lay off agency officials whose salaries the user fees fund.[237] The Government Accounting Office reported that if the 1997 reauthorization did not occur, the FDA would have to reduce its workforce by 700 full-time equivalents for a total of 1,977 employees.[238]

Export-Import Bank. The Export-Import Bank (EXIM Bank) is another agency requiring periodic reauthorization. The EXIM Bank first became an independent agency at the close of the Second World War with the Export-Import Bank Act of 1945.[239] The Act required and continues to require periodic reauthorization.[240] The most recent reauthorization occurred in 2015 as part of the larger FAST Act.[241] This reauthorization actually came five months after the EXIM Bank's authority lapsed, the longest such lapse in the EXIM Bank's history.[242] In 2012, the EXIM Bank had been reauthorized through 2014, and then into early 2015 with an appropriations continuing resolution.[243] When the EXIM Bank's authority lapsed for five months in 2015, it lost the ability to conduct new business.[244] However, the EXIM Bank could continue servicing incurred assets and obligations.[245] When it was eventually reauthorized through

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233 FDA Reauthorization Act of 2017, H.R. 2430, 115th Cong. (2017) (enacted) (preamble).

234 *E.g.*, *id.* § 302(3).

235 *E.g.*, *id.* § 203(f).

236 *See, e.g.*, Amanda Rae Kronquist, *The Prescription Drug User Fee Act: History and Reauthorization Issues for 2012*, BACKGROUNDER, at 3–5 (Dec. 21, 2011) (summarizing key changes with each reauthorization), http://thf_media.s3.amazonaws.com/2011/pdf/bg2634.pdf.

237 *See* Letter from Bernice Steinhardt, Government Accountability Office, to Sen. James Jeffords re PDUFA: Information About Reauthorization (July 21, 1996), https://www.gao.gov/assets/90/86843.pdf.

238 *Id.* at 1.

239 EXPORT-IMPORT BANK, *Full Historical Timeline*, https://www.exim.gov/about/history-exim/historical-timeline/full-historical-timeline (last visited June 21, 2019).

240 12 U.S.C. § 635f.

241 FAST Act, H.R. 22, 114th Cong. § 54001 (2015) (enacted).

242 EXPORT-IMPORT BANK, *supra* note 217.

243 MARK THORUM, EXPORT-IMPORT BANK, OIG-EV-17-02, REPORT ON EXIM BANK'S ACTIVITIES IN PREPARATION FOR AND DURING ITS LAPSE IN AUTHORIZATION (2017) (executive summary).

244 *Id.*

245 12 U.S.C. § 635f.

September of 2019 as part of the FAST Act,[246] the reauthorization came alongside substantive reforms.[247] For instance, the EXIM Bank is now required to hold a five percent reserve ratio[248] and appoint a chief risk officer.[249] This most recent reauthorization is yet another example of how sunset provisions can lead to the continued modification and modernization of federal agencies.

CFTC. The Commodity Futures Trading Commission (CFTC) is an example of an agency that does not have a statutory sunset but has required periodic reauthorization of appropriations.[250] Congress created the CFTC in 1974.[251] Congress limited the CFTC by only authorizing appropriations through 1978.[252] The appropriations authorization has been continually amended over time.[253] And the CFTC has operated without authorization of appropriations at least five times during its almost half-century existence.[254] Indeed, Congress has not reauthorized appropriations for the CFTC since 2008; such authorization expired in 2013.[255] Even so, Congress continues to appropriate funds to the CFTC through appropriations bills.[256]

PATRIOT Act. The history of the Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act) illustrates the versatility of sunset provisions. The PATRIOT Act was born of chaos and tragedy. It was hastily signed into law in response to the 9/11 terrorist attacks.[257] The Act clothed the government with immense authority to counter the terrorist threat.[258] Perhaps due to the emergency nature of the legislative response, Congress included a sunset

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246 *Id.*

247 FAST Act, H.R. 22, 114th Cong. § 51002 (2015) (enacted).

248 12 U.S.C. § 635e(b).

249 12 U.S.C. § 635a(l).

250 Commodity Futures Trading Commission Act of 1974, H.R. 13113, 93rd Cong. § 101 (1974) (enacted).

251 *Id.*

252 *Id.*

253 *See* 7 U.S.C. § 16(d).

254 *See* Lukken, *supra* note 192, n.4 ("The CFTC has operated without authorization five times during its 30-year history: from September 30, 1982 to January 11, 1983; from September 30, 1986 to November 10, 1986; from September 30, 1989 to October 28, 1992; from September 30, 1994 to April 21, 1995; and from September 30, 2000 to December 21, 2000.").

255 7 U.S.C. § 16(d) ("There are authorized to be appropriated such sums as are necessary to carry out this chapter for each of the fiscal years 2008 through 2013."). *See generally* RENA S. MILLER, CRS REPORT, COMMODITY FUTURES TRADING COMMISSION: PROPOSED REAUTHORIZATION IN THE 115TH CONGRESS (Sept. 29. 2017), https://fas.org/sgp/crs/misc/R44733.pdf.

256 *E.g.*, Consolidated Appropriations Act, H.J.Res.31, 116th Cong. div. C, tit. V. (2019) (enacted).

257 *See* Brian Duignan, *USA PATRIOT Act*, BRITANNICA, (last visited June 25, 2019) https://www.britannica.com/topic/USA-PATRIOT-Act.

258 *See id.*

requirement for most of the statutory provisions concerning enhanced surveillance.[259] Those sections were set for a 2005 sunset.[260]

This sunset spurred Congress to debate the future of the PATRIOT Act. The debate culminated in Congress passing numerous reforms.[261] At the same time, Congress repealed the sunset requirement for fourteen of the sixteen previously covered sections and made those sections permanent.[262] A sunset was retained for amendments to the Foreign Intelligence Surveillance Act of 1978 (FISA), which authorized "roving" surveillance and business records requests.[263] Another section, originating in the Intelligence Reform and Terrorist Prevention Act of 2004, also retained its sunset provision.[264] Congress reauthorized these sections until the end of 2009.[265]

By 2009, Democrats controlled Congress and the White House. When it came time to address the expiring sections of the PATRIOT Act, Congress failed to pass any comprehensive legislation.[266] Instead, the sections received one-year temporary extensions through a defense appropriations bill.[267] Then, with the PATRIOT Sunsets Extension Act of 2011—and without any substantive alteration—Congress extended their sunset by "striking 'May 27, 2011' and inserting 'June 1, 2015'."[268] Nearly fourteen years after 9/11, Congress once again watched the sun begin to set on the roving surveillance and business-records sections of the PATRIOT Act. After allowing the sections to expire for one day,[269] Congress passed the USA FREEDOM Act of 2015, the current law.[270] The

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[259] USA PATRIOT ACT of 2001, H.R. 3162, 107th Cong. § 224 (2001) (enacted).

[260] *Id.*

[261] *E.g.*, USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, 109th Cong. § 108 (2005) (enacted).

[262] *Id.* at § 102.

[263] *Id.*; U.S. Department of Justice, FACT SHEET: USA PATRIOT ACT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005, OPA 06-113, (March 2, 2006), https://www.justice.gov/archive/opa/pr/2006/March/06_opa_113.html.

[264] USA PATRIOT Improvement and Reauthorization Act of 2005, H.R. 3199, 109th Cong. § 103, (2005) (enacted).

[265] *Id.*

[266] Rachel L. Brand, *Reauthorization of the USA PATRIOT Act*, THE FEDERALIST SOCIETY (Jan. 20, 2010), https://fedsoc.org/commentary/publications/reauthorization-of-the-usa-patriot-act.

[267] *Id.*

[268] PATRIOT Sunsets Extension Act of 2011, S. 990, 112th Cong. § 1(a) (2011) (enacted).

[269] Jeremy Diamond, *Patriot Act provisions have expired: what happens now?*, CNN (June 1, 2015), https://www-m.cnn.com/2015/05/30/politics/what-happens-if-the-patriot-act-provisions-expire/index.html?r=https%3A%2F%2Fwww.google.com%2F.

[270] USA FREEDOM Act of 2015, H.R. 2048, 114th Cong. (2015) (enacted).

Act extended the sunsets by roughly four-and-a-half years until December of 2019.[271] It also modified FISA substantially.[272]

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These eight snapshots of regular reauthorization processes merit more in-depth exploration, as they identify a number of best practices could be adopted, and challenges that could be avoided, in reform efforts to implement a more-ambitious reauthorization process in Congress. We return to those implementation details in Part IV.

IV. REAUTHORIZATION AS A TOOL TO ADVANCE NONDELEGATION VALUES

As we have argued in this Article, the lack of legislative action with respect to decades-old broad delegations of policymaking authority to the regulatory state poses an overlooked, temporal delegation problem. As detailed in Part I, the EPA's attempt to regulate climate change and the FCC's attempt to regulate the internet provide vivid illustrations of this problem: In both circumstances, the federal agencies have relied on sources of authority granted by a prior Congress that never contemplated the regulatory problem; and in both circumstances, the agencies may be exercising that decades-old broad delegation in ways that a majority of the current Congress may not prefer.

This temporal delegation problem, however, has taken on added significance with the fall of lawmaking by legislation and the rise of lawmaking by regulation. Although counting words, pages, and laws is by no means a flawless method for capturing the extent of this trend in federal lawmaking, it provides at least an imperfect snapshot. For instance, by the end of 2016, the Code of Federal Regulations exceeded 175,000 pages, 100 million words, and tens of thousands of agency rules.[273] In 2016, federal agencies reached a new regulatory record by filling over 95,000 pages of the Federal Register with adopted rules, proposed rules, and notices—nearly 20% more than the 80,000 or so pages published in 2015.[274] Roughly two-fifths of those pages in 2016 were

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[271] *Id.* § 705.

[272] *E.g.*, *id.* § 101(a)(3)(C).

[273] *See* CLYDE WAYNE CREWS JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 19, 20 fig.14 (2017), https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202017.pdf (reporting the total pages at the end of 2016 as 185,053). Apparently, it would take more than three years and three months for one employed full time to read the entire Code of Federal Regulations. *See* Mercatus Center, *QuantGov Regulatory Clock*, QUANTGOV, https://quantgov.org/charts/the-quantgov-regulatory-clock/ (reporting 103,415,230 words and 1,084,666 regulatory restrictions in the Code as of October 3, 2018, with time based on reading 250 words per minute in a full-time job).

[274] CREWS, *supra* note 273, at 59 (reporting the total pages at the end of 2016 as 97,069, compared to 81,402 pages at the end of 2015). Of the 97,069 pages in 2016, 1,175 were blank. *Id.*

devoted to 3,853 final rules, an increase from the 3,410 final rules federal agencies promulgated in 2015.[275] By contrast, the 114th Congress, over that same two-year period, enacted just 329 public laws for a total of 3,036 pages in the Statutes at Large.[276]

In other words, we live in an era when the vast majority of federal lawmaking does not take place in Congress, but within the hundreds of federal agencies spread across the modern regulatory state. And such lawmaking is often taken under authority Congress delegated decades before based on legislative compromises to address different problems. One obvious, potential solution to this time problem of delegation would be for Congress to legislate more regularly—especially to more jealously guard the power it delegates to the President and the regulatory state.

Do not hold your breath that Congress will resume such legislative activity on its own, at least not on a voluntary basis. Nor is exhortation enough. The costs of regular legislative activity to members of Congress apparently outweighs its benefits and the accompanying costs of dealing with statutory obsolescence. But some form of temporary legislation or mandatory reauthorization could help force Congress to take its legislative role more seriously.

As detailed in Part III, the idea of temporary legislation or regular reauthorization is not new. On the contrary, it even predates the founding, with firm roots in the colonial era.[277] Congress has used it over the years in a variety of contexts, such as national security[278] and economic policy.[279] Though, mandatory reauthorization requirements are often ignored during the appropriations process.[280]

This Part explores how Congress could better use this longstanding legislative tool to mitigate the democratic deficits that accompany broad delegations of lawmaking authority to federal agencies. This discussion is inevitably preliminary, focusing on the bigger-picture framing and leaving the implementation details to those with more expertise in the legislative process. Part IV.A sketches out the various tools Congress could use to force regular reauthorization, whereas Part IV.B grapples with potential objections to Congress's use of this reauthorization toolbox.

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[275] *See id.* at 17, 75. *See generally* MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 18 tbl.6 (2016) (providing year-by-year statistics on the content of the Federal Register by pages and actual numbers of proposed and final rules).

[276] *Compare* Terrorism Risk Insurance Program Reauthorization Act of 2015, Pub. L. No. 114-1, 129 Stat. 3 (2015), *with* American Innovation and Competitiveness Act, Pub. L. No. 114-329, 130 Stat. 2969, 3038 (2017) (reflecting the number of pages taken up with public laws).

[277] *See* Gersen, *supra* note 135, at 252–53.

[278] *E.g.*, USA PATRIOT ACT of 2001, H.R. 3162, 107th Cong. § 224 (2001) (enacted).

[279] *E.g.*, Act of Feb. 25, 1791, ch. 10, 1 Stat. 191 (1791).

[280] *E.g.*, CBO REPORT, *supra* note 177, at 1.

Part IV.C explores a number of potential side benefits that this legislative toolbox will produce beyond addressing the delegation issue.

A. Implementation of Regular Reauthorization Regime

When it comes to implementing a regular reauthorization regime, there are two main issues: the breadth of the reauthorization mandate; and the means to encourage congressional compliance with the reauthorization requirement.

Breadth of Reauthorization Mandate

History gives us a number of alternatives—some more sweeping than others—for tailoring the breadth of the reauthorization mandate. As Thomas Merrill has remarked, "[s]unset provisions come in various forms. They can apply to entire statutes, to particular statutory provisions, to agency regulations and programs, or to administrative agencies themselves."[281] On the one extreme, Congress could consider enacting a universal sunset statute that would require the reauthorization of any federal agency or program within a certain number of years. As discussed in Part III.A, many state sunset laws, for instance, applied across the board. The failure to reauthorize would lead the sun to set on the entire agency or program, thus barring any subsequent appropriation.

This one-size-fits-all approach would be bold, yet foolish.[282] It would certainly need to be designed to avoid the dramatic bottleneck Congress would encounter in potentially having to reauthorize everything at once. The legislation would need to spread out the reauthorization requirements over a number of years, taking into account the work of each authorizing committee.

Congress can and should be more nimble in its reauthorization approach. Statutes vary, and action-forcing reforms may not be appropriate for all regulatory contexts.[283] For some federal programs and perhaps some entire federal agencies, it might make sense to incorporate express sunset provisions. Such a blanket sun-setting threat would force Congress to take a fresh look at the agency's regulatory activities and whether the program or agency continues to effectively fulfill the purpose for which Congress created it.

A narrower program- or agency-specific sun-setting approach has the additional benefit of involving the House and Senate authorizing committees in deciding whether to include, and how to design, the sunset

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[281] Easterbrook et al., *supra* note 169, at 347 (comments of Thomas Merrill).

[282] *Accord id.* at 358 (comments of William Eskridge) (observing that "sunsetting is not a one-size-fits-all solution" and that "[i]t may work better for some statutory schemes than for others").

[283] For an example of how different sorts of lawmaking reforms might be best suited to different sorts of problems, see Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009) (exploring the sorts of legislative precommitment strategies that might be most suited to addressing the problem of climate change).

provision. These committees are the same that exercise oversight functions over the particular programs, agencies, and subject matters, and thus are in a better position to tailor sunset provisions that take into account the unique characteristics of the particular regulatory areas. One critical decision the authorizing committees will need to make is the size of the authorization window before the sunset. For some regulatory contexts, that window will be quite small, perhaps even within the same presidential administration. As Romano has argued, such short time limits may be particularly appropriate for new, temporary, or emergency-driven agency programs.[284] For others, however, one could imagine a larger window of five, seven, ten, or even more years. A longer time horizon may be particularly appropriate where new administrative programs require an extended period of time to implement or when the agency programs might generate too much uncertainty or brinksmanship for continuing programs. Indeed, such considerations may counsel against the inclusion of any sunset provision.

Congress, moreover, does not face a binary choice between a complete sunset of an agency/program or permanent legislation. It may also incorporate statutory sunset defaults, to which the agency or program resets if not reauthorized. For instance, in 2015, when Congress failed to reauthorize the EXIM Bank for the first time in 81 years, the result was not the agency's closure.[285] Instead, the expiration of authorization merely resulted in the agency being unable to take on new customers; it would continue to have statutory authority to service existing customers.[286] It is also worth noting that that particular lapse in authorization lasted only a matter of months, and the reauthorization resulted in a number of important legislative reforms to the agency[287] and another (roughly) four years until the next sunset deadline.[288]

In some regulatory contexts, it might be advantageous to set the sunset default as something that would force Congress to revisit and reauthorize the agency or program. In the case of regulatory agencies, the lack of authorization could mean that an agency lacks the ability to act with the force of law. In effect, without a valid authorization, it could not be said that the agency has been delegated such authority.

Authorization for the Clean Air Act, to take one example, expired in 1998. Under this hypothetical proposal, the EPA would lack the ability to promulgate new regulations, issue new permits to regulated facilities, and perhaps even initiate new enforcement actions unless and until the Act was reauthorized. The expired authorization would not affect the validity of regulations already promulgated, however, nor would it prevent state-level enforcement under previously approved state implementation plans

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[284] *See* Romano, *supra* note 24.
[285] EXPORT-IMPORT BANK, *supra* note 217.
[286] *See* THORUM, *supra* note 221.
[287] *E.g.*, 12 U.S.C. § 635e(b); 12 U.S.C. § 635e(l);
[288] 12 U.S.C. § 635f.

or the filing of citizen suits against facilities for violating existing permits, regulations, or statutory provisions. Such a state of affairs would provide ample incentive for environmentalist organizations and regulated firms to support reauthorization as each would find the default baseline undesirable—thus providing Congress with the opportunity and, indeed, the need to revisit and reconsider particularly obsolete or ineffective provisions in the law, much as has occurred with the Farm Bill.

Similarly, in the immigration context, perhaps Congress would tie reauthorization together for the U.S. Immigration and Customs Enforcement (ICE) and the U.S. Citizenship and Immigration Services (USCIS). Failure to reauthorize could result in these agencies being unable to issue new removal orders and new visa and work permits for those who are presently inside the United States, while preserving the agencies' ability to regulate such matters at entry and exit to the country. In that sense, such a sunset default is reminiscent of the "hammer" provisions Congress has incorporated into certain rulemaking processes where an automatic agency action is triggered if the agency does not finish the rulemaking within the statutorily mandated deadline.[289]

The idea, in other words, would be to set the default to avoid catastrophic outcomes while still imposing significant costs on politically diverse groups so as to increase political pressure and swift congressional action. And, again, the authorizing committees would lead the way to craft such sunset defaults, leveraging their expertise in the subject matter that the committees gained through their oversight efforts. Sunset defaults may be particularly effective when they, in effect, stop the agency from growing but still allow the regulatory structure to remain in effect with the essential maintenance functions continuing. In that sense, this concept is somewhat analogous to what the federal government does when there is a complete shutdown, in that essential employees continue to ensure the agency's provision of essential services.[290] The difference would be that Congress would set by statute which services would continue under the sunset default.

A softer approach would shift away from reauthorization or sunset provisions in agency organic statutes that require a governing statute to be reauthorized and, instead, turn to the more modern innovation of reauthorization of appropriations. As outlined in Part III.B, in addition to temporary legislation and sunset provisions for certain federal programs and agencies, Congress frequently inserts authorizations of

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[289] *See, e.g.*, M. Elizabeth Magill, *Congressional Control Over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DUG L.J. 149 (1995); Lazarus *supra* note 283 at 1225–26 (discussing "hammer provisions in environmental law); Sidney A. Shapiro & Robert L. Glicksman, *Congress, The Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 839 (1988) *(*same).

[290] *See* COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET, Q&A: EVERYTHING YOU SHOULD KNOW ABOUT GOVERNMENT SHUTDOWNS 1 (Feb. 12, 2019), http://www.crfb.org/sites/default/files/QAShutdowns_Feb2019.pdf.

appropriations provisions in substantive legislation. Indeed, when we talk about reauthorization, these two concepts are conflated and confused.

Consider again, for instance, the CFTC. The CFTC has operated without authorization of appropriations at least five times during its almost half-century existence and currently is acting without authorization.[291] Then-CFTC Commissioner Walt Lukken referred to this legislative process as "periodic reauthorization," but it is technically the process of periodic reauthorization of appropriations.[292] By only tying agency funding to reauthorization, Congress can lower the stakes a bit for reauthorization. The agency remains in place; it just may have to stop certain operations and programs that are expressly tied to that particular appropriation.

One may respond that reauthorization of appropriations is toothless, because it does not force Congress to reconsider the agency's substantive mandate, just its level of funding for operations. And that reauthorization could result in a one-sentence, rubber-stamp amendment just extending the authorization of appropriations. But that is not necessarily the case. After all, the authorizing committees—not appropriations committees—are in charge of reauthorizing appropriations, so they may invoke their oversight authority and leverage their substantive expertise. Indeed, Lukken has documented how CFTC reauthorization of appropriations has led to a dramatic modernization of the CFTC's statutory mandate.[293] It has also led to encouraging the CFTC to operate more effectively in order to achieve a more routine reauthorization process that some of its sibling financial regulators enjoy. After all, "[r]outine reauthorizations," Lukken observed, "must be earned over time, not simply granted."[294]

Similar to tailoring general reauthorization to include sunset defaults, Congress could design authorization of appropriations provisions to target agency actions that would encourage Congress to reauthorize but not lead to catastrophic outcomes. Perhaps an agency would continue to have funding to enforce current regulations and permits, but not to make new regulations or new permits. Congress could also target for reauthorization of appropriations new agency programs or agency activities that touch on emerging or changing technologies, so that the agency has better incentives to respond to congressional wishes and secure congressional approval.

To be sure, asking Congress to rethink its approach to reauthorization or to reauthorization of appropriations is not a modest proposal. Perhaps Congress should begin with the more incremental approach. At least requiring, by statute, that the authorizing committees conduct some sort of oversight over the federal agency or program before Congress can pass

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[291] *See* Lukken, *supra* note 192, n.4; 7 U.S.C. § 16(d).

[292] *See* 7 U.S.C. § 16(d) ("There are authorized to be appropriated such sums as are necessary to carry out this chapter for each of the fiscal years 2008 through 2013.").

[293] *See* Lukken, *supra* note 192.

[294] *Id.*

appropriations legislation to renew funding for that agency or program. That would encourage authorizing committees to more closely monitor agency regulatory activities, and it would also encourage federal agencies to more carefully implement their statutory mandates and be more responsive to their congressional principals.[295]

In sum, Congress has a diverse reauthorization toolkit, ranging from an across-the-board sunset requirement to the modest requirement of conducting oversight before allowing reappropriation of funding. These are not new tools. But they could be incorporated more systemically in the legislative process to encourage Congress to engage in more regular legislative activity with respect to the statutes that govern federal agencies and programs.

Means to Encourage Congressional Compliance

Even if Congress were to use this reauthorization toolbox more systematically and effectively, such efforts would still fall short unless Congress dusted off and more strictly enforced the more-than-a-century-old House and Senate rules prohibiting Congress from appropriating funds for unauthorized or expired federal agencies and programs. As noted in Part III.B, appropriations committees, by chamber rules, have a duty to identify proposed funding for unauthorized or expired federal agencies and programs, and Congress has charged the CBO, by statute, to report to Congress annually on which authorizations of appropriations have already expired or will expire during the given fiscal year. The CBO identified nearly 1,000 such expired authorizations of appropriations in its 2019 report.[296]

Yet Congress apparently never enforces these rules against appropriation without authorization. That is because the current rules contemplate that a point of order must be raised—a procedural rule that apparently is never invoked. And, even if it could be successfully invoked, the House and Senate rules dictate that the Speaker of the House and the Presiding Officer of the Senate would have to rule on whether the appropriation lacks authorization.

To reverse this custom, the first step may be for various members of Congress to unite in their calls for these chambers' rules to be enforced during the appropriations process. These calls could be backed by the threat of members raising the point of order if there is not a good-faith attempt at compliance. However, the Speaker or Presiding Officer may still rule that the appropriation does not lack authorization, or the chamber may decide to change its rules to avoid the appropriations process stalling over such a procedural point of order.[297]

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[295] *Cf.* WALKER, *supra* note 135, at 17 (quoting an agency official, in explaining why federal agencies assist Congress in legislative drafting, that "oversight is always in the back of our minds").

[296] CBO REPORT, *supra* note 177, at 1.

[297] For helpful guidance on how to navigate this congressional procedural terrain, see SATURNO & YEH, *supra* note 192, at 4–7.

The more lasting approach would be to encourage Congress to change its rules in order to make the prohibition of appropriations without authorization self-executing—albeit, still subject to majoritarian override. Such an approach would shift the burden of inertia onto the corner-cutters, and in so doing, could spur Congress into action.

A similar approach would be to include in the various authorizing statutes express mandates that bar agencies from spending appropriated funding on unauthorized or expired programs or operations. In this way, even if the appropriations have not been authorized, Congress can still include them in an appropriations bill. However, Congress would then have to return to the authorizing statute and amend it before the agency could spend any of the appropriated funds.

A more aggressive approach would be to provide for judicial review of agency actions on the basis that they lack statutory authorization of appropriations. Such a judicial-review provision could be inserted into reauthorization statutes of agency organic statutes. Or, more ambitiously, Congress could modernize Section 706 of the Administrative Procedure Act to expressly allow for judicial challenges to any agency action that lacks statutory authorization of appropriations.[298]

The wisdom of judicial review in this context exceeds this Article's ambitions. But the bottom line is that Congress has various avenues for creating incentives, if not commands, to prohibit the appropriation of funding to federal programs or agencies that lack a current authorization (or authorization of appropriations). And members of Congress need not wait for a majority to attempt to move this project forward. A minority just needs to unite to call for Congress to enforce its own, longstanding rules, with the threat that they will use congressional procedure to try to force Congress to do so.

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This discussion of how to implement a regular reauthorization regime is necessarily preliminary. Any approach to implementation requires further development and empirical investigation. For instance, one needs to carefully consider the internal dynamics of Congress at the committee, leadership, and chamber levels, the role of congressional procedures and norms, the effect on reauthorization of in divided versus unified government, and the role of electoral pressures—just to name a few. More in-depth study needs to be done regarding current attempts at regular reauthorization, such as the eight snapshots depicted in Part III.B. We hope this Article helps frame and spur that further investigation.

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[298] *See* 5 U.S.C. § 706(2) (providing that a reviewing court can "hold unlawful and set aside agency action" that is, *inter alia*, "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or "without observance of procedure required by law").

B. Responses to Objections

We do not endeavor to defend the position that legislation is constitutionally or normatively better than regulation when it comes to making laws that affect core value judgments or that address questions of major economic, political, or social significance—though our priors on that debate should be quite apparent. Nor do we seek to provide a full defense for the preference for temporary over permanent legislation.[299] Instead, our main objective in this Article is to identify the underexplored temporal problems with broad congressional delegations and suggest one potential solution to this problem: regular, mandatory reauthorization of federal programs and agencies.

That said, three objections merit at least a brief response in this preliminary investigation of a regular reauthorization regime.

Congressional Incapacity

A common argument against an Article I renaissance in federal lawmaking is that the federal government has become so vast and complicated that Congress lacks the capacity to be a primary lawmaker. This congressional incapacity argument is at least two-fold: Congress lacks the expertise to make the laws, and it lacks sufficient time to regularly legislate.

In the agency reauthorization context, this argument may take on special significance. After all, federal regulation has become highly technical and complex. Federal agencies employ tens of thousands of scientists, economists, lawyers, and other experts to effectively regulate. Similarly, there are hundreds of agencies implementing even more statutes, such that reauthorization of all of those statutes would take more time than Congress could ever allocate while still fulfilling its other obligations to address new problems via legislation, complete regular appropriations, and fulfill its other obligations, such as the Senate's advice and consent function for administrative and judicial nominations. Indeed, mandatory reauthorization could displace resources necessary for Congress to pursue other objectives which those who elected them would prefer it prioritize. In other words, mandatory authorization could interfere with politically accountable agenda-setting. The time-constraint issues are particularly acute in light of the barriers in the Senate for quick and efficient deliberation, including the legislative filibuster and the cloture floor-time requirements.

Whereas the time-constraint argument raises serious concerns, discussed below, the congressional expertise argument is less compelling.

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[299] Others have attempted to carefully advance that defense. *See, e.g.*, Gersen, *supra* note 150, at 261–98 (assessing arguments on both sides and citing relevant literature). Jacob Gersen, for instance, concludes: "Normatively, temporary legislation should not be globally eschewed, and at least in specific policy domains such as responses to newly recognized risk, there should be a presumptive preference in favor of temporary legislation." *Id.* at 298.

Congress has the capacity to enhance its institutional capacity and expertise; indeed, the historical innovation of standing authorizing committees was a direct response to lawmaking power shifting to the Executive Branch.[300] More to the point, however, Congress does not legislate on their own. It turns out that federal agencies are deeply involved in helping to draft the legislation that grants them the discretion to regulate and constrains such discretion. They do so by drafting substantive legislation suggesting to Congress that they advance the agency's or the Administration's policy preferences. They also "legislate in the shadows," as one of us has framed it, by providing confidential technical drafting assistance on draft legislation proposed by Congress.[301]

The substantial role federal agencies play in the legislative process may raise some separation-of-powers concerns—or perhaps not. But their role does undercut the argument that Congress lacks access to the expertise necessary to effectively legislate in these increasingly complex regulatory areas. Federal agencies are Congress's partners and agents in this legislative process. And regulated entities and other interest groups are similarly involved, sharing their expertise and lobbying for their interests. One welcome side effect of regular reauthorization is that members and their staff serving on the various standing authorizing committees will necessarily gain greater subject-matter expertise, become more familiar with the federal agencies their committees oversee, and deepen the committees' working relationship with those agencies.

The time constraints are more compelling—but not insurmountable. After all, perhaps we should not worry too much about overtaxing a system that seems to expend so much energy on what amounts to so little of consequence these days. More to the point, Congress has developed a potent toolbox of procedural mechanisms to incentivize more responsive and timely legislative action. Congress may use unanimous consent or other methods to expedite consideration of relatively noncontroversial actions, including both legislative measures as well as the approval of nominees (of which there are hundreds with each new Presidential Administration).

When sufficient consensus does not exist, Congress can turn to other legislative tools. The Congressional Review Act, discussed in Part II.B. provides one example. There, Congress approved of a simple-majority resolution process, such that the filibuster does not apply in the Senate. Trade promotion authority, formerly known as fast track trade authorization, is another example. That statutory innovation required Congress to approve or deny the President's trade negotiation, without having the ability to amend or filibuster.[302] One could imagine similar

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[300] *See, e.g.*, CHAFETZ, *supra* note 27, at 267–301 (detailing evolution standing committees in House and Senate).

[301] Walker, *supra* note 42.

[302] *See, e.g.*, Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687 (1996).

legislative innovations being developed to efficiently process mandatory reauthorization legislation. Bills could be fast-tracked and prioritized on the calendar, amendments could be prohibited, the filibuster could be bypassed, and floor debate-time and amendment process could be severely limited—to just mention a few options.

Even with those innovations, however, Congress will need to be deliberate in how they handle reauthorizations. The standing authorizing committees will need to play an important role, and Congress may need to rely even more heavily on subcommittees to conduct the oversight and legislative development. The committees and the collective Congress will need to space out the reauthorization deadlines over the years to ensure sufficient committee and floor time to meet the deadlines and to minimize distortion in Congress's agenda-setting priorities. The time constraints will impose costs, but we are not convinced such costs outweigh the important benefits of Congress addressing the temporal problems of delegation.

Anti-Regulatory Disposition

Especially in light of the costs in terms of congressional resources and agenda-setting, some may argue that requiring regular reauthorization of federal programs and agencies will create a bias against regulation. Perhaps this proposal is just another example of what Gillian Metzger has proclaimed is "a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal."[303]

Practical experience with sunset provisions and temporary legislation, at both the state and federal level, does not support the claim that such mechanisms are inherently anti-regulatory. At the state level, sunset requirements appear to have done more to encourage legislative engagement and oversight of administrative agencies than to eliminate or prevent regulation.[304] At the federal level, periodic reauthorization has been used to update—and often to increase the stringency of—regulatory statutes, such as the Clean Air Act and Clean Water Act.[305] As Bill Eskridge has observed, "sunsetting can also increase regulatory ambition and agency authority."[306] This is particularly true when one considers that federal agencies play a substantial role in drafting the legislation—oftentimes "legislating in the shadows" through confidential technical drafting assistance.[307]

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[303] *See* Metzger, *supra* note 29, at 2.

[304] *See* Baugus & Bose, *supra* note 151, at 19; Kearney, *supra* note 164, at 50.

[305] *See* Easterbrook et al., *supra* note 169, at 347 (comments of Thomas Merrill); *see also id.* 353–54 (comments of William Eskridge, discussing example of Voting Rights Act).

[306] *Id.* at 357 (comments of William Eskridge).

[307] *See* Walker, *supra* note 42, at 1416 (concluding that "the relationship between individual members of Congress (and congressional committees) and federal agencies may elevate the risk that legislating in the shadows leads to

An unstated assumption of the "anti-regulatory" critique is that legislatures are necessarily more hostile to regulatory intervention than administrative agencies. While there are reasons to suspect that agencies will tend to support measures that enhance their own power and influence, there are reasons to doubt the underlying claim. However much influence economic interests have in the legislative process, such interests are also the dominant participants within the administrative process.[308]

It is certainly true that Congress sometimes delegates power to administrative agencies with the hope or expectation that such agencies will promulgate regulations that members of Congress were unwilling to overtly embrace. Yet it is also true that Congress sometimes delegates responsibility for developing regulations to agencies as a means of forestalling or preventing the adoption of such rules, such as occurred with the first federal vehicle emission standards.[309]

Whatever its faults, the legislative process tends to be more open and transparent than the administrative process. As a comparative matter, we suggest that members of Congress are more accountable for their votes in favor or against substantive legislative proposals than they are for supporting or opposing the grant of power to federal agencies.[310] Having to debate and deliberate over the reauthorization of specific laws may help facilitate the arrival of "republican moments" of the sort that have led to significant bouts of lawmaking.[311] David Schoenbrod, who spent years at the Natural Resources Defense Council trying to reduce lead air pollution, makes a plausible case that Congress would have done more to reduce lead from gasoline—and more quickly—had it been unable to simply delegate the question to the EPA and been forced to address the issue directly.[312]

At the same time, it is undeniable that Congress is unlikely to support the continuation or reauthorization of costly and expansive federal regulatory programs where such programs face significant political

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excessive delegation of interpretive and policymaking authority in ways that contravene the will of the collective Congress").

[308] *See, e.g.*, Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99 (2011) (documenting "interest group imbalances" within the administrative processes). *See generally* RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY (2019).

[309] *See* E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON & ORG. 313, 330-33 (1985); *see also* DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON 24-25 (2005).

[310] *See generally* E. SCOTT ADLER & JOHN D. WILKERSON, CONGRESS AND THE POLITICS AND PROBLEM SOLVING (2013) (exploring how Congress is held electorally responsible for its collective problem-solving ability and why that leads to successful legislation even during periods of deep partisanship divide).

[311] *See generally* Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59 (1992).

[312] *See* SCHOENBROD, *supra* note 309, at 29–38.

opposition. In the early 1990s, there was significant political support for adopting a series of regulatory reform measures when reauthorizing federal environmental laws. Although the reforms had bipartisan support, they were opposed by the House leadership and most major environmentalist organizations. Because there were no real consequences from failing to renew the authorizations of "expired" statutes, the reauthorization bills were shelved, preventing the adoption of regulatory reforms for which there appeared to be significant political support.[313]

Overall, the primary effect of sunsets or reauthorization requirements should be to bring more regular legislative engagement and greater democratic accountability. In some cases this is likely to result in greater federal regulation, and in other cases not. If there is broad support for increased regulation, requiring reauthorization should produce that result in a more accountable way than the status quo, particularly if reauthorization requirements are drafted in a way that incentivizes broad engagement in the reauthorization process and makes it difficult for Congress to shirk responsibility. Yet while sunsets and reauthorization requirements may not tilt the playing field for or against regulation, we expect that the contours of existing agency authority would evolve quite differently than without such requirements in place. Forced to reauthorize programs on a regular basis, Congress is more likely to consider whether prior delegations of authority match with contemporary demands and understandings. Were Congress forced to revisit the Clean Air Act, for example, it is possible that Congress would enact provisions delegating authority tailored to contemporary problems, such as climate change, rather than leave the EPA to attempt to shoehorn such concerns into the regulatory structures drafted to address different sorts of environmental concerns.

Regulatory Uncertainty and Distorted Policymaking

A more potent objection might be that regular reauthorization requirements could induce greater regulatory uncertainty. After all, as Aaron Nielson has framed it, federal agencies can promulgate "sticky regulations," which bring more certainty and reliability to the regulatory scheme and thus "create incentives designed to encourage regulated parties to develop technologies that help agencies accomplish their long-term goals."[314] There is no question that the prospect of regular legislative reauthorization introduces the prospect that existing regulatory requirements could change, and perhaps change more quickly than occurs with informal rulemaking. Others may be concerned that regular

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[313] *See* John H. Cushman, Jr., *Environmental Lobby Beats Tactical Retreat*, N.Y. TIMES, Mar. 30, 1994; *see also Draft Legislative Strategy Paper Developed by Environmental Group Lobbyists Dated March 5, 1994*, BNA NAT'L ENV. DAILY, Mar. 16, 1994.

[314] Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85, 90 (2018).

reauthorization and legislative engagement will result in distorted policymaking due to log-rolling and the influence of interest groups.

Such concerns are real, but can be ameliorated in various ways. Among other things, Congress could draft reauthorization requirements that are forward-looking. As suggested above, one way to incentivize reauthorization is to require agency action to be authorized if agencies are to act with the force of law, but not to eliminate existing rules or regulations when agency authorizations expire. If reauthorization occurs on a regular schedule, it will also be possible for the regulated community to anticipate when existing regulatory frameworks are "in play," and to plan accordingly.

The prospect of reauthorization will certainly encourage interest groups, economic and otherwise, to be more engaged in the legislative process, but that can be a feature as much as a bug. Legislative deal-making, coalition-building, and compromise are all essential features of legislating. Log-rolling and rent-seeking are undoubtedly part-and-parcel of the legislative process, but that is inherent in democratic decision-making within a representative republic. Moreover, it is not as if rent-seeking is absent from the administrative process—though rent-seeking at the agency level may well be less transparent. The aim of this proposal is to encourage more legislative engagement, because of the benefits that brings; this is not a cure-all designed to address every inadequacy or pathology within contemporary policymaking.

C. Implications Beyond Nondelegation

Although Congress engaging in regular reauthorization could result in some of the costs discussed in Part IV.B, it would, of course, also produce some important benefits.

Central to this Article, such legislative activity would help Congress address the temporal problems of broad, decades-old delegations of lawmaking power to federal agencies. Regular reauthorization should encourage Congress to revisit such delegations—giving Congress an opportunity to update old statutory delegations, revisit unpopular ones, and rein in or redirect agency actions inconsistent with current congressional and electoral preferences. In so doing, Congress could more easily modernize statutes in light of improved scientific understandings or other changing circumstances, and in turn improve agency efficiency and effectiveness. Congress would also be in a better position to more easily narrow overly broad delegations granted by prior Congresses.

Regular reauthorization would also produce a number of incidental benefits. A couple are worth briefly exploring here: how it would help strengthen the relationship between Congress and federal agencies; and how it would help alleviate some of the concerns about judicial deference doctrines.

Relationship Between Congress and Agencies

In their landmark study on statutory drafting within Congress, Lisa Bressman and Abbe Gluck reported that the congressional drafters surveyed perceived "agencies as the everyday statutory interpreters, viewed interpretive rules as tools for agencies, too, and made no distinction, as some scholars have, between agency statutory 'implementation' and agency statutory 'interpretation.'"[315] A companion study of federal agency rule drafters reached a similar conclusion: Federal agencies—and not federal courts—are the primary partners of Congress in agency statutory interpretation and law implementation.[316]

As one of us has empirically explored in a report commissioned by the Administrative Conference of the United States (ACUS), federal agencies play a critical and substantial role in drafting statutes. "Indeed, they are often the chief architects of the statutes they administer. Even when federal agencies are not the primary substantive authors, they routinely respond to congressional requests to provide technical assistance in statutory drafting."[317] It turns out that federal agencies provide statutory drafting assistance on the vast majority of proposed legislation that directly affects them and on most legislation that gets enacted—regardless whether the legislation would be detrimental to the agency.[318] Agency officials report that their agencies engage in this legislative drafting assistance for a number of reasons, including to maintain a healthy and productive working relationship with Congress and to educate the congressional staffers about the agency's existing statutory and regulatory framework.[319]

A regular reauthorization process would only increase the opportunity for meaningful interaction between the congressional principal and its administrative agents. Indeed, of the ten agencies studied in the ACUS report, one agency—the U.S. Department of Agriculture (USDA)—engaged in a regular reauthorization process. The USDA is involved in the Farm Bill reauthorization that takes place every 5-6 years. Those interviewed at the USDA emphasized how these reauthorization efforts greatly strengthened the agency's relationship with its authorizing and oversight committees in Congress.[320] If reauthorization were more common, other agencies would no doubt have similar opportunities to strengthen their relationship with Congress and thus be able to better understand, and be responsive to, current congressional preferences. Congress, in turn, would have more opportunities to reshape statutory

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[315] Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 767 (2014)

[316] Walker, *supra* note 23, at 1051–52.

[317] WALKER, supra note 135, at 1.

[318] *See id.* at 13–20 (reporting relevant findings from agency interviews and follow-up survey).

[319] *Id.* at 17–18.

[320] *See id.* at 48–51 (USDA case study).

mandates to respond to agency feedback on current challenges and new circumstances.

Effects on Judicial Deference Doctrines

In recent years, we have seen a growing call to rethink administrative law's deference doctrines to federal agency interpretations of law.[321] As is relevant here, *Chevron* deference commands a reviewing court to defer to an agency's interpretation of an ambiguous statute the agency administers so long as it is reasonable.[322]

One of the core challenges to *Chevron* deference is that it interferes with Congress's legislative role. In particular, Article I vests Congress with "All legislative Powers," yet *Chevron* deference encourages members of Congress to delegate broad lawmaking power to federal agencies. As Third Circuit Judge Kent Jordan put it, "The consequent aggrandizement of federal executive power at the expense of the legislature leads to perverse incentives, as Congress is encouraged to pass vague laws and leave it to agencies to fill in the gaps, rather than undertaking the difficult work of reaching consensus on divisive issues."[323]

The constitutional challenge to *Chevron* deference strikes us as lacking, at least in its current form. But Judge Jordan's observation nevertheless carries considerable force as a normative matter. Not only does *Chevron* deference encourage Congress to delegate broadly, but it also discourages Congress from revisiting prior delegations. This is problematic not just because Congress is unlikely to revisit an agency statutory interpretation that a court has identified as a reasonable but not optimal interpretation. Bill Eskridge has made a similar observation as to the democratic dangers of permanent legislation:

> One of the realities you have to confront is that when Congress passes these [permanent] statutes, however specific or general they are, Congress sets afloat a ship in an ocean that Congress is not necessarily going to control. The steering of the ship is not by members of Congress; it's mainly by agencies, with judges often playing an important role as well. So the interaction of agency interpretations, judicial pushback, agency response, and group responses to all of this creates a very, very different statute. There is a genuine danger in our republic where the dynamic lawmaking, which is inherent in our separation of powers, removes important

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[321] For a summary of these recent challenges, see Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018).

[322] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[323] Egan v. Del. River Port Auth., 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring in the judgment).

> statutory mandates like the Voting Rights Act from the democratic process and from any sense of democratic accountability.[324]

The lack of any serious threat of legislative action, moreover, may encourage federal agencies to be even bolder in their regulatory efforts. Indeed, empirical work on agency rule drafters suggests that the mere threat of more searching review—or, here, the threat of congressional attention—would encourage federal agencies to interpret statutes less "aggressively."[325] Unless there is a serious threat of legislative action, "agencies may come to view congressional oversight as just the cost of doing business and not a real constraint on regulatory activity."[326]

For many of us, *Chevron* deference has become far more problematic in the current era of congressional inaction. Congress appears to have no capacity or willpower to intervene when an agency has used statutory ambiguity to pursue a policy inconsistent with current congressional wishes, much less when an agency's organic statute is so outdated as to not equip the agency with authority and direction to address new technologies, challenges, and circumstances. If Congress were to engage in a regular reauthorization process, however, many of these concerns would be alleviated. Were Congress required to revisit agency statutory interpretations and delegations, courts would not have to worry as much about broad delegations, and they would not have less occasion to rely on arguments concerning legislative acquiescence.

Regular reauthorization may also produce similar salutary effects for another judicial deference doctrine: statutory stare decisis. The doctrine of stare decisis commands courts to not revisit judicial precedent absent some "special justification" beyond mere wrongness.[327] And, when it comes to statutory holdings—as opposed to constitutional ones—stare decisis carries "special force."[328] Indeed, the Supreme Court has stressed that statutory stare decisis applies "whether [the Court's] decision focused only on statutory text or also relied . . . on the policies and purposes

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[324] *See* Easterbrook et al., *supra* note 169, at 358 (comments of William Eskridge).

[325] Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 715–28 (2014).

[326] Walker, *supra* note 121, at 1119; *see also id.* at 1119 n.68 (noting that "[t]his is a paraphrase of Philip Wallach's excellent observation at the 2017 American Bar Association Administrative Law Conference").

[327] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014) (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)); *accord* Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015) ("Respecting stare decisis means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually 'more important that the applicable rule of law be settled than that it be settled right.'" (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))).

[328] BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 333 (2016) ("Stare decisis applies with special force to questions of statutory construction.").

animating the law."[329] Stare decisis currently carries more force in the statutory context, the Court has explained, because those who think the judiciary got the issue wrong "can take their objections across the street, and Congress can correct any mistake it sees."[330]

If Congress continues its current trend of legislative inaction, one could imagine growing calls—similar to those already being raised against *Chevron* deference—for the Court to reconsider its approach to statutory stare decisis. Regular reauthorization would hopefully alleviate some of those concerns by forcing Congress to revisit existing statutes more regularly, especially those statutes that have been interpreted by agencies and courts in a way inconsistent with current congressional wishes.

CONCLUSION

Although four Justices expressed interest this Term in revitalizing the nondelegation doctrine,[331] the Supreme Court is unlikely to rediscover an administrable principle in the nondelegation doctrine any time soon. Congress will continue to face myriad incentives to delegate broad statutory authority to federal agencies and few incentives to revisit those broad delegations. And the President and federal agencies will continue to leverage such delegated authority. It will be difficult to change the legislative process (or constitutional doctrine) to decrease the breadth of statutory delegation to federal agencies.

So perhaps combatting the breadth of statutory delegations is the wrong focus. Or at least we should not focus myopically on breadth. Instead, as this Article argues, we should also attend to the overlooked temporal problems of delegation. In other words, not only is the breadth of delegation problematic. So is that fact that federal agencies use decades-old congressional delegations of authority to regulate new technologies and circumstances that were wholly unanticipated by the enacting Congress and perhaps would not garner support in the current Congress.

Unlike the breadth problem of congressional delegation, the temporal problem has a plausible path forward, albeit a difficult one. Congress needs to return to a regular practice of legislating and, in so doing, revisit prior delegations of authority to federal agencies. To encourage such legislative action, Congress should engage in regular reauthorization of

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[329] *Kimble*, 135 S. Ct. at 2409 (quoting *Halliburton*, 134 S. Ct. at 2411); *see also* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1856 (2018) ("Even Justice Thomas, who gives the least weight to stare decisis of all the current Justices, appears to acknowledge its force when it comes to statutes.").

[330] *Kimble*, 135 S. Ct. at 2409.

[331] Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); *id.* (Alito, J., concurring in judgment).

federal agencies and programs and should take seriously its foundational rule against appropriation without authorization.