

Consent of the Governed: An Underenforced Constitutional Norm

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To honor the Declaration of Independence’s proclamation that governments derive “their just powers from the consent of the governed,”² the Constitution vested responsibility for making laws as well as other essential policies in the branch of government most directly accountable to the governed, Congress.² That Congress would bear such responsibility was integral to the compact that the framers of the Constitution offered to them.⁴

That Congress bear such responsibility is thus a constitutional norm, which I shall call the consent-of-the-governed norm. I mean “norm” to signify a binding principle of right action rather than the routine. Indeed, compliance with the norm is not now routine. Over the centuries, Congress has increased the use of these legislative powers beyond its own capacity to take responsibility for that use and so has delegated much of that responsibility to agencies. Thus, the courts cannot fully enforce the constitutional compact.³⁴

The Supreme Court has, however, erred in how it has accommodated this practical impediment to full enforcement of the norm by blurring the distinction between the norm and the impediment to its full enforcement. Keeping the two distinct is essential to make clear that Congress has a constitutional obligation to comply with the norm to the extent practical.

The Court blurred the distinction between the consent-of-governed norm and the impediment to its full enforcement by holding in *J.W. Hampton, Jr. & Co. v. United States*, decided in 1928 that Congress does not delegate its legislative powers so long as it states an “intelligible principle.”⁶ In practice, the intelligible principle can amount to nothing more than

¹ Trustee Professor, New York Law School. I am indebted to Ronald A. Cass, Joseph Postell, Ross Sandler, Richard B. Stewart, Peter J. Wallison and the participants in the faculty workshop at New York Law School as well as the participants in the research roundtable on “Delegation, Nondelegation, and Un-Delegation at the C. Boyden Gray Center for the Study of the Administrative State at George Mason University for insightful comments on earlier drafts. William Mills of the New York Law School Library and Reza Ravangard, New York Law class of 2019 solved many research problems. I, however, remain responsible for whatever still doesn’t make sense. ² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

² U.S. CONST. art. I, § 8 ⁴

See infra Part I.

³ My prior scholarship on delegation argued that Congress need not delegate legislative powers. E.g., David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* ch. 9 (1993) [hereinafter “Power without Responsibility”]. The argument was that delegation was as much the cause as the result of the increased use of legislative power. Whether that argument is valid, experience has convinced me that delegation will not be totally eliminated. This essay is based upon that premise.

⁴ U.S. 394 (1928)

popular generalities.⁵ As a result, the Court’s test is both unenforceable mush and trivializes the norm. Emblematic of this pooh-poohing of the norm, some of the justices’ opinions began a half century ago to call it “the nondelegation doctrine,” a label as divorced from its purpose as if equal protection of the laws was called the “nondifferentiation doctrine” or freedom of the press “the nonfiltering principle.”⁶ Because the “nondelegation” label makes congressional responsibility sound like a technicality, I refer instead to the consent-of-the-governed norm or, simply, the norm.

This essay focuses on the norm’s application to the power to regulate. My objective is to show how the Court could bring about much greater compliance with the constitutional compact by correcting its error.

This undertaking is inspired by an article that Professor Lawrence Sager published in 1978 in which he argued that courts could achieve fuller compliance with “underenforced constitutional norms” by distinguishing the norms from the impediments to their full enforcement.⁷ To illustrate, he discussed “equal protection,”⁸ which he defined thusly: “A state may treat people differently only when it is fair to do so.”⁹ The impediment to its full enforcement is that federal courts should not second guess policy decisions that the Constitution assigns to states or Congress.¹⁰ To accommodate this impediment, federal courts developed a test for enforcement that differs from the equal protection norm: an inequality is permitted if it bears a “rational relationship” to the government’s justification for it unless the inequality involves a dubious classification such as race.¹¹ This test ends up crediting some pretextual justifications, thus permitting some unfair inequalities. Sager showed that, by recognizing that the rational relationship test allows some violations of the equal protection norm, federal courts can allow state courts and Congress, which do not face the same impediment as do the federal courts, to augment the federal courts’ incomplete enforcement.¹²

Sager thus recommends that courts define constitutional norms and the impediments to their full enforcement separately. “[C]onstitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the

⁵ See *infra* Part III.

⁶ The earliest use of the term “nondelegation doctrine” or “non-delegation doctrine” in a Supreme Court opinion is in a passage citing with approval a call to explicitly abandon the doctrine. *McGautha v. California*, 402 U.S. 183, 253n.3 (1971) (Brennan, J., dissenting).

⁷ Lawrence Gene Sager, *The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) [hereinafter Sager].

⁸ U.S. CONST. amend. XIV, § 1.

⁹ Sager at 1215.

¹⁰ Sager at 1216.

¹¹ *Id.*

¹² *Id.* at 1212.

boundaries of the federal courts' role in enforcing the norm."¹³ What courts must not do is truncate their concept of a norm to fit the impediment.

Sager's article did not discuss the consent-of-the-governed norm, but it is underenforced to put it mildly.¹⁴ He did write, however, that a norm's status as underenforced is "particularly apparent when the absence of 'judicially manageable standards' is cited as a reason for the invocation of the political question doctrine."¹⁵ This is the reason that the Court gives for underenforcing the consent-of-the-governed norm.¹⁶

This essay shows that, by following Sager's recommendation, the Court could produce a judicially manageable test and thereby discharge its duty by providing substantial but incomplete enforcement of the norm. No law review article has attempted such a showing.¹⁷ The Court's following Sager's recommendation would also make clear to the members of Congress and their constituents that these members should do their best to live up to the norm but fail to do so now.²⁰

It may seem farfetched that the courts could now begin to enforce the norm in a meaningful way. After all, they have not done so for many decades and thus allowed Congress to build a government premised upon Congress escaping responsibility for the regulatory laws. This has tended to trap the courts in the mistakes of the past.¹⁸ Private discussions with sitting justices from the left, right, and center, none still on the Court, left me with the impression that they felt trapped—that they would have liked to do more to enforce the norm but were unsure of how to do so. This essay suggests a way out of the trap, thus allowing the Court and Congress to honor the norm in large part. That would increase the extent to which we live in a republic—that is a nation controlled by the public.

¹³ *Id.* at 1221.

¹⁴ *See infra* Part III. Whether the ultimate reason for underenforcement of a norm is an institutional constraint on the courts or on Congress, consent of the governed should be viewed as an underenforced constitutional norm. Sager at 1227.

¹⁵ Sager at 1226.

¹⁶ E.g., *Whitman v. American Trucking* 531 U.S. 457, 474-75 (2001). The reliance on the lack of a judicially manageable standard is clearer in the opinion that the Court quotes there, *Mistretta v. United States*, 488 U. S. 361, 416 (1989) (Scalia, J., dissenting).

¹⁷ A search of law reviews found seven publications that both cited Sager's article and mentioned the "delegation doctrine" or "nondelegation." Email from William Mills to David Schoenbrod, Nov. 30, 2018 (on file with author). None discussed the possibility of using Sager's recommendation to improve enforcement of the consent-of-the-governed norm. ²⁰ As Sager wrote, "[t]he obligation to obey constitutional norms at their unenforceable margins requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions. Public officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins." Sager at 1227.

¹⁸ *See infra* Part VI.

Part I of this essay explains the consent-of-the-governed norm as understood in our republic's early history. Part II shows why modern arguments to deny this history are unconvincing. Part III demonstrates that the Court in the twentieth century truncated the norm rather than leaving it whole and separately recognizing the impediment to its full enforcement. Part IV argues that the current rationales for this truncating of the norm are unconvincing. Part V shows how the truncating of the norm harms "the governed" and increasingly so in recent decades. Part VI explains how the Court and Congress are trapped. Part VII shows a way out of the trap.

I. THE CONSENT-OF-THE-GOVERNED NORM

To deliver consent of the governed, the Constitution empowered voters to sack the key policy makers. Article I vests "all legislative powers herein granted," including making regulatory law, in a Congress, including a House of Representatives directly elected at two year intervals, legislating in tandem with a president and requires roll call votes on controversial issues.¹⁹ So, these directly or indirectly elected officials would have to take personal responsibility for the hard legislative choices.²⁰ That way, those who made the key policies would be dependent upon the consent of the governed for their continuance in office.²¹ As James Madison wrote in *Federalist 51*, "A dependence on the people is, no doubt, the primary control on the government."²² That was the compact that the Framers offered the people.

Debate at the Constitutional Convention proceeded on the premise that Congress had to make the law itself rather than delegating that job to others.²³ John Locke, who influenced many of the Framers, thought a people's grant of legislative power was "only to make laws, and not to make legislators" because "when the people have said, we will submit to rules and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them."²⁷

Making the law meant not just passing statutes but passing statutes that state the rules governing society. In *Federalist 75*, Alexander Hamilton wrote "The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the

¹⁹ U.S. CONST. art. I, § 1, §5 cl.3 ("Each House shall keep a Journal of its Proceedings . . . and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal."), §§ 7-8.

²⁰ The Constitution does not, of course, call for the president to be popularly elected (U.S. CONST. art. II, § 1, cl.2-3) and the did not so require senators until the ratification of the Seventeenth Amendment. *Id.* at art. I, § 3, cl. 1. Nonetheless, even without direct elections, popular sentiment could result in either presidents or senators failing to get reelected.

²¹ Interring at 1733.

²² THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

²³ John L. Fitzgerald, *Congress and the Separation of Power* 35-39 (1986). *See also* Joseph Postell, *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government* (2017). [hereinafter Postell]. ²⁷ J. Locke, *Second Treatise of Government* 87 (R. Cox ed. 1982).

society.”²⁴ In *Fletcher v. Peck* decided in 1810, the Supreme Court wrote that “[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other ²⁵26 departments.”²⁹ And in *Gibbons v. Ogden* decided in 1824, the Court wrote that “to regulate commerce [which Article I includes in the legislative power] is to prescribe the rule by which commerce is to be governed.”³⁰ It is no wonder then that school civics courses once taught that it’s Congress’s job to make the laws and that its members are called “lawmakers.”

In *Cargo of the Brig Aurora v. United States* decided in 1813, the Court recognized in dicta that Congress may not delegate the power to make the laws governing society.³¹ The statute in question conditioned the termination of a maritime embargo on the president finding that other nations respected American neutrality. The attorney for the party charged with violating the embargo argued that “Congress could not transfer the legislative power to the President. To make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of a law.”²⁷ The Court responded that the president was not making a rule but rather applying a legislated rule by determining “the occurrence of any subsequent combination of events.”²⁸ This was not rulemaking but rather as, *Fletcher v. Peck* put it, “the application of [legislated] rules.”

Thus, the power to regulate was understood at the beginning of the republic to be the power to make the rules that bind society at large.²⁹ To do so, Congress must itself state the rules that bind society in terms understandable by the public, such as a rule limiting the amount of pollution from designated factories. The enacted rule would thus allow voters to hold their representatives responsible for the consequences in future elections. That serves the bedrock purpose of Article I.

In contrast, a statute like the modern Clean Air Act that tells an agency to make rules to achieve some goal like “protect health” with “an adequate margin of safety” states a goal rather

²⁴ THE FEDERALIST NO. 75, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁵ U.S. (6 Cranch) 87, 136 (1810) ³⁰ 22

U.S. (9 Wheat.) 1, 196 (1824).

²⁶ U.S. (7 Cranch) 382 (1813).

²⁷ *Id.* at 386.

²⁸ The passage in full is: we can see no sufficient reason why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct. The 19th section of that act declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation, without limitation upon the occurrence of any subsequent combination of events. *Id.* at 388.

²⁹ Rules that bind society include those that regulate anyone or anything other than the federal government. I would include in rules that bind society those that require federal agencies to issue rules regulating society, such as National Ambient Air Quality Standards under the Clean Air Act. 42 U.S.C. § 7409. Such rules of private conduct would not include rules about how federal agencies conduct their enforcement operations. ³⁵ 42 U.S.C. § 7409(b)(1).

than a rule.³⁵ As such, it conflicts with the consent-of-the governed norm. Stating goals is insufficient because Congress can state goals yet avoid responsibility to the governed for how major political controversies are resolved. For example, “protect health” is a pleasing goal yet, when this language was inserted in the statute in 1970,³⁰ the statute’s chief author, Senator Edmund Muskie, knew that the agency could not achieve the goal. As he later admitted after the air pollution problem was safely in the lap of the Environmental Protection Agency (EPA), Our public health scientists and doctors have told us that there is no threshold, that any air pollution is harmful. The Clean Air Act is based on the assumption, although we knew at the time it was inaccurate, that there is a threshold. When we set the standards [the responsibility for whose setting Congress in fact left to the EPA], we understood that below the standards that we set there would still be health effects.³¹

Yet, Congress took credit for unconditionally protecting health without regard to cost and covertly forced the agency to hide that it had to take cost into account.³² Nor did Congress decide, in the overwhelming majority of cases, which pollution sources must bear the cleanup burden.³³ So, the legislators had plausible deniability for almost any unpopular consequences of the rules announced on agency letterhead.

A statute that takes the form of a rule but in fact fails to state a rule of conduct in understandable terms such as one that bars large factories from emitting “unreasonable” pollution violates consent-of-the governed norm. What was unreasonable was apparent in the context of early courts instructing juries in tort actions that the standard of reasonable care was how people in their community customarily behave, but not in the EPA regulating large factories.³⁴ Custom is no guide because the EPA confronts newly understood threats, learns of newly invented means to deal with them, and must reckon with much diversity of opinion. Such a statute fails to achieve the objective of Article I to make the elected lawmakers responsible for the politically salient choices.

Now, of course, even a forthright rule will require interpretation in some cases.³⁵ Yet, law interpretation is distinct from policy making.³⁶ Interpretation calls for an inquiry into how the legislature that enacted the statute would have clarified the law’s ambiguities while policy making calls for an inquiry into what makes sense to the policymaker. In deciding how the

³⁰ Clean Air Act, Pub. L. No. 88-206, § 109, 77 Stat. 392 (1970).

³¹ Clean Air Act Amendments of 1977: *Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Health*, 95th Cong., 1st Sess., pt. 3, at 8 (1977).

³² See David Schoenbrod, *Saving Our Environment from Washington 70-72* (2005) [hereinafter *Saving Our Environment*].

³³ *Id.* at 26. The 1970 statute did require that auto manufacturers reduce emissions from new cars be reduced by 90%. Clean Air Act §202, 42 U.S.C. §7521 (1970). [This is a cite to the codification rather than the session law enacted in 1970.]

³⁴ See, e.g., *Aldred’s Case*, 9 Co Rep 57b; (1610) 77 ER 816, [1558-1774] All ER Rep 622; OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 87-88 (Mark DeWolfe Howe ed., Little, Brown 1963) (1881).

³⁵ See Ronald Dworkin, *Is Law a System of Rules?*, in *Essays in Legal Philosophy* 25, 52 (R. Summers ed. 1968); see also Henry Melvin Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 156 (tent. ed. 1958) (“The Legal Process”).

³⁶ E.g., Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058-60 (1975);

Congress that passed the statute would have resolved an ambiguity in it, a judge can get information from many sources. One of them is that by dictating clear outcomes in most cases the rule usually reveals the relative weight the legislature gave to conflicting policy goals, such as enhancing regulatory protection vs. avoiding regulatory burdens.³⁷³⁸

Such, I believe, is how the formulation in *Fletcher v. Peck, Brig Aurora*, and *Gibbons* should apply. In another early case, *Wayman v. Southard*, decided in 1825, the Court stated a test of Congress's job that sounds a bit different.⁴⁴ The statute at issue in that case authorized federal courts to adopt their rules of procedure. The Court stated

It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself. [Either the courts or Congress,] for example, may make rules directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description."³⁹

That work may be delegated because the rules in the example govern the operations of the courts rather than society. The objection before the Court was to the courts making rules that applied outside the courthouses, particularly rules involving the enforcement of judgments. The Court went on to state that the "line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details."⁴⁰ So, the opinion continued, other officials could "vary minor regulations which are within the broad outlines marked out by the legislation in directing the execution."⁴⁷

"Fill up the details" in this context might be understood to be a test to accommodate an impediment to the enforceability of the state-the-rule definition of the norm or, alternatively, a second and somewhat different statement of the norm. Either way, members of Congress would have to take personal responsibility for the politically salient choices and that serves the purpose of Article I. Rather than pausing to analyze which version is better or trying to reconcile them, this essay will use the state-the-rule version. The reason is that Congress now comes nowhere close to complying with either version, as the previous discussion of the Clean Air Act

³⁷ Congress could call upon an agency to interpret a rule stated in a statute. For example, a statute might require that, starting five years hence, no fossil-fueled power plant may emit sulfur at more than half the current average emission rate for such plants and direct the agency to issue a binding regulation stating the future limit in numerical terms. The agency would need to interpret and apply the statute, but Congress would have faced the salient policy choices. A court could then review the agency's interpretation. 5 USC § 706(2)(C). The agency would be applying a rule rather than making it.

³⁸ U.S. (10 Wheat.) 1 (1825).

³⁹ *Id.* at 42-43.

⁴⁰ *Id.* at 43.

⁴⁷ *Id.* at 45.

illustrates, and the point of this essay is to show how the Court could begin to bring Congress much closer to the consent-of-the governed norm rather than to definitively settle its perimeters. First, however, I must deal with modern arguments rejecting that the norm’s provenance.

II. MODERN ARGUMENTS REJECTING THE NORM

In their article “Interring the Nondelegation Doctrine,” Professors Eric Posner and Adrian Vermeule contend that “a statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power” and that no authority contrary to their contention appears until the late 1800s.⁴¹ For example, they argue that Locke’s statement that a legislature may not delegate its legislative powers “is fully consistent” with their position that Congress may pass statutes that authorize the executive branch to make law but may not authorize it to pass statutes.⁴²

Their contention overlooks much contrary evidence.⁴³ They claim that Congress does not delegate legislative powers when it passes a statute authorizing an agency to make law, but do not even mention *Federalist 75*, *Fletcher*, or *Gibbons v. Ogden*. These authorities make clear that Congress’s job includes not just passing statutes, but also making the laws governing society. Posner and Vermeule also assert that their contention is consistent with “[t]he Framers' principal concern . . . legislative aggrandizement—the legislative seizure of powers belonging to other institution.”⁴⁴ Yet, they do not discuss a concern that was no less important—consent of the governed—or even mention *Federalist 51*.

They do discuss the *Brig Aurora* but, in quoting it, omit the language that indicates that the Court upheld the statute on the basis that it gave the president the power to apply a rule by finding “the occurrence of any subsequent combination of events” rather than proclaim a rule.⁴⁵

⁴¹ Eric A. Posner & Adrian Vermeule, *Interring the Delegation Doctrine*, 69 U. CHI. L. REV. 1721, 172 (2002) [hereinafter *Interring*].

⁴² *Interring* at 1727. Similarly, Professor Cynthia R. Farina, *Deconstructing Nondelegation*, 33 Harv. J.L. & Pub. Pol’y 87, 90-93 (2010). argues that, since the president can delegate, so can Congress. For a rousing rebuttal, see Ronald A. Cass, *Delegation Doctrine Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J.L. & Pub. Pol’y 147, 178-81 (2017) [hereinafter *Cass*].

⁴³ For an explanation of this history far richer than provided here, see Philip Hamburger, *Is Administrative Law Unlawful*, pt. I (2014).

⁴⁴ See James O. Freedman, *Delegation and Institutional Competence*, 43 U. CHI. L. REV. 307, 309 (1976). (analyzing the Framers' views of delegations)

⁴⁵ *Interring* at 1737-38. They leave out this sentence: “The 19th section of that act declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation, without limitation upon the occurrence of any subsequent combination of events.” 11 U.S. (7 Cranch) at 388.

Professor Jerry Mashaw objects to characterizing the president’s role as one of rule application. “The Court’s description of the President’s role, which involved delicate diplomatic negotiations, complex bilateral understandings, and uncertain compliance, was surely a model of understandment concerning the president discretion effectively conferred on him to find a fact.” Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 25 (2012) [hereinafter *Mashaw*]. Yes, the president got to set the strategy to get other nations to respect American neutrality, but the president’s job with respect to the rule enforced in *Brig Aurora* was far simpler: to find whether other nations were respecting American neutrality.

They may have missed the importance of this language because they looked for evidence of the “intelligible principle” test early in the republic rather than the state-the-rule definition of the consent-of-the governed norm.⁴⁶ The professors’ errors lead them to wrongly conclude the norm “wasn’t clearly adopted by the Supreme Court until 1892.”⁵⁴

Professor Jerry Mashaw also argues that the consent-of-the-governed norm is “simply a mistake,”⁵⁵ but based primarily the conclusion in his book that Congress never honored it: “From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking.”⁴⁷ I admire his book for showing that the early federal government had a larger administrative apparatus than previously understood and that the separations between the legislative, executive, and judicial branches were far from neat.

Nonetheless, he fails to demonstrate that the early Congresses systematically gave away their legislative powers. He conflates (1) Congress ceding legislative powers which it alone was supposed to exercise (such as making rules governing society) and (2) Congress letting others make decisions that Congress itself need not make but could and sometimes did (such as its enabling the courts to make rules governing courthouse procedures or the executive to make rules on how it enforces the legislated rules governing society). The two are distinct, as Dean Ronald Cass shows.⁴⁸ Mashaw applies the word “delegate” to both, which is semantically correct, but is nonetheless confusing because only the first oversteps the norm established by Article I.

For an example of Congress exercising a power that it could leave to others, consider how it dealt with taxes.⁴⁹ Congress alone can impose taxes, but it can allow others to make rules on how officials will get the money. Even so, Congress would still be responsible for the rules that bind the people. As Mashaw acknowledges, early Congresses not only set excise taxes, they enacted detailed rules instructing officials on how to collect them, even though that was not a job that it had to do.⁵⁰ So detailed were these rules that, in Mashaw’s words, “one would hardly be surprised to find an instruction concerning when inspectors were to rise in the morning, or that while engaged in official duties the collectors should keep breathing.”⁵¹ Many of Mashaw’s

⁴⁶ They do look for evidence of the “intelligible principle” in *Wayman v. Southard* and unsurprisingly not finding it, conclude it displays no definitive signs of a concern with delegation. Interring at 1738-39. ⁵⁴ Interring at 1722.

⁵⁵ Mashaw at 25.

⁴⁷ *Id.* at 5. Professors Posner and Vermeule make a similar argument, but I will focus on Mashaw’s version because it is more detailed and was written more recently. Interring at 1732-41.

⁴⁸ Cass, at 155-58. The distinction appears in *Wayman* at 23 U.S. at 42-43.

⁴⁹ U.S. CONST. art I, § 8, cl.1.

⁵⁰ Mashaw at 44.

⁵¹ *Id.*

examples of Congress delegating are of its letting others do what Congress itself did not have to do.⁵²

For example, Mashaw writes that “any claim that early Congresses declined to delegate broad authority to others must also conjure with the First Bank of the United States. The Bank’s function, in effect if not in form, was essentially that now served by the Federal Reserve Board in regulating the money supply.”⁵³⁵⁴ This makes it seem that Congress granted the First Bank legislative power because the Federal Reserve does impose rules regulating how much banks can lend in order, in part, to control the money supply.⁶³ Yet, the First Bank did not have the power to issue rules binding other banks.⁵⁵ It did affect the money supply, but by deciding how much money *it* would lend. Congress could have taken that decision away from the First Bank, leaving it with First Bank was not a delegation of legislative power.

In his extended analysis of Mashaw’s book, Professor Joseph Postell writes,

From 1780 to 1828, Congress largely refrained from delegating its legislative powers to administrative officials, and did so because of its commitment to the constitutional principle of nondelegation. There were some temporary deviations in which Congress granted lawmaking powers to administrators, most notably the infamous Embargo of 1807-09. Jerry Mashaw writes that the embargo statutes “featured stunning delegations of discretionary authority both to the President and lower-level officials,” and therefore “it has much to teach us about early understandings about the nondelegation doctrine.”⁶⁵

The embargo, as helpfully explained by Mashaw,⁵⁶ was, however, borne out of desperation. In the course of a war with each other, Britain and France seized American merchant ships and kidnapped their crews. These were acts of war against the United States, which was a neutral, but its leaders were afraid of responding militarily against great powers. As an alternative, President Thomas Jefferson recommended responding by keeping American ships at home and depriving Britain and France of American exports. Not knowing in advance how to do so in a way that would minimize harm to the domestic economy, he asked Congress for broad regulatory powers and got them.

As Postell sums up, “the embargo was a temporary deviation from the typical policy decisions of the early republic, one that that was nearly universally acknowledged as a colossal failure, and thus is of very limited value as an indication of what early American politicians

⁵² E.g., Mashaw at 46 (granting the president the power to decide how to distribute congressional appropriated funds to veterans), 47 (leaving the First Bank decide how much to lend).

⁵³ *Id.* at 47.

⁵⁴ U.S.C. § 84 (2012)

⁵⁵ An Act to Incorporate the Subscribers to the Bank of the United States, Ch. 11, 1 Stat. 196 (1791) ⁶⁵ Postell at 78 (quoting Mashaw at 90).

⁵⁶ Mashaw at ch. 6. [Research needed on extent to which Congress specified as much as it could in the circumstances.] ⁶⁷ *Id.* at 78.

regarded as legitimate.”⁶⁷ It certainly was not an example of the congressional buck passing that drives so much delegation today.

Mashaw’s second major example of Congress delegating legislative powers is the Steamboat Act of 1852.⁵⁷ Coming more than six decades after the Constitution was ratified, this is hardly an example of early Congresses delegating lawmaking authority. More fundamentally, it is not much of an example. The statute, as he describes it, used “administrative rulemaking as a principal technique for articulating regulatory standards.”⁵⁸ Yet, Postell finds only two sections of the statute where “the supervising inspectors were given rulemaking authority.”⁵⁹ One called for them, as the statute put it, to make rules “for their own conduct” and that of the inspectors working under them.⁶⁰⁶¹ This power, Postell argues, was not to make rules governing society, but rather to apply them and so did not violate the consent-of-the-governed norm.⁶²

The other provision called for them to make rules for ships passing each other.⁶³ Assuming these were rules governing society, their genesis suggests no comfort with Congress empowering others to make such rules. As Postell recounts, the bill originally introduced contained a section on this subject with detailed rules based upon traditional practices.⁶⁴ Legislators objected because they didn’t understand the section and, particularly how these practices, which varied with whether a ship was going upstream or downstream, applied when tides reverse the direction of the water’s flow as can happen far inland in some rivers.⁶⁵ At the end of the legislative process in the House, it passed a bill which included 150 amendments, one of which gave the inspectors broad rulemaking authority over ships passing each other. The Senate acceded because it was that or enact no bill dealing with the death toll from steamboat explosions.⁶⁶

The original language suggests that members of Congress expected to state the rules themselves. The rest of the bill as passed did too. It is often highly specific, containing detailed rules on a wide range of issues bearing on steamboat safety from lifeboats to firefighting equipment, the pressure in boilers, and much more.⁶⁷ Here’s one example:

⁵⁷ Mashaw at ch. 11.

⁵⁸ *Id.* at 152.

⁵⁹ Postell at 98.

⁶⁰ Act of August 30, 1852, ch. 106, sec. 19, 10 Stat. 61 (1852).

⁶¹ Postell at 98-99.

⁶² Postell at 98-99.

⁶³ Act of August 30, 1852, ch. 106, sec. 29, 10 Stat. 61 (1852).

⁶⁴ Postell at 99.

⁶⁵ *Id.* at 100.

⁶⁶ *Id.* at 99-101.

⁶⁷ Postell at 101-02.

That every vessel so propelled by steam, and carrying passengers, shall have not less than three double-acting forcing pumps, with chamber at least four inches in diameter, two to be worked by hand and one by steam, if steam can be employed, otherwise by hand; one whereof shall be placed near the stern, one near the stem, and one amidship; each having a suitable, well-fitted hose, of at least two thirds the length of the vessel, kept at all times in perfect order and ready for immediate use; each of which pumps shall also be supplied with water by a pipe connected therewith, and passing through the side of the vessel, so low as to be at all times in the water when she is afloat: Provided, That, in steamers not exceeding two hundred tons measurement, two of said pumps may be dispensed with; and in steamers of over two hundred tons, and not exceeding five hundred tons measurement, one of said pumps may be dispensed with.⁶⁸

Such detailed provisions are more like a regulation that a modern agency would put in the *Code of Federal Regulations* than an enabling statute that a modern Congress would put in the *United States Code*. Yet, Mashaw compares the 1852 statute to modern statutes creating “the Occupational Safety and Health Administration, the National Highway Traffic Safety Administration, the Consumer Product Safety Commission, and the Environmental Protection Agency in the 1960s and early 1970s.”⁶⁹

Mashaw dismisses the specifics in the statute by stating that the steamboat inspectors had “considerable discretion.”⁷⁰ The statute did leave some room for judgment calls, as in the phrase “a suitable, well-fitted hose” in the section quoted at length above. Yet, the inspectors, who were expected to come from the steamboat business,⁸¹ could base their determinations on their knowledge of practices in their line of work, much as common law juries in that era would base their judgments about reasonable care on practices in their own communities. Thus, the judgments left to the inspectors could be of rule application rather than rulemaking. Alternatively, they would be considered as rulemaking of “the fill up the details” variety. Either way, the legislators had taken responsibility for the politically salient choices. It was nothing like modern statutes in which members of Congress grant legislative powers to avoid personal responsibility for the laws.⁷¹ As history professor Daniel Walker Howe concludes, legislators in the early decades took positions on the hard choices.⁷² In contrast, as part IV.E shows, modern Congresses specify no end of details, but manage to sidestep the hard choices.

III. THE TRUNCATING OF THE NORM

⁶⁸ Act of August 30, 1852, ch. 106, sec. 3, 10 Stat. 61 (1852).

⁶⁹ Mashaw at 21. See also *id.* at ch. 11.

⁷⁰ Mashaw at 192. ⁸¹

Mashaw at 195.

⁷¹ David Schoenbrod, *DC Confidential: Inside the Five Tricks of Washington* 70-74 (2017).

⁷² Daniel Walker Howe, *What Hath God Wrought* 272-73, 365, ch. 4 (2007). Cf. Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* 21 (rev. ed. 1996) [hereinafter *Wiebe*].

As the early exceptions to compliance with the consent-of-the governed norm show, even a conscientious Congress fell short. Full compliance became even harder as the nation grew in land area, population, technological prowess, and interstate activity.

Take, for example, a problem that came from railroad lines stretching across many states. State-by-state rate-making and litigation were no way to regulate a railroad. Yet, Congress itself could not set the rates for all the railroads. So, a wide range of interests including the railroads themselves urged Congress to establish an agency to set rates.⁷³ The result was the Interstate Commerce Act of 1887.⁷⁴

This statute was an early victory for the Progressive Movement. The “progressive” in its name meant an outlook quite different from what “progressive” means today. As Robert Wiebe’s excellent history of the rise and decline of self-rule in the United States explains, the end of the nineteenth century brought exciting new technologies such as electricity as well as many firms that did business on a national scale such as the big railroads. The firms’ executives prided themselves on the quasi-scientific systems that they developed to operate on a national scale as well as their national outlook. They hired their junior executives from universities that instilled such pride in their students. Wiebe calls the group with this outlook the “national class” as distinguished from the “main street class,” which comprised the leading lights of the older, more parochial order. The Ivy League rather than Podunk College was the path to success among the national class. According to Wiebe, the national class sought to shift power from the state and local level to the national and from legislatures beholden to voters to commissions and courts insulated from political pressure and staffed by experts—in other words, to people more like themselves.⁷⁵

In empowering federal agencies, the Progressives began to push the republic down a slippery slope towards Congress systematically evading responsibility, but that was unintentional. Many of the Progressives believed in separation of powers, including a Congress that makes the law, and thought they were honoring these beliefs.⁷⁶

These Progressives conceived of the Interstate Commerce Act as authorizing experts to apply a rule on railroad rates rather than to make rules. The putative rule was that the rates be “just and reasonable.” That may sound like a vague goal rather than a rule, but it was the standard that courts had used in deciding cases that the railroads had brought against states. It called for the railroads to get total revenues that covered costs, including the cost of capital as determined in the market for capital. Whether this standard and others in other statutes left too much wiggle

⁷³ Stephen Skowronek, *Building the American State: The Expansion of National Administrative Capacities 1877-1920* 126-31 (1882).

⁷⁴ Interstate Commerce Act of 1887, Pub. L. 49-104, 24 Stat. 379 (1887).

⁷⁵ For the assertions in this paragraph, see Wiebe at ch. 6.

⁷⁶ Power without Responsibility at 31-32.

room was not apparent to many of the Progressives because they saw their statutes as empowering experts in agencies insulated from politics to use scientific methods to find correct ways to apply statutes.⁷⁷ The Court approved the Progressives' statutes empowering agencies.⁷⁸

In contrast to delegations to agencies, in *United States v. L. Cohen Grocery Store Co.*, decided in 1921, the Court struck down a federal statute on the grounds that it delegated lawmaking power.⁹⁰ The statute made it a crime to charge "unjust or unreasonable" prices for "any necessities." With a delegation to the courts rather than experts, there could be no pretense that science had made the indefinite definite. The Supreme Court held that "Congress alone has power to define crimes against the United States."⁹¹

Similarly, in two other cases -- *Knickerbocker Ice Co. v. Stewart*, decided in 1920 and *Washington v. W.C. Dawson*, decided in 1924 -- the Court struck down statutes that instructed federal courts to apply state workmen's compensation statutes in admiralty cases.⁹² The justices reasoned that Congress could not delegate to state legislatures the power to enact the federal law.

Even so, in *Hampton*, decided in 1928, the Court upheld a delegation of legislative power to the president.⁹³ The challenged statute authorized the president to impose a tariff of up to 50% to equalize differences in costs of production in the United States and the principal competing country.⁹⁴ The statute did not make a rule or even establish a definitive goal because, even if the cost of production of an imported good was lower, the president did not have to impose the tariff. Nor did the president's decisions simply "fill up the details" because tariffs were a hot button issue. Nor was the decision to be made by experts insulated from politics, for although experts would make recommendations, the final decision lay with the president.

All this put the *Hampton* court in a pickle because, by then more than four decades after the Interstate Commerce Act of 1887, many agencies were, in effect, adopting rules of decision. It was unimaginable that the Court could thrust all this work on Congress. Instead, the Court held that Congress has done its job if it had stated "an intelligible principle" to guide the delegated decision.⁹⁵ If this test meant that Congress must state an "intelligible principle" of what private conduct is prohibited, then the new test was the same as the old state-the-rule test. But as the case's facts make clear, the Court meant that Congress had done enough if it stated an "intelligible principle" concerning the goals that should move the president when he states the applicable law. Moreover, the Court opined that, "[i]n determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination."⁹⁶ This language concerns the impracticality of Congress making every rule but fails to distinguish the norm from the impediment to its full enforcement. This language also seems to have left up to Congress how much guidance it gives the agency, which is a strange way to assign responsibility.

⁷⁷ For the assertions in this paragraph, see *id.* at 31-33.

⁷⁸ E.g., *Field v. Clark*, 143 U.S. 649 (1892).

Yet, the norm that elected lawmakers should make the law still had popular appeal.

⁹⁰ 255 U.S. 81(1921).

⁹¹ 87-88.

⁹² 253 U.S. 149 (1920) and 264 U.S. 219 (1924).

⁹³ 276 U.S. 394 (1928).

⁹⁴ *Id.* at 401.

⁹⁵ *Id.* at 409.

⁹⁶ *Id.* at 406.

President-elect Herbert Hoover called for repeal of the statute upheld in *Hampton* because it delegated legislative power.⁷⁹ An editorial in *The Constitutional Review* said the statute was "the most dangerous advance in bureaucratic government ever attempted in America."⁸⁰

Only five years later, Congress passed a statute, the National Industrial Recovery Act, that provided little control, but granted President Franklin Roosevelt sweeping powers to regulate industry in response to the Great Depression.⁸¹ The Italian dictator, Benito Mussolini stated admiringly of Roosevelt's sway under the statute, "ecco un ditatore"—that is, "behold a dictator."⁸²⁸³⁸⁴⁸⁵ In 1935, in *Panama Refining v. Ryan*, a divided Court struck one delegation in the statute.¹⁰¹ Later that year, in *A.L.A. Schechter Poultry Corp. v. United States*, a unanimous Court, including Justices Louis Brandeis, Benjamin Cardozo, and Harlan Stone, struck another of its delegations.¹⁰²

Then, in 1936, in *Carter v. Carter Coal Co.*, citing *Schechter*, the Court struck down a delegation of rulemaking power to an association of coal mining companies.¹⁰³

Roosevelt famously struck back at the Court by proposing a statute authorizing him to appoint additional justices. Congress did not pass this so-called "court-packing plan," but the president nonetheless prevailed. With retiring justices replaced by Roosevelt appointees and the emergencies of the Great Depression and World War II, the scolded Court rejected every delegation challenge to regulatory statutes.⁸⁶⁸⁷ Whatever the Court mean by "intelligible principle" in 1935, it came to mean next to nothing.

⁷⁹ With our Readers, 13 Const. Rev. 100, 100 (1929) (citing Hoover's speech of Oct. 15, 1929).

⁸⁰ *Id.* at 101 (J.S. Cotton).

⁸¹ National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195, (1933).

⁸² James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 Am. J. Comp. L. 747, 766(1991) (citing Mussolini, Ecco un ditatore!, 26 B. Mussolini, Opera Omnia, 10 (1958) (June 28, 1933)).

⁸³ U.S. 388, 419-30 (1935).

⁸⁴ U.S. 495, 529-42 (1935).

⁸⁵ U.S. 238, 310-11 (1936).

⁸⁶ *Whitman*, 531 U.S. at 474 (citing cases).

⁸⁷ U.S. 116 (1958). In *Arizona v. California*, 373 U.S. 546, 625-27 (1963) (Harlan, J., dissenting in part), three justice dissented on the grounds that the Court such have invoked the norm to construe a statute narrowly. ¹⁰⁶ 415 U.S. 336 (1974).

Nonetheless, when the dust settled from these emergencies and the Korean War, justices expressed concern for the consent-of-the-governed norm in cases decided on statutory interpretation grounds. In *Kent v. Dulles* decided in 1958, five justices invoked it as a reason to narrowly construe a statute that otherwise threatened “protected freedoms.”¹⁰⁵ Then, in *National Cable Television Association v. United States* decided in 1974, the Court invoked the norm to reject an interpretation of a statute that gave an agency the power to tax those they regulated in order to cover the cost of regulation.¹⁰⁶ This was the first time the consent-of-the governed norm had been applied in a business regulation case in four decades. The justices citing the norm in these cases and others were from the left as well as the right.

Meanwhile, many voters got upset at Congress for enacting pass-the-buck statutes. One manifestation came along with the first Earth Day in 1970. A Ralph Nader book charged that people died from air pollution because Congress, starting with Senator Edmund Muskie, had written air pollution legislation that gave an agency broad discretion to regulate pollution and thereby avoided the hard choices.⁸⁸⁸⁹

In response, Muskie authored the 1970 Clean Air Act, which he claimed “faces the air pollution crisis with urgency and in candor. It makes hard choices.”¹⁰⁸ As a result, he vowed, “all Americans in all parts of the country shall have clean air to breathe within the 1970s.”¹⁰⁹ Instead of openly granting an agency broad discretion on how to regulate, the new statute ordered the EPA to make rules fully sufficient to protect health by deadlines and granted citizens the right to enforce this order in federal court.⁹⁰

The statute did go on for pages and clearly authorized the agency to regulate, but, as suggested in part I, still managed to skirt almost all the politically salient choices. For example, it required the EPA and the states to impose the rules needed to “protect health” while ignoring the known fact that it was impossible for the agency to do so completely.⁹¹

Congress ducking the hard choices led to disastrous consequences. Take, for example, the pollution that came from refiners adding lead additives to gasoline. The statute promised that health would be protected from lead completely by 1976. As an attorney for the Natural Resources Defense Council in the 1970s, I won cases that aimed to push EPA to do its duty on lead in gasoline. Nonetheless, because of pressure from politicians from the left and right, that did not happen until the mid-1980s and then only after the big oil refiners found that they could then save money if the EPA banned lead additives to gasoline.⁹²

⁸⁸ John C. Esposito, *Vanishing Air: The Ralph Nader Study Group Report on Air Pollution*, (New York: Grossman Publishers, 1970) (with an introduction by Nader), 287, vii-ix.

⁸⁹ Cong. Rec. 42, 381 (1970). ¹⁰⁹ 116
Con. Rec. 42,381 (1970).

⁹⁰ E.g., Clean Air Act, Pub. L. No. 88-206, § 108 - 110, Stat. 304 (1970).

⁹¹ *Saving Our Environment* at 25-26, 70.

⁹² On the lead litigation and its consequences, see generally *id.* at ch. 4.

To put the consequences in perspective, consider that in 2016, President Barack Obama declared a state of emergency because one-twentieth of the children of Flint, Michigan, had blood lead levels above five micrograms.⁹³ In the 1970s, virtually 100 percent of New York City's children had blood lead levels above that level, and the average blood level in children across the United States was three times that level.⁹⁴ Back in the 1970s, my medical experts told me that, although lead in paint caused tragically high lead levels in many children, the population wide contamination came primarily from lead in gasoline. The unqualified promise that the Clean Air Act would "protect health" was a pious fraud.

I began to wonder what would have happened if Congress could not pass the buck on lead in gasoline. Doing nothing on lead wasn't an option because in 1970 "Get the Lead Out," as some bumper stickers read, was a popular demand. Congress itself, in a singular exception to the statute's general flight from responsibility, had decided that new cars had to emit 90% less of a list of pollutants by 1975, but left lead off the list. The statute instead order the EPA to fully protect health from airborne by 1976. If Congress couldn't have passed the buck on lead, it would have required, I estimated, removal of at least half of the lead in gasoline by 1975. Using EPA health data, I showed that this quicker start on lead would have averted about 50,000 deaths in the United States, about equal to American deaths in the Vietnam War.⁹⁵ There should be a monument to these victims of Congress's shirking on the scale of the Vietnam Veterans Memorial. It should be located on Capitol Hill.

Nonetheless, the Clean Air Act of 1970 was perfect for the politicians because they got credit for granting the right to healthy air and could blame the EPA and the states for failing to deliver it as well as the economic burdens. That's why legislators of both parties voted for it almost unanimously in 1970.^{96,97,98}

Also passed in 1970 was another statute that made high-sounding promises, the Occupational Safety and Health Act.¹¹⁷ It directed the agency to ensure "safe places of employment" and reduce occupational exposure to toxic materials "to the extent feasible," without making clear what these requirements meant.¹¹⁸ In its 1980 decision in *Industrial Union*

⁹³ Yanan Wang, *Untold cities across America have higher rates of lead poisoning than Flint*, Wash. Post: Morning Mix (Feb. 4, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/02/04/untold-cities-acrossamerica-have-higher-rates-of-lead-poisoning-than-flint>.

⁹⁴ Mahaffey K.R., Annest J.L., Roberts J., Murphy R.S. *National estimates of blood lead levels: United States, 1976-1980. Association with selected demographic and socioeconomic factors*. NEW ENG. J. MED. (1983).

⁹⁵ Saving Our Environment at ch. 4.

⁹⁶ The Senate version of the act passed unopposed, 116 CONG. REC. 33,120 (1970) (for: 73, against: 0); the House version provoked a lone dissenting vote, id. at 19,244 (for: 375, against: 1). The conference report was agreed to by both the Senate and House without opposition. Id. at 42,395 (Senate), 42,524 (House).

⁹⁷ U.S. 607 (1980).

⁹⁸ U.S.C. § 651 et seq. (1971).

Department, AFL-CIO v. American Petroleum Institute (often called the *Benzene* case), the Court flunked a regulation that the agency promulgated to limit benzene levels in workplaces. To save the statute from being an unconstitutionally broad delegation, four justices construed the statute to require that the agency to set the limit to protect health from harm that is significant. The agency had failed to require that the harm be significant. A fifth justice, William Rehnquist, voted to declare the Act unconstitutional for delegating legislative power,¹¹⁹ a position with which Chief Justice Warren Burger agreed in a subsequent case.¹²⁰

In 1996, in *Loving v. United States*, the Court praised the consent-of-the-governed norm in dicta. A member of the Armed Services sentenced to death invoked the norm to challenge the constitutionality of a statute that empowered the president to establish the criteria for such sentences in military tribunals.¹²¹ He lost, in part because of the special authority that the president has in military matters, but the Court stated

Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking. See *Chadha supra*, at 951. Ill suited to that task are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control. The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.¹²²

Yet, the “clear assignment of power” does not result in the Court enforcing it in most cases and, where it does, not by invoking the norm. Take the case cited, *Chadha*. It struck the legislative veto which, depending upon the statute, allowed one or two houses of Congress to veto designated administrative actions. The stated rationale was the legislative veto cuts the president out of legislative actions in contravention of the Article I legislative process, which involves the House, the Senate, and the president.¹²³ Yet, as Justice Byron White argued in dissent, the legislative veto was being struck because it delegates legislative power to a process other than that of Article I, but that reasoning would also invalidate delegation of lawmaking authority to agencies.¹²⁴ The *Loving* dicta did, however, hint, that *Chadha* could be viewed as, in part, a delegation case.

Similarly, in *Clinton v. City of New York* decided in 1998, justices from the left and right joined in striking down the line-item veto, which allowed the president to reject line items in appropriations statutes.¹²⁵ The Court reasoned that this procedure contravened Article I's legislative process, which limits the president to accepting or not the entire bill passed by the House and the Senate.¹²⁶ Yet, the line item veto could also be conceived as delegating

¹¹⁹ 672-88.

¹²⁰ *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 543-44 (1981) (Burger, C.J. joining in a dissenting opinion of Rehnquist, J.).

¹²¹ 517 US 748 (1996).

¹²² 517 US at 757-58 (citing *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983)).

¹²³ *Chadha*, 462 U. S. at 944-959.

¹²⁴ 517 US at 984-89 (White, J., dissenting).

¹²⁵ 524 U.S. 417 (1998).

¹²⁶ 524 U.S. at 436-41.

Congress⁹⁹¹⁰⁰'s power over appropriations to the president acting alone.

Concerns of practicality were no barrier in striking delegation of the appropriations power because Congress likes to hand out the money itself as that usually brings credit to its members. In contrast, Congress tends to delegate the power to impose rules regulating society because enacting rules themselves brings blame as well as credit. Besides, there are so many rules.

Thus, the Court faced a case more fraught with political and practical difficulty in *Whitman v. American Trucking* decided in 2001, in which trade associations had argued that a popular regulatory statute, the Clean Air Act, unconstitutionally delegated legislative power.¹²⁷ Specifically, they argued that the “protect health” provision delegated legislative power because it gave no guidance as to the extent to which the agency must protect health. A DC Circuit panel had held that the Clean Air Act as construed by the agency did delegate power unconstitutionally.¹²⁸

In an opinion by Justice Antonin Scalia, the Court stated that the text of the Constitution “permits no delegation of [legislative] powers.”¹⁰¹ Yet, having seemingly vowed that the Court would stop Congress from abdicating its legislative power, the Court trivialized that vow by stating, “we repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’”¹⁰² Indeed, the opinion noted that the even

⁹⁹ U.S. 457 (2001).

¹⁰⁰ F.3d 1027, 1034, rehearing granted in part 195 F.3d 4, rehearing en banc denied, id. at 13 (D.C. Cir., 1999), affirmed in part, reversed in part, and remanded sub nom. *Whitman*. It was reported that this aspect of the original court of appeals decision was influenced by my book, *Power without Responsibility*. John J. Fialka, “Professor Wants Congress to Clean Up Its Act,” Wall Street Journal (May 20, 1999).

The panel held, however, that the statute might be saved through a narrowing interpretation, but rather than narrowing the interpretation itself, called upon the agency to consider a narrowing construction. 175 F.3d at 1034-38 That seemed to be *Benzene* adapted to the age of *Chevron*. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* is discussed in part VII infra. The Court rejected having the agency provide a narrowing interpretation: “The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority.” 531 U.S. at 473. That rationale would have made no sense if the Court had acknowledged that if it is underenforcing the norm because a narrowing construction would at least narrow the scope of the standardless delegation.

¹⁰¹ *Id.* at 472 (citations omitted).

¹⁰² *Id.*

goals as mushy as “the public interest” had counted as an “intelligible principle.”¹⁰³ The opinion concluded by stating that we have “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.”¹⁰⁴ The quotation is from a prior opinion in which Justice Scalia argued “intelligible principle” was not a judicially manageable test.¹⁰⁵ *Whitman*, in effect, lets the members of Congress, despite their self-interest, judge whether they have made themselves sufficiently responsible to voters.¹³⁴

In sum, “consent of the governed” has become farce.

IV. RATIONALES FOR TRUNCATING THE NORM

A. The Norm Lacks a Judicially Manageable Test

The Court concludes that judges lack a judicially manageable test of whether Congress does its duty, but the lack has come from the Court truncating the original state-the-rule definition of the norm into the mushy intelligible principle definition to accommodate the impediment to enforcement.¹³⁵

The Court should embrace the state-the-rule definition of the consent-of-the governed norm and accommodate the impediment to its full enforcement in another way. Congress could comply with the consent-of-the governed norm far more than it now does by, for example, by voting on the most important regulatory rules. James Landis, once the New Deal’s leading expert on administrative law and later dean of Harvard Law School suggested that Congress could provide that “administrative action . . . of large significance” not take effect until Congress explicitly approves it.¹⁰⁶ He wrote that for administrative officials, “it is an act of political wisdom to put back upon the shoulders of Congress” responsibility for such actions.¹³⁷ In 1984, Stephen Breyer, then a court of appeals judge, showed that such a procedure could be made constitutional by requiring that the votes approving regulations be presented to the president for signature and also made feasible by including in the legislative procedures limits on debate, a bar

¹⁰³ *Id.* at 474.

¹⁰⁴ *Id.* at 474-75.

¹⁰⁵ *Id.* at 474-75, citing *Mistretta v. United States*, 488 U. S. 361, 416 (1989) (SCALIA, J., dissenting); ¹³⁴ American Trucking could have won a minor victory for the constitutional norm along the lines of *Benzene* by adopting the argument that Professor Marci Hamilton and I advanced in an amicus brief. We argued that to reduce the scope of the delegation, the statute should be construed to require the agency to set the standard to protect against harms to health that it had found to be significant and in the rulemaking it had expressly refused to make such a finding. There was strong support for this reading of the statute in its legislative history. American Trucking preferred, however, to argue that the statute be construed to minimize costs to its members. David Schoenbrod, “Politics and the Principle that Elected Legislators Should Make the Laws,” 26 *Harvard Journal of Law and Public Policy* 241, 270-75 (2002). Professor Hamilton and I filed amicus briefs on the delegation issue in *Clinton*, *Loving*, and other cases. ¹³⁵ See part III *supra*.

¹⁰⁶ James Landis, *The Administrative Process* 77, 79 (1938) [hereinafter Landis]. Landis suggested in the alternative the legislative veto, which was struck down in *Chadha*. *Id.* at 77. ¹³⁷ *Id.* at 76.

on filibusters, and a deadline by which the House and Senate must vote.¹⁰⁷ Instead of using gridlock or platitudinous statutes to avoid responsibility for hard choices, the legislators would have to vote “yea” or “nay” on specific regulations

Congress could find the time for this work. Members and their staffs would have the benefit of the agency’s rulemaking record. Were regulations of large significance defined as an executive order defines “significant regulatory action” for the purpose of triggering regulatory review by the president’s Office of Information and Regulatory Affairs (OIRA),¹⁰⁸ there would be about as many such major regulations as votes on symbolic public laws such as those naming post offices.¹⁰⁹ President William Clinton issued the executive order that contains the current definition and it has remained unchanged under Presidents George W. Bush, Barack Obama, and Donald Trump.¹¹⁰ Voting on major regulations would require legislators to shoulder more responsibility, but exercising legislative powers is in their job description, while naming post offices is not.

The question of how Congress should bear more responsibility raises two issues. First, how should Congress shoulder that responsibility—whether through a version of Landis/Breyer or some other change in the current regulatory process? Second, how should the regulatory rules for which Congress takes responsibility be defined.¹⁴²

These are issues with important policy dimensions. So, Congress should have the first crack at resolving them, even though the Court should ultimately ensure that the norm is not unreasonably underenforced. Part VII will suggest how such a process could work.

B. Congress Is Accountable for Agency-Made Rules

Professors Posner and Vermeule also claim that delegation does not allow members of Congress to evade responsibility to the governed. They do so in several paragraphs of

¹⁰⁷ Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785 (1984).

¹⁰⁸ Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1994). [hereinafter “Executive Order”]. President Clinton’s executive order was in turn a variation on one issued by President Ronald Reagan.. Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1982).

¹⁰⁹ DC Confidential at 153.

¹¹⁰ Exec. Order. No. 13258, 67 Fed. Reg. 9358 (2002); Exec. Order. No. 13422, 72 Fed. Reg. 2763 (2007). ¹⁴² The Executive Order’s definition includes actions that have “an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” Executive Order at § 3(f)/ The second half of the definition is highly subjective, but could be made less so by employing the methodologies that OIRA routinely uses to monetize effects other than “on the economy.” Another question is whether the threshold for both economic effects and other adverse effects should be different than \$100 million per year.

suppositions about how legislators and voters behave.¹¹¹ These suppositions are not supported by reference to the work of political scientists, the social scientists who do systematically describe such behavior.¹¹² To the contrary, political scientists concludes that delegation does allow legislators to evade responsibility.¹⁴⁵

C. The President Is Accountable for Agency-Made Rules

Professors Posner and Vermeule also argue that the accountability of the president as executive preserves the consent of the governed.¹⁴⁶ Yet, a president serving a second term escapes accountability at the polls because the Constitution bars a third term. And even a firstterm president largely escapes blame for the burdens imposed by agencies. Some agencies are independent of presidential control. Most are subject to it, but presidents usually will personally

which legislators can shift blame. Posner & Vermeule, *Interring at 1749*. These political scientists are cited for quite a different proposition: that enforcing the nondelegation doctrine would drive Congress to delegate to legislative bodies rather than administrative agencies and thereby undercut accountability another way. *Id.* This later proposition, if true, may be relevant to the issue of the extent to which courts should underenforce the norm, but not to whether it should, as Posner and Vermeule recommend, be killed off altogether.

¹⁴⁵ E.g., R.DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 101 (1990) (“Sometimes legislators know precisely what the executive will decide, but the process of delegation insulates them from political retribution.”); DAVID R.MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 132 (1974) (“[I]n a large class of legislative undertakings the electoral payment is for positions rather than for effects.”); Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 175 (Roger G. Noll ed., 1985) (offering a mathematical assessment of when it pays legislators to delegate); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *PUB. CHOICE* 33, 45, 47 (1982) (stating that legislators may pick the regulatory form that makes them look best to their constituents rather than the one that does the most good for their constituents); Justin Fox & Stuart V. Jordan, *Delegation and Accountability*, 73 *J. POL.* 831, 843–44 (2011); Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 *POL.&SOC’Y* 152, 173 (2010) (stating that well-organized business interests pushing for favors from legislators at the expense of the average voter “will seek to substitute symbolic actions for real ones, for example, or manipulate complex policy designs to produce more favorable yet opaque distributional outcomes”); R. Kent Weaver, *The Politics of Blame Avoidance*, 6 *J. PUB. POL’Y* 371, 375, 386–87 (1986) (stating that politicians pass the buck as a means to avoid blame for unpopular actions). But see Epstein & O’Halloran.

In addition, researchers have used experimental subjects to test whether delegation of authority enables legislators to shift significant amounts of blame to agencies and found that it can. See, e.g., Adam Hill, *Does Delegation Undermine Accountability? Experimental Evidence on the Relationship Between Blame Shifting and Control*, 12 *J. EMPIRICAL LEGAL STUD.* 311 (2015) (answering the question affirmatively on the basis of experiments by multiple researchers). Of his own experiments, Hill wrote, “[e]ven in these cases, where the agent is

¹¹¹ *Interring at 1749-50*.

¹¹² Posner and Vermeule do cite political scientists David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 *CARDOZO L. REV.* 947 (1999) [hereinafter Epstein & O’Halloran], but for a proposition other than the one I dispute: delegation does not increase the extent to

effectively powerless to change the outcome, participants blame principals significantly less than in cases where the principal brings about the outcome directly.” *Id.* at 312.

Posner and Vermeule also float the idea that delegation must be just fine because delegation is used pervasively in public and private life. Interring at 1744-45. Here, they attack an argument that no one makes: delegation is invariably bad. The beef is with only that delegation designed to deflect blame from where it should lie rather than to achieve economies of specialization or scale. Delegation to deflect is a ploy used in in business as well as government. See, e.g., Andy Kessler, “Where in the World is Larry Page?,” *Wall Street Journal* (Dec. 30, 2018) (identifying some of the corporate leaders who work through surrogates in order to deflect blame).

In addition, Posner and Vermeule also argue that legislators will engage in “happy talk” regardless of whether they delegate. Interring at 1048. That is so, but spin is less effective than spin plus arranging to have the bad news comes on the letterhead of an agency rather than from a vote in Congress.

¹⁴⁶ *The Executive Unbound: After the Madisonian Republic* ch. 4 (2010).

announce only those rules that the White House political advisors think would be popular.¹¹³¹¹⁴ Otherwise, the president leaves the announcement to the head of the agency. The agency head can usually shift some of the blame to the statute or the court decisions that structured the agency’s decision making. Everyone is responsible, so no one is.

Moreover, few regulatory issues become important in a national presidential election because they are usually overshadowed by the president’s work as commander in chief, diplomat in chief, economic strategist, and national leader. These roles generally let the president appear aloof from choices about regulation. In contrast, how representatives and senators would vote on such issues could be important in many of their reelection campaigns.

D. The Constitution Was Amended to Get Rid of the Norm

Professor Bruce Ackerman argues that the reelection of President Franklin Roosevelt after the confrontation with the Court over delegation and other constitutional issues was “a constitutional moment” in which the body politic decided not to insist that Congress take responsibility for the exercise of legislative powers.¹¹⁵ That, however, seems to be contradicted by the overwhelming majorities of voters in polls from 1958, 1977, and 2004-05 wanting Congress to make policies. And, if this voter sentiment came about since the constitutional moment, why then is it not a new constitutional moment that undoes Ackerman’s?

Moreover, the Constitution is not just an agreement on how government should work in response to the will of the governed, but also how the Constitution can be amended in response to the will of the governed. The Constitution, of course, includes an explicit, formal process for

¹¹³ See, for example, Lisa Heinzerling, “Ozone Madness,” *Grist*, September 4, 2011, <http://grist.org/article/2011-09-04-ozone-madness/>. Professor Heinzerling was a key member of President Obama’s team at the EPA.

¹¹⁵ Bruce Ackerman, *The Storrs Lectures: Discovering The Constitution*, 93 *Yale L.J.* 1013, 1053-57, 1070-71 (1984); Bruce Ackerman, *We The People: Foundations* 47-50 (1991). See also, e.g., Cass Sunstein, *Constitutionalism After the New Deal*, 101 *HARV. L. REV.* 421, 432 n.40, 447-48 (1987) (arguing that the New Deal amended the Constitution to allow delegation). But see, e.g., Lawrence G. Sager, *The Incongruous Constitution*, 65 *N.Y.U. L. REV.* 893, 924-33 (1990).; ¹⁴⁹ U.S. Const. article V.

its amendment.¹⁴⁹ While there is something to be said for substance over form, form does have its uses. A formal amendment would have had to make clear whether the electorate opposed a procedural requirement that Congress take responsibility or rather cared more about FDR's substantive objectives, whether any such change was meant to be permanent or only for the duration of the emergencies of the Great Depression and World War II, whether the amendment permits only the broad ("here's a problem, fix it") delegations that typified the New Deal or also the narrow ("we get the credit, the agency gets the blame") delegations of the Clean Air Act and its aftermath.

E. The Constitutional Norm Prevailed Only in 1935 and Has Been Adequately Replaced by Canons of Statutory Construction

Referring to *Panama Refining* and *Schechter* striking down different provisions of a New Deal statute in 1935, Professor Cass Sunstein has quipped that the constitutional constraint on Congress delegating legislative has "had one good year and 211 bad ones (and counting)."¹¹⁶ Yet, as Professor Mark Tushnet, recently blogged, "It's not true," citing *Carter* in 1936.¹⁵¹ I cite other examples: *Knickerbocker Ice* in 1920, *L. Cohen Grocery Store* in 1921, and *Washington* in 1924. One could also arguably cite *Clinton* in 1998 and, given the gloss in *Loving, Chadha* in 1983.¹¹⁷ More importantly, Congress substantially honored the constraint well into the 1800s.¹¹⁸ *Brig Aurora* and *Wayman* upheld challenged statutes on reasonable grounds. That the cases were brought suggests that litigants were willing to challenge delegations. That more cases were not brought suggests that there was not much worth challenging.

In a more recent article, Professor Sunstein argues that the Supreme Court has replaced the constitutional constraint on delegation with various "nondelegation canons" of statutory construction, which he calls collectively that "The American Nondelegation Doctrine."¹¹⁹ It, he claims, serves the purposes of the traditional doctrine.¹²⁰ In his words, it stops "legislative

¹¹⁶ Nondelegation Canons, 67 U. CHI. L. REV. 312, 322 (2000) (hereinafter "Nondelegation Canons"). ¹⁵¹ Mark Tushnet, "The Nondelegation Doctrine -- Correcting a Common Error," Balkinization (Dec. 22, 2018) <https://balkin.blogspot.com/2018/12/the-nondelegation-doctrine-correcting.html>.

¹¹⁷ See discussion *supra* part III.

¹¹⁸ See discussion *supra* part II.

¹¹⁹ Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181(2018). [hereinafter *The American Doctrine*].

¹²⁰ He also gives arguments against the traditional doctrine. First, he states that it is not judicially manageable because it requires courts to answer a question of degree: "how much discretion is too much discretion?" *Id.* at 1182-83 (emphasis in original). This is true of the *Hampton*, yet Sunstein's own canons require judgments of degree. The "the elephants-in-mouseholes doctrine," invoked when agencies find big powers in obscure grants of authority, requires courts to make two judgments of degree: how big is an elephant and how obscure is a mousehole. Generally, his canons are changeable (*id.* at 1184 ("they change over time")) and unclear in application (*id.* at 1200 ("The passage is not without ambiguity")). Meanwhile, *Chevron* is of doubtful manageability because there are several conflicting versions. Beermann at 783, 817-29.

Sunstein's second reason, the traditional doctrine is of "uncertain pedigree" because, citing Professor Mashaw, it clashes with "actual practice during the early period of the American republic." *The American Doctrine* at 1183. Yet, as I argued in part II, Mashaw is wrong. Sunstein also relies upon Posner and Vermeule for the

shirking . . . by requiring Congress to make the relevant judgments. . . . [E]xecutive officials cannot seize on vague or general language to produce specified kinds of outcomes. The legislature must authorize those outcomes in advance, and with a high level of particularity.”¹⁵⁶

The kinds of outcomes for which agencies need clear legislative statements of authorization include, to list some of Sunstein’s examples, those arising from the agency claiming the power to act retroactively, extraterritorially, or in ways that create serious constitutional problems, or would bring about an enormous and transformative expansion in their regulatory authority.¹²¹

Although often sensible tools in statutory interpretation, clear statement requirements do little to stop shirking by Congress. An example is the 1970 Clean Air Act which, as discussed in part I, plainly authorized the agency to protect health, but let members of Congress evade responsibility for the extent to which health would be protected and on whom the cleanup burden would fall.¹²²¹²³

So, yes, members of Congress are elected and must authorize agencies to make law but with great skill shift blame to the agencies for the unpopular consequences such as regulatory protection not delivered or regulatory burdens imposed. That is not consent of the governed.

One might argue that voters should do the homework necessary to see through such trickery, but they will not and they should not have to. As Professor Jeremy Waldron writes, “The agent-accountability that is involved in democracy puts the onus of generating that transparency and the conveying of the information that accountability requires on the persons being held accountable. . . . The agents owe the principal an account.”¹²⁴ The justices have the duty of ensuring that the governed get the transparency to which we are entitled.

V. THE HARM TO THE GOVERNED

Some of these ardent arguments to stymie the consent-of-the-governed norm seem to spring from a belief that the public is better served when agencies rather than Congress run

related proposition that the norm lacks “clear roots . . . in the text and in found-era debates.” The American Doctrine at 1183. Yet, the roots were clear enough to persuade the early Supreme Court in cases such as *Fletcher v. Peck*, *The Brig Aurora*, and *Gibbons v. Ogden*. See part II *supra*.

Sunstein’s third reason is discussed at the outset of part IV, *infra*.¹⁵⁶
Id. at 1191.

¹²¹ *Id.* at 1181, 1185,**

¹²² David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, UCLA L. REV.

¹²³ , 789-98 (1983).

¹²⁴ Jeremy Waldron, “Accountability: Fundamental to Democracy” (Public Law Paper 14–13, New York University School of Law, April 2014), 32 ((emphasis in original).

regulation.¹²⁵ The belief is understandable. Congress is less knowledgeable than the agencies and given to posturing or worse.

The Progressives similarly saw the choice as whether experts in agencies or legislators should run regulation and opted for the experts. That is why they passed statutes that said to agencies, here's a problem solve it. Under such broad delegation, the agencies got discretion to regulate as they thought best and with it came most of the credit and blame for the consequences of the ensuing regulation.

That, however, is not how Congress now generally delegates. Instead of giving agencies *carte blanche*, Congress orders them to make rules sufficient to deliver popular promises, such as protecting health protection. With such narrow delegation,¹²⁶ the members of Congress get the credit for the popular promises and the agency gets the blame for the burdens needed to deliver on the promises and the failures to deliver.¹²⁷

With Congress exerting power over agencies through narrow delegation, the choice is no longer whether experts in agencies or legislators should run regulation. Rather, the choice is whether Congress is responsible or not for its role in regulation.

That role has increasingly harmed the public. So politically profitable is it for Congress to issue statutory orders to agencies that Congress radically increased the number of orders to the EPA in the 1990 version of the Clean Air Act. It contains the phrase "the administrator . . . shall" 940 times.¹²⁸ Many of the orders must be performed repeatedly. The orders are lengthy, which helps explain why the statute's text would fill a 450 page book. Long statutes full of complicated orders are not unusual.¹²⁹

The legislators are sufficiently skilled so that they can issue many lengthy orders, yet still avoid blame for the hard choices. For example, when President Obama's EPA issued a new ozone standard under the statutory mandate to "protect health" from air pollutants in 2015, legislators of both parties were able to criticize the agency from their stereotypical perspectives.¹³⁰¹³¹

¹²⁵ E.g., Sunstein at 1183 (arguing that that the traditional nondelegation doctrine may not "promote social welfare" based in part upon the superior knowledge of the agencies).

¹²⁶ Power without Responsibility at 43.

¹²⁷ *Supra* n. --

¹²⁸ The enumeration of duties is based upon the analysis in an email from Iain MacDonald, Research Assistant, NYU School of Law, to David Schoenbrod (July 19, 2009).

¹²⁹ E.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010)

¹³⁰ Anthony Adragna, Reactions to Ozone Rule Familiar on Capitol Hill, 46 ENV'T REP. 2901 (2015). Some members of Congress claimed that EPA went too far and that "it'll be important for Congress to fight back." *Id.* While others expressed disappointment with EPA for the rule being "not as strong as [they] had hoped." *Id.*

¹³¹ DAILY ENV'T REP. (BNA) (Oct. 8, 2009).

One result of narrow delegation is extraordinary complication. As said of the Clean Air Act by Gina McCarthy, whom President Barack Obama appointed assistant administrator of EPA and then administrator, "each sector has 17 to 20 rules that govern each piece of equipment and you've got to be a neuroscientist to figure it out."¹⁶⁶ The complication requires big business to hire staffs of costly experts and suffer even more costly delays. The consequences are worse for smaller businesses, farmers, state and local governments, and other entities subject to federal regulation but less able to afford the experts.

Another result is that the statutes' orders grow obsolete fast because their terms are based upon circumstances and understandings that change. Yet, because the statutes were designed to be perfect for members of Congress, they have no incentive to revise them, even as they grow increasingly dysfunctional for their constituents.

Consider Congress's failure to update the environmental statutes, almost none of which have been amended for almost three decades despite rapid changes in our understanding of environmental problems and how to deal with them. In a project organized by New York Law School and New York University School of Law in 2007, some fifty environmental law experts from across the ideological spectrum set out to show lawmakers to be elected in 2008 how to update these obsolete statutes. The project's leaders--Professor Richard Stewart, former chair of the Environmental Defense Fund, his colleague on the NYU faculty, Professor Katrina Wyman, and I--summarized the results in a book, *Breaking the Logjam*.¹³² The focus was on how to get more environmental protection at lower cost rather than how clean is clean enough. Our proposals included greater use of market-based alternatives to inefficient command-and-control regulation, leaving essentially local issues to state and local government, and imposing direct federal regulation of national issues such as interstate pollution.

Democrats and Republicans on Capitol Hill told us in private they wished that our reforms were already in the statutes, but that Congress would not enact them because doing so would require legislators to take responsibility. So, for example, Congress did not adopt the *Breaking the Logjam* proposal to deal with the large stationary sources of interstate major pollutants by enacting a national cap-and-trade system.¹⁶⁸ That system would make it profitable for pollution sources to invent and use less expensive ways to cut pollution. Instead, the current statute tells the EPA to tell the upwind states to tell polluters in their state to limit pollution sufficiently to reduce harm in downwind states.¹⁶⁹

¹³² David Schoenbrod, Richard B. Stewart & Katrina M. Wyman, *Breaking the Logjam: Environmental Protection That Will Work* (2010) [hereinafter "Breaking the Logjam"]. ¹⁶⁸ *Breaking the Logjam* at 87-89. ¹⁶⁹ *Id.* at ch. 5. ¹⁷⁰ Bill Pedersen & David Schoenbrod, "The Overwhelming Case for Clean Air Act Reform," 43 *Environmental Law Reporter* 10967 (Nov. 2013) <http://elr.info/news-analysis/43/10969/overwhelming-case-clean-air-act-reform>

This wackadoodle system serves members of Congress by interposing federal EPA and state officials between them and blame for the burdens of pollution control but disserves their constituents because it makes pollution control more expensive. That results in more pollution that kills constituents. During the Obama administration, the EPA calculated that the existing statute would halve ozone and particulate pollution, which are the major killers, thereby adding six months to the lifespan of the average American. A congressionally imposed national cap-and-trade system could easily allow halve the pollution again and so, based upon EPA's health analysis, add another three months to the average life.¹⁷⁰ So, the average voter will die a quarter year sooner. That's you.

In sum, by delegating the legislative power to make regulatory law, members of Congress get to evade responsibility for how they wield power and, as a result, wield it irresponsibly. They do, however, retain the powers that are not legislative, such as the power of the purse and the power to investigate, as Professor Josh Chafetz convincingly shows.¹³³ These powers can also be wielded in ways that allow the legislators to escape responsibility for the hard choices.

Consider how the incentives of members of Congress would change if they had to vote on regulations. They would then bear personal responsibility for both regulatory benefits and burdens and, in particular, the failure to deliver popular benefits and the imposition of unpopular burdens. So, a challenger in a future election could charge the incumbent with inflicting bad consequences on voters. It's roll call votes on rules, not debate, sound bites, votes for popular goals, that make members of Congress responsible for regulations in future elections. The upshot: although the legislators themselves would spend little time on each regulation and voters would not read them, the legislators would still fear the blame that they might bear for long-term consequences of their votes.

This would better align the interests of legislators and their constituents. With legislators now largely shielded from blame for the consequences for constituents, the credit and blame they get is little affected by these consequences. Once they bear responsibility for them, more of the skill they now employ to make themselves look good would be put in service of doing good for their constituents. Agency experts would become Congress's allies in showing how to update statutes to allow agencies to promulgate for congressional approval regulations that produce better consequences for constituents and then using the revised statutes to produce such regulations. As Landis wrote, his suggestion "would have the administrative as the technical agent in the initiation of rules of conduct, yet at the same time to have the legislative share in the responsibility for their adoption."¹⁷²

What has happened to Landis/Breyer in Congress in recent decades illustrates how its shirking has rendered it ridiculous. In 1995, some members of Congress involved me in designing a bill that would require Congress to take responsibility for the regulation. I suggested

¹³³ Josh Chafetz, *Congress's Constitution: Legislative Authority and Separation of Powers* (2017). ¹⁷² *Id.* at 76.

Landis/Breyer. The result was a Congressional Responsibility Act bill introduced by members of both parties.¹³⁴

When it began to get support, the growing possibility of its passage worried legislators because they might end up with responsibility. To avoid that, they passed in 1996 a sound-alike bill, the Congressional Review Act, and President William Clinton signed it.¹³⁵ Not surprisingly, however, Congress hardly ever opts to take the responsibility that comes with voting on regulations. All but one of the exceptions came after the Obama administration postponed controversial regulations until after the 2016 election to avoid angering voters and shift the blame for the burdens of implementation to the incoming administration, assumedly of President Hillary Clinton.¹³⁶ As a result, the Obama administration failed to give Congress notice of many regulations sufficiently promptly to safeguard them from annulment by a new Republican president and Congress and these were easy votes for the Republicans.¹³⁷

Long before 2017, however, it became apparent that the Congressional Review Act failed to make elected lawmakers responsible to voters. To ward off blame for regulations, Republicans in the House have repeatedly passed a bill based upon the original Congressional Responsibility Act.¹³⁸ Yet, the new bill is another sham starting with its new title, Regulations from the Executive in Need of Scrutiny (REINS). Many statutes require agencies to promulgate regulations, but the title suggests that the regulations stem from overzealous agencies. Worse still, the bill is full of poison pills that ensure it will never get significant Democratic support and so make its enactment improbable.¹⁷⁸ Indeed, of the 39 cosponsors of the bill in the Senate in the

¹³⁴ Congressional Responsibility Act of 1995, H.R. 2727, 104th Cong. (1995). This bill, unlike my present proposal was not limited to major regulations.

¹³⁵ Congressional Review Act, 5 U.S.C. §§ 801–808 (2006).

¹³⁶ See, e.g., “The Mysteries of the Congressional Review Act,” 122 HARV. L. REV. 2162 (2009).

¹³⁷ Juliet Eliperin & Darla Cameron, *How Trump is rolling back Obama’s legacy*, Wash. Post: Politics (Jan, 20 2018), <https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules>.

¹³⁸ The House most recently passed the bill on Jan. 5, 2017. H.R. 26, 115TH Cong. (2017). The bill is H.R.26, the Regulations from the Executive in Need of Scrutiny Act of 2017, 115th Congress REINS [hereinafter “REINS”].¹⁷⁸ One poison pill: all existing regulations would expire in ten years unless expressly approved by Congress. REINS at § 809. Yet, the bill lacks realistic procedures to consider the immense pile of such regulations in that time frame. In the meantime, the people, business, and governments of the United States will have little idea which of their existing regulatory protections and obligations will drop dead in a decade. Well before then, the uncertainty would crimp the economy.

Another poison pill bars an agency from presenting a regulation to Congress for approval when the same Congress failed to approve another regulation on the same subject. *Id.* at § 801(b)(5). So, if the agency discovers that a rejected regulation would have been approved if worded somewhat differently, the agency cannot present a new version to the same Congress. That would keep majorities in both houses from approving a regulation they would support. This is anti-regulation rather than pro-responsibility.

I discuss another poison pill in the text.

115th Congress, none was a Democrat.¹³⁹ The upshot is that REINS's sponsors can claim to want to be responsible without ever having to take responsibility.

One poison pill requires agencies to cut the cost of existing regulations to offset the cost of any new regulations.¹⁸⁰ So, the Republicans who support REINS can take credit with their party's base for wanting to control regulatory costs but shift to agencies the blame for limiting regulatory protection. Meanwhile, the Democrats who support existing regulatory statutes can take credit with their party's base for wanting regulatory protection but shift to agencies blame for the regulatory burdens. This is a perfect recipe for polarization.

The Democrats, for their part, have introduced no alternative versions of Landis/Breyer stripped of the poison pills. They prefer instead to blast the Republicans for being against regulatory protection. The upshot is a legislative stalemate in which lawmakers from both parties escape responsibility for the laws. This illustrates in a microcosm how the polarization, brought on by both parties ducking responsibility, produces gridlock.

If either the Democrats or Republicans in Congress really wanted to submit to “the consent of the governed,” they could introduce a bill that strips the REINS Act of its poison pills, makes clear that it applies to regulations that reduce regulatory protection as well as those that increase it, and give it a new title, such as the Responsibility for Regulation Act.¹⁴⁰

Instead, we get shirking on stilts.

The shirking not only promotes polarization but corrodes trust in Washington. The portion of voters who trust the federal government to do “the right thing” most of the time or all of the time plummeted from four-fifths in the early 1960s to one-fifth in 2015 and 2017.¹⁴¹ Governor Howard Dean and I have joined in arguing that such distrust explains why presidential candidates who ran against Washington in 2016—Donald Trump and Bernie Sanders—did much better than expected.¹⁴² Of course, over this period, Congress has earned distrust in other ways. It has developed ways to claim credit and shift blame on not only regulation, but also on taxing and spending, war, and much more.¹⁴³ Regulation is, however, where Congress's deceptive conduct

¹³⁹ <https://www.congress.gov/bill/115th-congress/senate-bill/21/cosponsors>

¹⁸⁰ *Id.* at § 808.

¹⁴⁰ I outline such a bill at <https://www.dc-confidential.org/responsibility-regulation-act/>.

¹⁴¹ Pew Research Center, “Public Trust in Government: 1958-2017,” <http://www.peoplepress.org/2017/12/14/public-trust-in-government-1958-2017/>

¹⁴² Howard Dean & David Schoenbrod, “Populism is powerful because Washington deserves a kick in the pants,” *USA Today* (Oct. 23, 2017) <https://usat.ly/2zwIRnL>. See also Christopher DeMuth, “Trumpism, Nationalism, and Conservatism,” *Claremont Review of Books* (forthcoming) (arguing that Congress's flight from responsibility helps cause the current political malaise).

¹⁴³ How Congress does this and how voters, if saw through legislators' tricks, could get Congress to shoulder responsibility is the topic of my recent book, *DC Confidential: Inside the Five Tricks of Washington* (2017).¹⁸⁵ Gallup Polls, “Honesty/Ethics in Professions” (Dec. 4-11, 2017) <https://news.gallup.com/poll/1654/honestyethics-professions.aspx>.

most clearly contravenes the Constitution. By refusing to any longer be a party to Congress's pretense that it seeks to be responsible for regulation, the Court may well help voters see the politicians' deception on the rest.

VI. OUR REPUBLIC TRAPPED

From this account, one might think that members of Congress are either ignorant or indifferent to the harm done by their flight from responsibility. Yet, from my experience, many of them do know and care. Many of them care because they chose politics as a career partly to feel they were doing good. Now, however, they find people rate them as no more honest than the sales staff on car lots.¹⁸⁵

They nonetheless fail to make the changes needed to take responsibility because they are trapped. As former Katherine Gehl and Professor Michael Porter show in their Harvard Business School report, *How Competition in the Politics Industry Is Failing America*,¹⁴⁴ political competition has degenerated into a system that empowers party functionaries and the voters who cast ballots in the primaries at the expense of centrist voters.

In contrast, if the courts partially enforced the consent-of-the-governed norm, legislators would bear more responsibility for regulatory burdens and disappointments, which make them more vulnerable to centrist voters. Moreover, the courts' invoking of the norm would help voters see the sham in the legislators' claims that they strive to shoulder responsibility.

The trap that Congress is in would be partially loosened if the justices authorized the federal courts to enforce the norm, but the Supreme Court is also trapped. To see why, start by considering the consequences of the modern Court holding that it would strike down statutes that fail something like the original state-the-rule definition of Congress's job. Such an opinion would come as a bolt out of blue. Chaos would ensue because many, if not most, of the regulatory statutes in the *United States Code* would flunk the test.¹⁴⁵ If any such statute could fall if challenged, a huge swath of the *United States Code* and the *Code of Federal Regulations* would be at death's door. That would leave people, businesses, and other private institutions in pervasive doubt as to their regulatory duties and protections. Congress could, as a practical matter, do nothing but pass a brief statute enacting much of the *Code of Federal Regulations*. That would make a mockery of congressional responsibility. Besides, it would take time for Congress to decide what to include in the statute. For example, there would be strong arguments to exclude regulations presently undergoing judicial review. Even after the statute got passed,

¹⁴⁴ Katherine M. Gehl & Michael E. Porter, *How Competition in the Politics Industry Is Failing America: A Strategy for Reinvigorating Our Democracy* (Harvard Business School (Sept. 2017) <https://www.hbs.edu/competitiveness/Documents/why-competition-in-the-politics-industry-is-failing-america.pdf>.

¹⁴⁵ Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 327 (1987).

Congress and agencies would struggle to meet the need for ongoing changes in statutes and regulations.

So, the Court might well face an assault on its independence more successful than the court packing plan. Indeed, an essay in a progressive journal recently opined, “Long seen as an unacceptable tactic, court-packing is now increasingly viewed as the least-bad option by an array of scholars and activists fearful that the Supreme Court has become a wholly owned subsidiary of the Republican Party.”¹⁴⁶

The Court might make itself a smaller target by stating at the outset that the constitutional norm would be only partially enforced but deciding the scope of enforcement would require a judgment of policy. This judgment of policy would be far more contentious than those in other constitutional decisions because so much of our current regulatory infrastructure is based the Court’s consent to Congress shirking its duties.

A law professor named Antonin Scalia was surely aware of this trap when he wrote “A Note on the Benzene Case” in 1980.¹⁴⁷ He acknowledged the constitutional norm is underenforced: “the notion seems to have taken root that if a constitutional prohibition is not enforceable through the courts it does not exist. Where that mind set obtains, the congressional barrier to unconstitutional action disappears unless reinforced by judicial affirmation.”¹⁹⁰ Thus, he clearly saw this prohibition as “an underenforced constitutional norm,” but without using that phrase or indicating any knowledge of Sager’s article. To the contrary, instead of following Sager’s recommendation that jurists conceive of norms untruncated by the impediments to their enforcement and recognize those impediments separately, Professor Scalia urged that courts to find some way to partially enforce the truncated version of the norm, the intelligible principle test. Using this test, the courts do not strike down statutes on delegation grounds because of, in his words, “the difficulty of enunciating how much delegation is too much.”¹⁹¹ He urged, nonetheless, that the vagueness of the intelligible principle test need not block enforcement. Citing various vague constitutional doctrines as examples, he wrote “surely vague constitutional doctrines are not automatically unacceptable.”¹⁴⁸ Moreover, he argued that “in modern circumstances the unconstitutional delegation doctrine, far from permitting an increase in judicial power, actually reduces it. . . . [J]udicial invocation of the unconstitutional delegation doctrine is a self-denying ordinance—forbidding the transfer of legislative power not to the agencies, but to the courts themselves.”¹⁴⁹

He concluded his note by proposing a way to acknowledge the underenforced norm: “even those who do not relish the prospect of regular judicial enforcement of the unconstitutional delegation doctrine might well support the Court’s making an example of one—just one—of the

¹⁴⁶ Ian Millhiser, “Let’s Think About Court-Packing,” DEMOCRACY JOURNAL (winter, 2019) 82, 82.

¹⁴⁷ Antonin Scalia, *A Note on Benzene Case*, 4 Regulation 25, 28 (1980). [hereinafter *A Note on Benzene*].

¹⁹⁰ *Id.* at 28. ¹⁹¹ *Id.* at 27.

¹⁴⁸ *Id.* at 28.

¹⁴⁹ *Id.* at 28.

many enactments that appear to violate the principle. The educational effect on Congress might well be substantial.”¹⁵⁰ Yet, his note offers no way to explain why the statute struck down was the one chosen as the sole sacrificial victim. Without such an explanation, the decision would look unprincipled and thus could also endanger the Court’s independence. On the Court, Justice Scalia found no statute that flunked the intelligible principle test and, to the contrary, wrote the Court’s opinion in *Whitman*.¹⁵¹

VII. THE WAY OUT OF THE TRAP

What keeps the trap locked is that achieving compliance with the consent-of-the-governed norm to the extent practical requires decisions about how to do so, those decisions include matters of policy within the province of Congress, and Congress is reluctant to make those decisions.

There is, however, a way out of the trap. As a litigation team at the Natural Resources Defense Council, Ross Sandler and I learned a lesson that we, as law professors, elaborated in a book: in institutional reform cases dealing with violations whose remedy depends upon policy judgments within the province of a reluctant legislature, lower federal courts and state courts can often succeed by starting a conversation with elected officials about the remedy.¹⁹⁶ The upshot can be, if all goes well, a division of labor in which the elected officials make the policy judgments and the judges stick to enforcing rights. This approach can help the Court out of the consent-of-the-governed trap even though the legislature in this matter sits high on Capitol Hill. The reason is that, as I will show, the Court would have an ally that is even more powerful than Congress: public opinion.

A conversation is a better starting place than the guillotine of holding statutes unconstitutional. The Court can begin the conversation by invoking the consent-of-the-governed norm as the reason to modify the *Chevron* doctrine of statutory interpretation. *Chevron v. Natural Resources Defense Council*, decided four years after *Benzene*, stated that when Congress has not “spoken directly to the precise question at it issue,” a court reviewing an agency action “may not substitute its own construction of a statutory provision for a reasonable interpretation made by . . . the agency.”¹⁹⁷

Now, however, the Court seems poised to modify *Chevron*¹⁹⁸ and for good reason. A wide range of scholars has disagreed with *Chevron*’s assumption that statutory ambiguity means that Congress intended to delegate to the agency the power to resolve the ambiguity.¹⁹⁹

¹⁵⁰ *Id.*

¹⁵¹ In *Mistretta v. United States*, Justice Scalia wrote, “I dissent from today’s decision because I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws.” 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). Thus, he did not find that the statute failed the intelligible principle test.

Unhappiness with, and confusion about, the original statement of the doctrine in *Chevron* has led the Court to put several, conflicting glosses on it, leading to confusion.²⁰⁰

The consent-of-the-governed norm is a compelling reason to reduce the extent to which the Court's approach to statutory interpretation gives agencies leeway to determine the scope of

¹⁹⁶ Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (2004). We showed that this can be done in a way that respects consent of the governed. *Id.* at ch. 9.

¹⁹⁷ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)..

¹⁹⁸ For the prediction of a change coming, see *Judicial Fortitude: The Last Chance to Rein in the Administrative State* ch. 7 (2018) [hereinafter Wallison].

¹⁹⁹ See, e.g., Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 795-98 (2010) [hereinafter Beermann]; Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1399-1441 (2017) (hereinafter "Chevron's Inevitability"). Indeed, shortly after *Chevron*, Justice Stevens wrote an opinion dissenting from how the Court applied *Chevron*. *Young v. Commun. Nutrition Inst.*, 476 U.S. 974, 984 (1986) ²⁰⁰ E.g., Beermann at 783, 817-29.

the power delegated to them.¹⁵² The clash between *Chevron* and the consent-of-the-governed norm is in no way justified by the practical impediment to the courts striking down all statutes that violate that norm.¹⁵³ Moreover, as Professor Cynthia Farina showed, *Chevron* is "is fundamentally incongruous with the constitutional course by which the Court came to reconcile [rulemaking] agencies and separation of powers," which is that the courts would ensure that the agencies adhered to the instructions that Congress gave them.^{154,155}

A majority of the justices now on the Court have objected to *Chevron*. In a dissenting opinion in *City of Arlington v. Federal Communications Commission*, Chief Justice John Roberts wrote that "before a court can defer to the agency's interpretation of the ambiguous terms . . . , it must determine for itself that Congress has delegated authority to the agency to issue those interpretations with the force of law."²⁰⁴ As Peter Wallison shows in his excellent new book

¹⁵² Professor Sunstein objects, arguing that with or without *Chevron*, the "recipient of the delegation will be either agencies or courts." *Nondelegation Canons* at 330. Yet, Congress does not delegate policy making authority to courts that interpret statutes given the longstanding distinction between law interpretation and policy making. See text accompanying notes -- -- infra. Interpretation calls for an inquiry into how the legislature that enacted the statute would have clarified its ambiguities. In contrast, policy making, which is what agencies must do with ambiguities under *Chevron*, is picking a policy that makes sense to them. For that reason, courts are generally stuck with prior statutory interpretations while, under *Chevron*, agencies can change policy. 2B Norman Singer & Shambie Singer, *Sutherland Statutory Construction* § 49:4 (7th ed.) available Westlaw (updated Nov. 2018). Of course, a legal realist might well dismiss the interpretation/policymaking distinction as eyewash, but Professor Sunstein implicitly but unmistakably accepts it in arguing for canons of interpretation that he favors. *The American Doctrine*.

¹⁵³ On the clash, see generally, *Chevron's Inevitability* at 1453-56.

¹⁵⁴ Cynthia Farina, *Statutory Interpretation and the balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 487 (1989). See also *id.* at 498, 516.

¹⁵⁵ US 290, 314-15 (2013) (Roberts, C.J., dissenting).

Judicial Fortitude,¹⁵⁶ five current Supreme Court justices (Roberts, Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh) have expressed support for changing *Chevron* to reduce its prodelegation tilt.²⁰⁶

To begin to unlock the trap, the Court should design any modification of *Chevron* to reduce its prodelegation slant and bottom its decision upon the consent-of-the-governed norm. That would say that Congress rather than agencies or the courts should take responsibility for the hard policymaking choices.

In basing any modification of *Chevron* on the consent-of-the-governed norm, the Court could recognize the untruncated norm and, at the same time, call upon Congress to decide how to reconcile the norm with concerns of practicality.

Reducing the prodelegation tilt in statutory interpretation would not in itself result in Congress taking much more responsibility¹⁵⁷ but would put some pressure on its members to do so. The Court now lends its prestige to supporting Congress's pretense that it does its legislative duty by holding that Congress has done so. The Court's refusal to assist Congress in its farcical coverup would tend to prod Congress to engage in the conversation. Changing *Chevron* would also put a bit more responsibility on Congress for regulatory outcomes. *Chevron* enables legislators to plausibly deny responsibility for regulatory protection, withheld or regulatory burdens imposed by saying that the agency misused its discretion under the statute. After changing *Chevron*, however, the courts would affirm that the interpretations are based upon what Congress previously wrote and, if the legislators don't like it, they should change it. So, many of the hard choices that Congress avoided would return to haunt it.

Members of Congress pretend to want responsibility because voters believe overwhelmingly that Congress should bear responsibility. According to Professor David Mayhew, in polls conducted in 1958, 1977, and 2004-05, by a margin of three to one, voters preferred Congress rather than the president to "make policies."¹⁵⁸ A poll taken in January of 2019 found that "[e]ighty-two percent (82%) of voters believe Congress should review and approve regulations rather than allowing agencies to set them up on their own."¹⁵⁹ The support

¹⁵⁶ *Judicial Fortitude: The Last Chance to Rein in the Administrative State* ch. 7 (2018). Wallison also argues that Justice Scalia, who had been a staunch defender of *Chevron* was, near the end of his time on the Court, "was beginning to move closer to the Robert's view in *City of Arlington*." *Id.* at 153. ²⁰⁶ *Id.* at 152.

¹⁵⁷ See *infra* Part V.E. E. Donald Elliott & Peter Schuck, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984-1077 finds that *Chevron* did not decrease the reversals of administrative decisions. Nonetheless, Beermann at 831 suggests that *Chevron* may nonetheless have had a considerable effect on judicial review because *Chevron* likely made agencies more adventurous in their interpretation of their enabling statutes

¹⁵⁸ Imprint at 8.

¹⁵⁹ Scott Rasmussen, "82% Say Congress Should Review & Approve Federal Regulations" (January 24, 2019) <https://scottrasmussen.com/82-say-congress-should-review-approve-federal-regulations/>. See also Mark Chenoweth, Florida Voters Join Chevron Revolt And Strike A Blow Against Judicial Bias (Nov. 8, 2019)

for Congress to shoulder responsibility was essentially the same regardless of party affiliation, race, or political ideology.¹⁶⁰

If, nonetheless, Congress fails to adopt a way to take substantially more responsibility—or, even worse, tries to evade the change in *Chevron* by ceding legislative powers to agencies more expressly,—the Court should recognize its responsibility to enforce the consent-of-the-governed norm but in a way that takes practicality into account. The Court might do so by, for example, informing Congress that if it continues to fail to decide how it will bear substantially more responsibility for the regulatory laws, the Court will enforce the norm in cases concerning major regulations that Congress has not approved.

That Congress should vote on such regulations already has a certain bipartisan pedigree. It came from a leading New Dealer (Landis) and was elaborated by a Supreme Court justice who is an expert in regulation and was appointed by a Democratic president (Breyer). Subsequently, Republican legislators in the House have repeatedly passed the REINS bill, which incorporates a version of Landis/Breyer. Major regulations could be defined in a way that also has a bipartisan pedigree. The definition could largely track the definition of “significant regulatory actions” used by presidential administrations of both parties.¹⁶¹ Such a definition could be made entirely judicially manageable.

This approach would circumvent the biggest concern raised by the current lack of a judicially manageable test. The courts would not be seen to picking and choosing among regulatory statutes or agency actions. Rather, the norm would apply to all significant regulations under all statutes, whether they increase or decrease regulatory protection.

Rolling out the guillotine would be easier after having tried a conversation first. The public having been educated on Congress’s evasion of duty, the Court’s constitutional intervention will not come as a bolt out the blue. Moreover, the Court will have made clear that it had preferred Congress to make the policy judgments about how to begin to comply with the norm. Indeed, even after Congress fails to decide how it will bear responsibility and the Court holds that it will strike major regulations that Congress has not approved, Congress could still come up with an alternative way of taking substantial responsibility.

This approach would be roughly analogous to a court holding that a legislative districting violates the “one person, one vote” requirement, but giving the state legislature time to draw legislative districts that comply with the Constitution. If the state legislature fails to redistrict, then the court would have to do so.²¹² Yet, if the state legislature later comes up with an

<https://www.forbes.com/sites/markchenoweth/2018/11/08/florida-voters-join-chevron-revolt-and-strike-a-blowagainst-judicial-bias/#2cfd60f44fe6> (Florida passes referendum abolishing Chevron-like statutory interpretation in state courts).

¹⁶⁰ <https://scottrasmussen.com/crosstabs-jan-15-16-3/>

¹⁶¹ The definition could be made more definite by stating dollar thresholds for regulatory benefits as well as costs.

alternative that does comply with the Constitution, the legislature's alternative could supplant that of the Court.

Judges are, of course, rightly hesitant about making policy, but their jobs sometimes require them to do so. The equal protection norm did not dictate the rational relationship test, but rather that test came from the imperative to choose a practical way to strike a balance between the equal protection norm and the prerogative of states to make policy choices.²¹³ Similarly, the norm that gave rise to *Roe v. Wade* did not dictate how far into the pregnancy a woman's right to choose extends but rather came from the imperative to choose a practical way to strike a balance between the woman's right and the rights of the being within her.²¹⁴ Then too, the freedom of speech norm did not dictate the test for when the government may regulate the time, place, and manner of speech but rather came from the imperative to choose a practical way to strike a balance between the freedom of speech norm and the practical problems that would come from

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no constraint on the time, place, and manner of speech.¹⁶² We often fail to notice the judicial policymaking inherent in such tests because judges tend to blur the distinction between norms and the means chosen to accommodate the practical impediments to their full enforcement.

Congress could find a way to take responsibility for major regulations despite the filibuster. As already observed, voters want it to take responsibility and one available design was floated by Democrats and embraced by Republicans. Both business and advocates of strong regulation would hate a paralysis in regulation.

CONCLUSION

The Court has no more supreme duty than judging compliance with the Constitution. None of the Constitution's norms is more supreme than consent of the governed. Yet, in response to claims that Congress violates this this norm by outsourcing lawmaking to agencies, the Court outsources judgment to Congress. That's poetic injustice. It should stop.

"To say what the law is"¹⁶³ in the context of the consent-of-the-governed norm, the Court must distinguish between the norm and the impediment to its full enforcement. If the Court does its duty, Congress can do its.

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¹⁶³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).