Delegation and Time

Jonathan H. Adler
Christopher J. Walker

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DELEGATION AND TIME

JONATHAN H. ADLER* & CHRISTOPHER J. WALKER**

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

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

* Johan Verheij Memorial Professor of Law and Director, Coleman P. Burke Center for Environmental Law, Case Western Reserve University School of Law.
** Associate Professor of Law, The Ohio State University Moritz College of Law. For able research assistance, thanks to Nathan Coyne (Moritz Class of 2020). For helpful comments on prior drafts, thanks to Alex Acs, Paul Larkin, Richard Lazarus, Brian Mannix, Jennifer Mascott, David Schoenbrod, and <insert>, as well as participants at the Ohio State American Politics Seminar and University of Pennsylvania Law School Legislation Seminar. The authors received funding from the C. Boyden Gray Center for the Study of the Administrative State to prepare and present this Article at the Center's Constitution’s First Branch—Rediscovering the Legislative Power Conference. This is an early working draft, so comments are particularly welcome.
INTRODUCTION

This Term, in Gundy v. United States, the Supreme Court will once again consider whether a statutory grant of authority to a federal agency or executive branch official (here, the Attorney General) violates the nondelegation doctrine. Article I of the Constitution commands that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States.” The Court has long interpreted Article I as prohibiting Congress from delegating legislative powers to the other branches of government (or anyone else). It has also held, however, that Congress can delegate discretion to federal agencies to implement legislation so long as the legislation provides an “intelligible principle”—“clearly delineat[ing] the general policy, the public agency which is to apply it, and the boundaries of that delegated authority.”

Despite that the nondelegation doctrine technically remains the law of the land, the Supreme Court has only struck down two statutory delegations as unconstitutional—both back in the 1930s. As Cass Sunstein quipped, “We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).” Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 322 (2000).

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2 U.S. Const. art. I, § 1.
3 See Mistretta v. U.S., 488 U.S. 361, 371-72 (1989) (“[W]e long have insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.”) (quoting Field v. Clark, 143 U.S. 649, 692 (1892)).
there have been many unsuccessful challenges.⁷ These nondelegation challenges have focused almost entirely on the breadth and substance of legislative delegation and whether the delegation complies with the intelligible principle test. In other words, the judicial inquiry has examined the substantive transfer of lawmaking authority from Congress to the administrative state.

Although the Supreme Court has not invalidated a statute on nondelegation grounds in more than eight decades, the Court has embraced a number of normative canons or clear-statement rules that attempt to address nondelegation concerns through tools of statutory interpretation as opposed to constitutional doctrine.⁸ We saw the most recent version of this approach in King v. Burwell, the statutory challenge to the Affordable Care Act. There, Chief Justice Roberts, writing for the Court, applied the major questions doctrine to refuse Chevron deference to the IRS due to the economic or political significance of the question and the IRS's lack of expertise in answering the question.⁹ Reflecting nondelegation concerns, Chief Justice Roberts concluded: “Whether those credits are available on Federal Exchanges is thus a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.”¹⁰ Like the nondelegation doctrine itself, these nondelegation canons of statutory interpretation focus on the breadth of delegation to presume, as Justice Scalia colorfully put it, that Congress “does not . . . hide elephants in mouseholes.”¹¹

Legislative responses to nondelegation concerns have also largely focused on addressing the breadth of statutory delegations to federal agencies and federal agencies’ authority to address questions of deep political and economic significance. One obvious example is the

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⁸ See, e.g., Sunstein, supra note 6, at 315–16 (“I believe that the [nondelegation] doctrine is alive and well. It has been relocated rather than abandoned . . . . Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so. The relevant choices must be made legislatively rather than bureaucratically. As a technical matter, the key holdings are based not on the nondelegation doctrine but on certain ‘canons’ of construction.”).


Congressional Review Act (CRA), which allows Congress to invalidate a major agency rule with only a simple majority in both chambers (and presidential approval). The CRA has played a major role in the Trump Administration, with Congress having invalidated fourteen major agency rules that were promulgated at the end of the Obama Administration. The proposed Regulations of the Executive in Need of Scrutiny (REINS) Act would take the CRA one step further by requiring congressional action before any “major” agency rule went into effect. Congress has also, at times, utilized the appropriations process to constrain prior delegations of regulatory authority, such as through substantive appropriations riders. Such interventions are a blunt tool, however, and are more able to prevent regulatory action than to expand or update prior grants of regulatory authority.

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

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13 See GEO. WASH. U. REG. STUD. CTR., CONGRESSIONAL REVIEW ACT—115TH CONGRESS (last updated June 1, 2018), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdts1866/f/downloads/CRA%20Tracker%205-23-18.pdf; In addition, Congress also used the CRA to invalidate two regulations promulgated by the Consumer Financial Protection Bureau (CFPB) after President Trump assumed office. See infra notes __, and accompanying text.
14 H.R. 26, 115th Cong. § 3 (2017) (defining “major rule” as one that the Office of Information and Regulatory Affairs has deemed would result in “(1) an annual cost on the economy of $100 million or more (adjusted annually for inflation); (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises”). See generally Jonathan H. Adler, Placing “REINS” on Regulations: Assessing the Proposed REINS Act, 16 NYU J. LEG. & PUB. POL’Y 1 (2013); see also Jonathan R. Siegel, The REINS Act and the Struggle to Control Agency Rulemaking, 16 NYU J. LEG. & PUB. POL’Y 131 (2013).
15 See Michael S. Greve & Ashley C. Parrish, Administrative Law Without Congress, 22 GEO. MASON L. REV. 501, 502 (2015) (noting Congress “consistently fails to update or revise old statutes even when those statutes are manifestly outdated or, as actually administered, have assumed contours that the original Congress never contemplated and the current Congress would not countenance”).
16 See, e.g., Christopher J. Walker, Inside Agency Statutory Interpretation, 67 STAN. L. REV. 999, 1000 (2015) (observing that “the focus and function of lawmaking have shifted from judge-made common law, to congressionally enacted statutes, and now to agency-promulgated regulations”).
without regular legislative activity, the nondelegation problems of open-ended, broad statutory delegations are exacerbated. Even when the failures or limitations of existing statutory schemes are revealed, Congress tends not to act.\textsuperscript{17} Without regular legislative activity, agencies are forced to get more creative with stale statutory mandates to address new problems and changed circumstances in the regulatory landscape.\textsuperscript{18} What legislative activity occurs, often comes in reactive spurts, triggered by apparent emergencies or crises—a dynamic which often encourages Congress to delegate broad authority before focusing on what sort of regulatory response might be required.\textsuperscript{19}

To be sure, even without regular legislative activity, Congress retains some powerful tools to oversee agencies and shape regulatory activities.\textsuperscript{20} But federal agencies may come to view such congressional oversight as just the cost of doing business and not a real constraint on regulatory activity.

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

This Article proceeds as follows: Part I provides an overview of the nondelegation doctrine debate and how the doctrine attempts address the democratic deficits in lawmaking by regulation. Part II examines the judicial and legislative responses to nondelegation, emphasizing how they

\textsuperscript{17} See, e.g., Roberta Romano, \textit{Regulating in the Dark}, in \textit{REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION} 86, 87 (Cary Coglianese ed. 2012) (“Congress tends not to move nimbly to rework financial legislation when it becomes widely acknowledged as flawed or seriously deficient”).


\textsuperscript{19} See Romano, supra note 17, at 90 ("[D]elegation enables legislators to ‘do something’ in a crisis, by passing ‘something’ and thereby mollifying media and popular concerns, while at the same time shifting responsibility to an agency for potential policy failures.").

primarily address the scope of open-ended congressional delegation, not the temporal aspect. Part III turns to the temporal problems with excessive delegation. Part III.A develops the theoretical case for regular reauthorization to address the temporal aspects of delegation's democratic deficits. Part III.B examines the history of reauthorization practices in Congress, surveying the breadth of such practices and then exploring a few specific recent reauthorizations. Part IV fleshes out the details of how Congress could utilize reauthorization as a legislative tool to advance nondelegation values, examining the various mechanisms to encourage a regular reauthorization process and responding to potential objections. The Article concludes with a few observations about how a regular reauthorization process would strengthen the partnership between Congress and the regulatory as well as affect judicial review, in terms of both deference to agency statutory interpretations (Chevron deference) and deference to prior judicial statutory interpretations (statutory stare decisis).

I. NONDELEGATION AND CONGRESSIONAL INACTION

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

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22 See Gillian E. Metzger, Foreword—1930s Redux: The Administrative State Under Siege, 131 HARV. L. REV. 1, 7 (2017) (noting “broad delegations of authority to the executive branch . . . represent the central reality of contemporary national government”); id. at 24 (“Broad delegations of policymaking power represent the backbone of the modern administrative state”).
23 See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”); see also La. Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.”); see also Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 COLUM. L. REV. 2097, 2101 (2004).
24 See, e.g., Edward H. Stiglitz, The Limits of Judicial Control and the Nondelegation Doctrine, 34 J. L. ECON. & ORG. 27, 39 (2018) (noting empirical support for claim that “the quantity of delegations increased dramatically during the New Deal”). For histories of the growth of the regulatory state tailing the increase in delegation, particularly in the 1960s and 1970s, see WILLIAM F. WEST, ADMINISTRATIVE RULEMAKING 16–31 (1985); CORNELIUS M. KEWIN, RULEMAKING 8–20 (3d ed. 2003); MARC ALLEN EISNER, JEFF WORSHAM & EVAN J. RINGQUIST, CONTEMPORARY REGULATORY POLICY 35–44 (1999). This expansion in delegation has been “a bipartisan enterprise.” Christopher DeMuth, The Regulatory State,
Congress often has good reasons to delegate substantial policymaking and implementation to administrative agencies. Some would say broad delegation is “necessary." Legislators, even those with longstanding service on relevant committees, tend to lack the same degree of subject-specific expertise as do administrative agencies. The same is true for legislative staff. Agencies may also be free of some of the temporal and political constraints faced by elected officials, particularly members of the House of Representatives who need to stand for reelection every two years. It may also be easier to develop coherent policies on complex or controversial matters within a hierarchical structure than in a legislative committee.

However necessary the practice of delegation, it is not without its downsides, including a potential loss of democratic accountability. Concerns about delegation also motivate much contemporary criticism of the administrative state. To some critics, the widespread delegation of regulatory and other power to federal agencies represents an unconstitutional delegation of legislative power. To others, widespread

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26 See, e.g., Metzger, supra note 22, at 7 (claiming broad “delegations are necessary given the economic, social, scientific, and technological realities of our day”).

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

28 See DeMuth, supra 24, at 72 (“A hierarchy can make decisions with much greater dispatch than a committee can.”).


30 See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW LAWFUL? (2014); Gary Lawson, Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine, 73 Geo. Wash. L. Rev. 235 (2005); Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327 (2002); Michael B.
delegation represents the legislature’s shirking of its fundamental responsibilities and undermines the democratic legitimacy of regulatory policy. As John Hart Ely observed, the concern with delegation is not necessarily that “faceless bureaucrats’ necessarily do a bad job as our effective legislators.” Rather, it is that “[t]hey are neither elected nor reelected, and are controlled only spasmodically by officials who are.” In this way, broad delegation can be viewed as a threat to deliberative democracy.

Then-Professor Elena Kagan observed that delegation enables Congress to pass the buck to the executive branch, even though it may increase the power and influence of individual legislators. Other justices have identified broad delegation as a threat to individual liberty.

Much criticism of unbridled delegation focuses on the volume, range, and expansiveness of the legislature’s delegation of authority. Under some statutes, federal agencies are granted the authority to make broad policy decisions with tremendous economic consequences, such as the level of air pollution that is acceptable in urban areas or how to regulate emerging telecommunications technologies. Under others, agencies are


31 See Lawson, supra note 30, at 332 (“The delegation phenomenon raises fundamental questions about democracy, accountability, and the enterprise of American government.”).


33 See Sunstein, supra note 8, at 6. Indeed, as John Hart Ely observed, “[t]hat legislators often find it convenient to escape accountability is precisely the reason for a non-delegation doctrine.” Ely, supra note 32, at 133.

34 See Kagan, supra note 32, at 32.

35 See Rao, supra note 29 (explaining how delegation may create opportunities for individual legislators to “collude” with agencies or influence regulatory policy through oversight, appropriations, and direct involvement with agencies); see also Christopher J. Walker, Legislating in the Shadows, 165 U. Pa. L. Rev. 1377, 1407–19 (2017) (exploring how the role of federal agencies in statutory drafting may exacerbate the risks of administrative collusion). [perhaps expand to incorporate political science literature on committees, Congress, and delegation]

36 See Dep’t of Transportation v. Ass’n of Am. R.Rs., 135 S. Ct. 1225, __ (2015) (Alito, J., concurring); id. at __ (Thomas, J., concurring in the judgment); see also Metzger, supra note 22 at 23 (“Both justices expressed concern that delegations make lawmaking too easy and threaten individual liberty.”); Rao, supra note 29, at 1465 (“The Constitution separates lawmaking from law execution to promote accountability and the rule of law, and thereby safeguard individual liberty.”).


38 <insert citations>
given minimal constraints on whether to adopt regulatory measures and what policy objectives such measures should pursue.

While jurist and academics have focused on the breadth and scope of delegation, less attention has been paid to the temporal element of delegation. In many cases in which agencies utilize their delegated power, they are drawing upon authority that has been granted many years (or decades) earlier. Yet agencies quite often rely upon long-standing—and even long-dormant—authority when promulgating new regulations. This temporal dimension is largely absent from debates and discussions about delegation.

A few examples illustrate the importance of time. When the Federal Communications Commission (FCC) first sought to adopt an “open internet” order, it relied upon authority based in a 1934 statute that had not been substantially revisited by Congress in fourteen years. Even with these revisions, the statute was “woefully outdated” within a decade. The 1996 amendments to the Communications Act were enacted before the deployment of residential broadband or “Wi-Fi” networks, let alone the launch of Facebook, Wikipedia, Netflix, or even Google. These amendments were premised upon the existence of particular technologies and market pressures and presumed the desirability of a “stovepipe” regulatory framework that separated telecommunications and information services. However appropriate such premises were at the time Congress acted, they are obsolete in the twenty-first century. Yet the statute from which the FCC draws it authority to regulate internet service providers reflects these outdated assumptions.

Environmental law is replete with statutes based on outdated or mistaken assumptions that limit their effectiveness. In some cases, these statutes were based on then-current scientific understandings of environmental problems and their causes. Yet as scientific understanding and technical expertise concerning pollution and other

39 See In re Preserving the Open Internet, 25 F.C.C.R. 17905 (2010), order vacated in part, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014); see also U.S. Telecom. Ass’n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehe’g en bane) (“[B]ecause Congress never passed net neutrality legislation, the FCC relied on the 1934 Communications Act, as amended in 1996, as its source of authority for the net neutrality rule.”).
41 See id. at 104.
42 See id. at 106–07 (“However serviceable these definitional constructs may have been at an earlier time, . . . they are no longer serviceable in a world in which digital technology is rapidly displacing analog.”).
43 See A. Dan Tarlock, The Nonequilibrium Paradigm in Ecology and the Partial Unraveling of Environmental Law, 27 Loy. L.A. L. Rev. 1121, 1122-23 (1994) (noting how much environmental law was based upon an equilibrium paradigm that is no longer accepted by scientists); see also Daniel B. Botkin, The Moon in the Nautilus Shell: Discordant Harmonies Reconsidered ix (2013).
environmental concerns have advanced, the statutory regimes have not kept pace.\textsuperscript{44} Much of the Clean Water Act focuses on pollution from point sources; relatively little of the Act concerns non-point sources. However well-justified this emphasis may have been in 1972, it is obsolete today, as nonpoint source pollution now presents the far greater threat to water quality. Yet the Environmental Protection Agency (EPA) has been delegated relatively little authority to address it.

The Clean Air Act (CAA) is arguably the most expansive federal environmental law. It is also the source of authority for recent regulations adopted to limit greenhouse gas emissions in an effort to reduce the threat posed by global warming.\textsuperscript{45} Congress erected the basic architecture in 1970,\textsuperscript{46} and made significant modifications in 1977\textsuperscript{47} and 1990.\textsuperscript{48} As originally constructed, the CAA focused most acutely on localized air pollution. The “centerpiece” of the Act consists of those provisions that define acceptable ambient concentrations of regulated air pollutants and direct states to adopt implementation plans to ensure compliance with the designated standards.\textsuperscript{49} Relatively little of the CAA’s core architecture is concerned with interstate air pollutants, let alone those dispersed globally. Global climate change, in particular, was not yet a serious concern within the legislative branch.\textsuperscript{50}

When Congress last modified the CAA in 1990, it tightened and revised the NAAQS provisions Congress also expanded the statute’s scope to address non-localized air pollutants, such as those that contribute to acid precipitation and the depletion of stratospheric ozone.\textsuperscript{51}


\textsuperscript{49} See, e.g., Lisa Heinzerling, The \textit{Clean Air Act and the Constitution}, 20 \textit{ST. LOUIS PUB. L. REV.} 121, 121 (2001) (“The National Ambient Air Quality Standards (NAAQS) form the centerpiece of what many consider to be this country’s single most important environmental program.”); see also Union Elec. Co. v. EPA, 427 U.S. 246, 249 (1976) (characterizing provisions requiring state implementation plans to meet NAAQS standards the “heart” of the CAA).

\textsuperscript{50} See Richard Lazarus, \textit{Environmental Law without Congress}, 30 J. LAND USE & ENVTL. L. 15, 30 (2014) (“Climate change is perhaps the quintessential example of a new environmental problem that the Clean Air Act did not contemplate.”); see also Arnold W. Reitze, Jr., \textit{AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT} 419 (2001).

provisions were enacted to address each of these concerns. No provisions were adopted with the express purpose to address greenhouse gas emissions, however. Nor have any such measures been adopted since. Nonetheless, seventeen years later in *Massachusetts v. EPA*, the Supreme Court concluded that the plain language of the CAA was capacious enough to cover greenhouse gases as air pollutants. Whether or not the Court was correct to interpret the CAA in this fashion, it is fair to observe that the *Massachusetts v. EPA* decision set in motion a series of regulatory initiatives that Congress had never contemplated, let alone endorsed, and forced the EPA to try to retrofit a twentieth-century statutory regime to address a twenty-first century problem.

The temporal lag between delegation and utilization of regulatory authority raises multiple distinct concerns about whether delegation is consistent with democratic governance. As already noted, agencies only have that power delegated to them by the legislative branch. Thus, when an agency exercises such power, we may assume this is democratically legitimate because it has been authorized by the political branches and thus satisfied the requirements of bicameralism and presentment. Yet when decades pass between the enactment of statutes that delegate authority to agencies and the exercise of that authority, there is a risk that the delegated authority will be used for purposes or to address concerns that the original legislature never considered. This may mean that the specific regulatory tools granted by Congress may not align with the nature of the problem the agency has decided to address.

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

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


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


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

58 See infra notes ___ and accompanying text.

broadly, agencies may be exercising power granted for one purpose to pursue another Congress had not even contemplated. This was arguably true with both the FCC’s initial effort to impose “net neutrality” and the EPA’s use of the CAA to address climate change.

When agencies rely on regulatory authority delegated to them in the past, there is also a risk that the power exercised is no longer in line with contemporary legislative majorities. The inertia inherent in the legislative process makes it difficult to revise prior delegations of authority and can entrench the preferences of prior-in-time legislatures. As a consequence, agencies may often have the power (or even the obligation) to take steps based upon the preferences of a prior congress that could no longer command such support. In this respect, the temporal lag between delegation and regulatory action may create a particularly concerning democratic deficit. The values ascendant at the time of enactment may no longer command widespread support. Particular policy concerns, much like given statutory language, may be obsolete.

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

II. CONVENTIONAL RESPONSES TO NONDELEGATION

A. Delegation in the Courts

Time and again the Supreme Court has proclaimed that Article I, section 1 of the Constitution vests “all legislative powers” in Congress, and that such power may not be delegated to other branches. Yet this

(2011) (noting that “statutes that empower the agencies are increasingly obsolete”).

60 See Rui J. P. de Figueiredo, Jr., Electoral Competition, Political Uncertainty, and Policy Insulation, 96 AM. POL. SCI. REV. 321, 322 (2002) (“Because of the multiplicity of veto points in the legislative process under a separation of powers system, new laws are extremely difficult to pass, for a minority can block new legislation.”); McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80 GEO. L.J. 705, 720 (1992) (discussing phenomenon of “vetogates”).

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

62 See Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 472 (2001) (“Article I, § 1, of the Constitution vests ‘all legislative powers herein granted . . . in a Congress of the United States. This text permits no delegation of those powers.’”); Field v. Clark, 143 U.S. 649, 692 (1892) (“That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the
principle has not prevented Congress from delegating substantial policymaking authority to administrative agencies, including the authority to promulgate prescriptive regulations. Rather, as long understood and applied by the Supreme Court, the “non-delegation doctrine” has merely required that Congress articulate an “intelligible principle” to guide an agency’s exercise of delegated power.

In principle, this doctrine ensures that Congress remains responsible for the major policy judgments that drive regulatory decisions. In practice, the “intelligible principle” requirement has not done much to constrain delegation to administrative agencies. While Congress may not grant an administrative agency a “blank check” to do anything and everything, virtually anything short of that will do. The Supreme Court has found an “intelligible principle” in statutes authorizing federal agencies to set “generally fair and equitable” prices and to regulate in the “public interest.” As Justice Scalia summarized, the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” To the contrary, in the nation’s history the Supreme Court has only invalidated two statutes on non-delegation grounds, and both of these decisions were handed down in a single year.
Thus, it can be said, “the nondelegation doctrine has had only one good year and over two hundred bad ones.”

While the nondelegation doctrine has not led to the invalidation of federal statutes, nondelegation concerns appear to have influenced various administrative law doctrines. Most notably, nondelegation concerns appear to have influenced how the Court interprets statutes that may be understood to delegate authority to regulatory agencies. In particular, under various common canons of construction, courts are not to lightly presume that Congress has delegated authority to agencies that might implicate constitutional concerns, such as by intruding on state prerogatives or infringing upon constitutional rights.

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

An unconstrained *Chevron* doctrine might raise substantial delegation concerns. Yet as it has been refined by subsequent decisions, the doctrine actually accommodates nondelegation values. Most notably, *Chevron* deference is only available where courts can conclude that Congress has actually delegated such authority to the agency in question, albeit implicitly or explicitly. As the Court explained just a few years after *Chevron*, “[a] precondition to deference under *Chevron* is a

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71 Posner & Vermeule, supra note 63, at 1740 (citing Sunstein, supra note 8, at 322); see also Christopher DeMuth, Can the Administrative State Be Tamed? 8 J. Leg. Analysis 121, 128 (2016) (“nondelegation was a one-year, two-case wonder”).
73 Sunstein, supra note 8, at __.
75 Id. at 842-43.
76 See, e.g., Hamburger, supra note 30.
77 See Thomas W. Merrill & Kristin E. Hickman, Chevron’s Domain, 89 Geo. L.J. 833, 855 (2001) (“A finding that there has been an appropriate congressional delegation of power to the agency is critical under Chevron.”); see also Jonathan H. Adler, Restoring Chevron’s Domain, 81 Missouri Law Review 983 (2016) (discussing the delegation foundation of Chevron and the implications of this approach).
congressional delegation of administrative authority.” Yet Congress cannot be presumed to “hide elephants in mouseholes,” delegation must be demonstrated, not merely presumed.

The so-called “major questions” doctrine provides a useful example of how nondelegation concerns have influenced the Court’s approach to Chevron. As Chief Justice Roberts explained in King v. Burwell, Chevron “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.” Yet not just any gap will do. Where a proffered statutory interpretation would seem to give an agency unnecessarily broad authority, the Court has cautioned that Chevron may not apply. Specifically, in cases such as FDA v. Brown & Williamson and King v. Burwell, the Court has cautioned against deferring to agencies on questions of major economic or political significance. The reason for this, as the Court has explained, is that it would be extremely unlikely that Congress would delegate the responsibility for resolving such questions to administrative agencies. Indeed, there is even reason to suspect that the delegation of some such questions might raise constitutional questions.

While the nondelegation doctrine itself is not used to invalidate the delegation of such questions to federal administrative agencies, the so-called “major questions” doctrine serves to ensure that such broad and consequential delegations are not merely assumed to have been delegated implicitly due to the existence of a statutory gap or ambiguity. Only where Congress has expressly granted such authority, where such a delegation


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


82 King, 135 S. Ct. at 2488–89.

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

be recognized. In this way, the “major questions” doctrine helps protect against the potential loss of democratic accountability that may result from unduly broad delegations. Because such delegations will not be presumed, they are only allowed where Congress has clearly and openly indicated its intent to delegate.

However much the “major questions” doctrine may be understood to help compensate for the potential democratic deficit caused by delegation, it does not do much at all to address the temporal concerns. The “major questions” doctrine focuses on the nature and magnitude of the delegation at issue, such as whether the matter in question is of major economic and political significance, or whether it implicates matters beyond the usual concerns and expertise of a given regulatory agency. It does not, however, pay much attention to when the delegation occurred.

B. Delegation in Congress

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

The Legislative Veto

The legislative veto was an early effort to constrain the potential adverse consequences of expansive delegation. Between the 1930s and 1980s, Congress enacted dozens upon dozens of legislative veto provisions within nearly 300 statutes. These provisions enabled Congress to delegate broad legislative-like authority to administrative agencies while retaining the unilateral authority to overturn administrative decisions through legislative action, but without presidential assent or a veto-proof

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


majority. The legislative veto also ensured that a later Congress would retain the ability to reject agency actions in the future, should a subsequent Congress no longer support the delegation of authority enacted by one of its predecessors. In this way, the legislative veto did address the time lag between legislative authorizations and agency actions.

Legislative vetoes were not long for this world, however. In 1983, the Supreme Court invalidated the legislative veto as an impermissible infringement on the Constitution’s requirement of bicameralism and presentment for the enactment of legislation, in \textit{INS v. Chadha}. Overturning an administrative action, a majority of the Court concluded, constitutes a legislative act under the Constitution, and is therefore subject to the requirement of bicameralism and presentment. A single house, acting alone, could not invalidate an action taken by a federal agency pursuant to an otherwise lawful delegation of authority. Rather, the concurrence of both houses of Congress and presentation to the President for his signature or veto, the latter of which could be overturned by super-majorities in both legislative chambers, would be required.

Although a unicameral legislative veto was declared unconstitutional, there is nothing to stop Congress from repealing or overturning regulations of which Congress disapproves, either because Congress prefers different policies or because Congress believes a given action represents an improper use of delegated authority. Traditional legislative procedures, however, can make it difficult for Congress to take such actions, even when there is majority support for overturning an agency action. The existence of “vetogates” and other procedural hurdles to the enactment of new legislation means that Congress may fail to enact measures altering, redirecting, or rescinding authority previously delegated to an agency at the same time Congress would be unable or unlikely to reenact the previously delegated authority. Under \textit{Chadha}, Congress has a more difficult time disciplining the exercise of power it has delegated to agencies.

\textit{The Congressional Review Act}

Concern that federal agencies may adopt regulations opposed by current legislative majorities led to the enactment of the Congressional Review Act of 1996 (CRA). The CRA created an expedited process for

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

89 \textit{Chadha}, 462 U.S. 919.

90 \textit{U.S. CONST. art. I, § 7, cl. 2–3.}

consideration of joint resolutions to overturn regulations of which Congress disapproved so as to make it easier for Congress to reject agency actions of which it disapproves. In effect, the CRA created a means through which Congress could police the exercise of delegated authority by agencies. While it would remain difficult for the current Congress to repeal prior grants of delegated authority, the CRA makes it easier for the current Congress to overturn specific exercises of such power, thereby creating a modest check on the temporal democratic deficit broad delegations may produce, particularly during the transition from one Presidential administration to another.

The CRA’s ability to address such temporal concerns is limited, however. This is because the CRA can only be used within a relatively short window of time after the promulgation of a major regulation. Under the CRA, before any new rule may take effect the promulgating agency must submit a report on the rule to each house of Congress and the Comptroller General. If the regulation is deemed a “major rule”—defined for purposes of the Act as any rule that OIRA concludes is likely to have an annual effect on the economy of $100 million or more, or otherwise have significant effect on consumer prices or the economy—it may not take effect for at least sixty days after its submission to Congress. This waiting period was adopted to provide Congress with an opportunity to review major rules and consider whether to overturn them. For this purpose, the CRA creates a streamlined procedure whereby Congress may overturn a major regulation by enactment of a joint resolution by both houses.

Enacted in 1996, the CRA lay almost completely dormant for its first two decades. Because the CRA resolutions are subject to presidential

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94 The window for congressional action may be extended by an agency’s failure to comply with the CRA’s reporting requirements. Under the CRA, a new rule is not to take effect until after the rule has been submitted to both houses of Congress and the Comptroller General. See 5 U.S.C. § 801(a)(1)(A). Agency submission also starts the review period in which Congress may invoke the CRA’s procedures to enact a resolution of disapproval. Were an agency to fail to submit a newly promulgated regulation, as required by the CRA, Congress would appear to retain the ability to revoke that regulation under the CRA. See Larkin, supra note 93, at 214–15.
96 5 U.S.C. § 804(2).
99 See MORTON ROSENBERG, CONG. RESEARCH SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 6 (2008) (noting through 2008, joint resolutions of disapproval were introduced for fewer than five percent of the regulatory actions to which the CRA procedure could be applied).
veto, the only real opportunity for Congress to utilize the CRA is rescind “midnight regulations" adopted at the end of a Presidential administration. Consequently, prior to the election of President Trump, the CRA had only ever been used once to repeal a regulation: the ergonomics rule adopted by the Occupational Safety and Health Administration during the Clinton Administration. And this particular regulation was only repealed because it was promulgated at the end of the Clinton Administration, creating an opportunity for a Republican Congress and the Bush Administration to utilize the CRA procedures to repeal it.

As the ergonomics rule illustrates, only those rules adopted near the end of a President’s term are vulnerable to CRA repeal. This is because a President is likely to veto any legislative effort to overturn a regulation issued by his own administration. Further, an outgoing Administration can reduce the vulnerability of regulations to CRA review by ensuring new rules are not issued at the tail end of a presidential term. During the last year of the Bush Administration, for example, agencies were put on notice that they needed to finalize new regulations early enough so that they would not be subject to repeal under the CRA.

Despite its early quiescence, the CRA was used extensively by the Trump Administration during its first year in office. In 2017, Congress

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


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

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


105 See generally, Paul J. Larkin, Jr., The Trump Administration and the Congressional Review Act, 16 GEO. J.L. & PUB. POL’Y 505 (2018); see also Christopher J. Walker, Restoring Congress’s Role in the Modern Administrative State, 116 MICH. L. REV. 1101, 1102 (2018) (“[O]utside of the tax reform legislation enacted at the close of the year, Congress’s most significant legislative
enacted, and the President signed, fifteen resolutions of disapproval to revoke major regulations with which Congress and the White House disapproved.\textsuperscript{106} Fourteen of these rules were “midnight regulations” adopted during the closing months of the Obama Administration. The fifteenth was a rule promulgated in 2017 by the Consumer Financial Protection Bureau. A sixteenth resolution of disapproval—targeting another CFPB rule—was passed, and signed by the President in 2018.\textsuperscript{107}

While the CRA may be a useful tool to quickly rollback regulatory measures adopted at the end of one Administration, it remains a particularly limited tool for restoring accountability for regulatory policy. The CRA makes it easier for Congress to rescind major rules that are opposed by a contemporary legislative majority, provided the White House agrees or there are enough votes to override a Presidential veto. With the CRA, a contemporary Congress can constrain the ability of agencies to use prior delegations of authority to enact policies that no longer enjoy political support.

The CRA also provides Congress with a targeted means of rescinding prior delegations of authority to regulatory agencies. This is because the CRA also provides that, once a resolution of disapproval is enacted, the rejected rule “may not be reissued in substantially the same form” unless it is subsequently authorized by Congress.\textsuperscript{108} In other words, a resolution of disapproval not only rescinds a rule, it also rescinds the specific delegation of authority upon which the agency relied.\textsuperscript{109}

\textit{The REINS Act}

Dissatisfied with the CRA’s limited potential to constrain major agency actions that lack political support within Congress, some members of Congress have considered reforms to strengthen the CRA. One such set of reforms is known as the “REINS Act” (for “Regulations of the Executive in Need of Scrutiny”), which would require legislative authorization for new major rules before they may take effect.\textsuperscript{110} Such resolutions of approval would be subject to expedited consideration and streamlined legislative procedures, much like resolutions of disapproval under the CRA.

\textsuperscript{106} See Larkin, \textit{Trump and CRA}, \textit{supra} note 105, at 509.
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} See 5 U.S.C. § 801(b)(2).
\textsuperscript{109} The precise scope of the CRA’s limitation on the promulgation of rules on related subject matter after the adoption of a resolution of disapproval has not yet been tested. See Stephen Santulli, \textit{Use of the Congressional Review Act at the Start of the Trump Administration: A Study of Two Vetoes}, 86 GEO. WASH. UNIV. L. REV. 1373 (2018) (discussing potential conflict over what constitutes a rule that is “substantially the same” as one rescinded under the CRA).
\textsuperscript{110} For a discussion of the REINS Act, see Adler, \textit{supra} note 14. For a less favorable view, see Siegel, \textit{supra} note 14.
The primary difference is that while the CRA creates an expedited process for the disapproval of major agency rules that would otherwise become final regulations, REINS creates an expedited process for the approval of major agency rules that is a precondition for final promulgation, and effectively disables traditional means of legislative obstruction or delay. Specifically, whereas traditional legislation can be bottled up in committee or held up by a determined handful of legislators, resolutions of approval under the REINS Act cannot be disposed of without a majority vote.

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

Adoption of the REINS Act would make it much more difficult for agencies to rely upon “old statutes” to adopt new policies without legislative approval. In this regard, the REINS Act would begin to address the problem of obsolete or outdated legislative authorizations. It would, however, do this in a purely reactive manner, placing the legislature in the position to reject those agency initiatives with which it disagrees, but doing little to encourage more proactive or forward-looking legislative engagement with new, emerging, or changing concerns that might justify federal regulation.

**Appropriations and Oversight**

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

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111 Different versions of the REINS Act have been introduced. For a summary and analysis of the precise legislative language introduced in 2011, see Adler, supra note 14, at 21–24.

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

113 See Rao, supra note 29.
In his recent book *Congress’s Constitution*, Josh Chafetz categorizes Congress’s tools outside of regular legislation into six main powers: (1) the power of the purse; (2) the personnel power; (3) contempt of Congress; (4) freedom of speech or debate; (5) internal discipline; and (6) cameral rules. This congressional toolbox provides Congress with substantial power to monitor, constrain, and shape agency regulatory activity and merit some attention here.

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

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

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114 See Chafetz, supra note 20.
115 See id. at 45–77.
117 See Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 Geo. L.J. 619, 653 (2006) (“[T]he appropriations process is procedurally distinct from the authorization process in several significant respects. These differences, moreover, have significant ramifications for the kind and substance of the laws that are produced.”).
118 Lazarus, supra note 117, at 654; accord Christopher J. Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting* 10–11, 38–39 (Admin. Conf. of U.S. ed. 2015); see also Adoption of Recommendations, 80 Fed. Reg. 78,161, 78,162 (Dec. 16, 2015) (“Appropriations legislation presents agencies with potential coordination problems as substantive provisions or ‘riders’ may require technical drafting assistance, but agency processes for reviewing appropriations legislation are channeled through agency budget or finance offices. It is crucial for the budget office to communicate with an agency’s legislative counsel office to anticipate and later address requests for technical assistance related to appropriations bills.”).
119 See Walker, supra note 105, at 1108.
The use of the appropriations process to limit agency action is no substitute for affirmative legislation. Appropriations riders may prevent agency departures from legislatively approved paths, but they cannot wholly redirect regulatory programs. When Congress sought to ensure completion of the Tellico Dam, continued appropriations were not enough to trump the regulatory strictures of the Endangered Species Act. Legislative action was required. Limiting appropriations is an effective way to limit an agency’s exercise of delegated power, but it takes more than an appropriation of federal funds to authorize agency action.

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

Second, Congress has a potent personnel power, which consists of a suite of tools that includes Congress’s role in appointing agency officials, limitations on the president’s ability to use acting officers or recess appointments, and Congress’s ability to remove officials in the other branches of government. These tools extend beyond approving the president’s choice to run a federal agency. For instance, the Senate holds a committee hearing on each nominee and can extract pledges from the nominee about how she will run the agency, including commitments concerning congressional oversight cooperation. Nominees often have one-on-one meetings with senators, during which additional discussions about the agency’s regulatory activities can take place. Consent can be withheld to force the president to choose a nominee with a different regulatory agenda, or it can be delayed until the agency complies with certain oversight requests or completes (or commits to complete) certain regulatory activities. The Senate committee’s advice-and-consent power is often also exercised in the form of refusing to hold the nomination hearing at all.

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121 The entire saga of the snail darter and the Tellico Dam is recounted in Zygmunt Plater, Classic Lessons from A Little Fish in A Pork Barrel-Featuring the Notorious Story of the Endangered Snail Darter and the TVA’s Last Dam, 32 UTAH ENVTL. L. REV. 211 (2012).
123 See CHAFETZ, supra note 20, at 78–151.
124 See Walker, supra note 105, at 1108–12.
The final four tools in the congressional toolbox all relate to Congress’s ability to conduct oversight of federal agencies. Congress’s Article I cameral rules powers allow Congress to set up committees and to grant certain investigatory powers, such as subpoena and hearing powers, to those committees and subcommittees.\(^{125}\) These oversight powers are enhanced by Congress’s power to hold Executive Branch officials in contempt for failure to comply with congressional oversight inquiries.\(^{126}\) That members of Congress have an Article I freedom of speech and debate also allows Congress to make public nonconfidential information from the Executive Branch\(^{127}\)—oftentimes even the threat of which encourages federal agencies to comply with oversight requests or even to change agency behavior.\(^{128}\)

Congress’s appropriations and oversight powers are important, and can have a significant effect on how agencies exercise their delegated powers. Indeed, it may be true that today “congressional oversight of agency action is one of the most powerful tools that Congress has to exercise some measure of control over administrative policymaking.”\(^{129}\) Yet the oversight power is inherently limited and, equally important, is necessarily reactive. These tools can be deployed to constrain agency actions at odds with contemporary congressional preferences, but are ill suited to updating obsolete statutory frameworks.\(^{130}\) Upgrading or modernizing statutes to ensure agencies have those powers necessary to address contemporary concerns requires actual lawmaking.

## III. REAUTHORIZATION IN THEORY AND IN PRACTICE

Statutory frameworks need to be revisited if they are to be effective and if they are to reflect contemporary preferences and present understandings. Statutory obsolescence is a perpetual concern (or, at least it should be). The problem of outdated statutory frameworks is particularly acute for those authorizing complex regulatory programs operating within ever-changing and evolving contexts. Failure to revise and reconsider the premises upon which such programs are based and the ways in which they operate inevitably undermines democratic

\(^{125}\) See Chafetz, supra note 20, at 267–301.

\(^{126}\) See id. at 152–98.

\(^{127}\) See id. at 201-31. Congress may still constrain the ability of individual members of Congress to leak nonpublic information through Article I’s internal discipline powers. See id. at 232–66.

\(^{128}\) See Walker, supra note 105, at 1112–13.


\(^{130}\) <CJW Note: Insert some discussion about the problems with individual members and committees exercising this oversight authority to shape agency behavior, as opposed to the collective Congress (from Rao and Part II of my review of Chafetz’s book.>
accountability and compromises effective governance. Either regulatory agencies learn to reinterpret and stretch their existing authority, the underlying statutory framework becomes obsolete, or both.

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

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

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

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

Regular reauthorization, where it occurs, is one way to help keep agency authorizations current and responsive to changing circumstances,

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131 See Mettler, supra note 61, at 370 (“The lack of policy maintenance undermines laws’ ability to achieve the purposes for which they were created.”); id. at 375.
134 See id. at 248; see also Brian Baugus & Feler Bose, Sunset Legislation in the States: Balancing the Legislature and the Executive 8-18 (Mercatus Research, Mercatus Center at George Mason University, 2015).
135 See Gersen, supra note 133, at 248.
evolving understandings, and shifting political coalitions. One statute that has been reauthorized on a regular basis is the farm bill. The law's time-limited authorization—and the prospect of significant disruption within the agricultural sector should reauthorization fail—has resulted in the law's continued modification and revision since its creation during the Great Depression.¹³⁶

A. Temporary Legislation, Sunsets, and Reauthorizations

The idea of temporary legislation is not new. “Temporary legislation,” Jacob Gersen has observed, “is a staple of legislatures, both old and modern.”¹³⁷ Well before the birth of the modern regulatory agency, prominent voices extolled the virtue of legislation that needs to be renewed or revisited. Thomas Jefferson, for instance, argued that vices such as corruption make statutory expiration preferable to relying on the possibility of repeal.¹³⁸ In Federalist No. 26, Alexander Hamilton argued two-year limits on military appropriations would require periodic deliberation and thereby check potentially unwise policy decisions.¹³⁹ Temporary legislation was utilized by colonial legislatures and the early Congress.¹⁴⁰ The Sedition Act of 1798, as enacted, expired in 1801¹⁴¹ and the first two national banks were created with time-limited charters and allowed to expire as well.¹⁴²

During the New Deal, when Congress set about creating a range of new federal agencies, William Douglas urged consideration of limiting how long Congress’s new creations could operate without renewed legislative authorization. Prior to his appointment to the Supreme Court, Douglas advised President Roosevelt to include sunset provisions due to the risk that a new agency would have exhausted its “great creative work” within a decade, and risked falling prey to “inertia” and becoming “a prisoner of bureaucracy.”¹⁴³ Sunset provisions, in Douglas’s view, were a way to limit rent-seeking within the administrative state. Theodore Lowi echoed this view in The End of Liberalism, in which he urged adoption of a “tenure of statutes” act that would require statutes authorizing

¹⁴⁰ See Gersen, supra note 133, at 252–53.
¹⁴² See Act of Feb. 25, 1791, ch. 10, 1 Stat. 191 (1791); Act of Apr. 10, 1816, ch. 44, 3 Stat. 266 (1816).
administrative agencies to be periodically renewed. The idea was to require periodic reevaluation and review of administrative agencies, so as to provide opportunities to eliminate wasteful or unneeded programs, and bring wayward bureaucracies to heel.

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

Proposals to adopt an across-the-board sunset provision, such as that proposed by Lowi and (more recently) Philip Howard, have not gotten very far. Yet temporary legislation or time-limited authorization is common. The Voting Rights Act of 1965 and the USA-PATRIOT Act are but two prominent examples of statutes initially enacted with expiration dates, and each was revised by subsequent congresses during reauthorization. Congress also enacts tax provisions on a time-limited basis, though this is often done to game the relevant budget rules. In such cases, Congress limits the authorization of new programs when unsure whether a given program or requirement will prove wise or to encourage legislative reconsideration within a given period of time.

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146 Id. at 212; see also Chris Mooney, A Short History of Sunsets, Leg. Affairs, Jan-Feb 2004.
147 See Blickle, supra note 145, at 217.
149 See Baugus & Bose, supra note 134.
150 See Blickle, supra note 145 at 228-29. In some cases, the cost of the periodic review approached or exceeded the cost savings from the termination of unnecessary programs. Id.
There are a host of arguments in favor of sunset provisions in organic statutes. The most obvious is that sunset provisions increase the likelihood of culling outdated programs and agencies. Over time things change, and what was once necessary may no longer be. In the alternative, an agency may remain necessary, but in dire need of reform. Sunset provisions can serve as an effective oversight tool when properly employed.153

Time-limiting statutory authorizations may also facilitate rapid congressional response to apparent crises where there is a perceived need for Congress to act quickly in response to urgent threats, but where Congress may also lack the information necessary to develop the most appropriate response.154 As Professor Romano notes, “sunsetting mitigates the predicament of legislating with minimal information and therefore running the risk of getting things seriously and, for all practical purposes, permanently wrong.”155 If anything, Romano understates the value of sunsets, in that even a purportedly well-informed Congress may be misinformed or mistaken. The best understanding of many social problems at the time of legislative action may prove to have been based upon faulty premises, erroneous analyses or limited information. Legislation is never enacted with perfect knowledge, enhancing the value of legislative procedures or norms that incentivize regular reengagement with complex statutory regimes.

Being vested in certain instances with legislative, executive, and judicial powers, agencies pose a new and unique threat to the separation of powers. Sunset provisions shift the burden of inertia from those in favor of repeal, to those in favor of reauthorization. One result of this is that—provided Congress does not blindly reauthorize an agency—if the agency has drifted from its intended purpose, Congress can modify its authorizing statute. Agency drift can thus be checked.156

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

153 See Blickle, supra note 145, at 228-230.
154 See Romano, supra note 17, at 96.
155 Romano, supra note 17, at 96.
156 See Baugus and Bose, supra note 134, at 13-18; see also George K. Yin, Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint, 84 N.Y.U. L. Rev. 174, 182 (2009) (arguing that, in the context of tax and spending legislation, “increased use of temporary-effect legislation enhances political accountability and may lead to greater fiscal restraint”).
B. Reauthorization Today

When we talk about reauthorization today, we are actually referring to two distinct yet related concepts. First, there is temporary legislation—enabling statutes that authorize a particular federal program or agency to operate for a set time period. 157 Second, there is the authorization of appropriations, which, as the Congressional Budget Office (CBO) has explained, functions to authorize the appropriation of funds (generally discretionary) to carry out a program or function established in an enabling statute. An authorization of appropriations constitutes guidance to the Congress about the funding that may be necessary to implement an enabling statute; it may be contained in that enabling statute or provided separately. An authorization of appropriations may be annual, multiyear, or permanent. Such an authorization also may be definite or indefinite: It may authorize a specific amount or “such sums as may be necessary.” 158

As for the former, perhaps more classic version of reauthorization, there is no federal repository that tracks and documents these various forms of temporary legislation—though some scholars have explored specific statutory contexts. 159

As for the latter, however, Congress requires the CBO to prepare a report each year that documents all federal programs and activities for which authorization of appropriations has already expired prior to, or will expire during, the fiscal year. 160 For instance, in its March 2019 report, CBO identified 971 expired statutory authorizations of appropriations with more than $300 billion for which Congress had appropriated funding for fiscal year 2019. 161 Among the major sources of expired authorizations that have nevertheless been funded are programs under the Veterans’ Health Care Eligibility Reform Act of 1996, Housing and Community Development Act of 1992, and the Violence Against Women and Department of Justice Reauthorization Act of 2005. 162 As reported in its searchable data supplement to the 2019 CBO report, nearly two dozen of

157 Gersen, supra note 133, at 247 (“[T]emporary legislation merely sets a date on which an agency, regulation, or statutory scheme will terminate unless affirmative action satisfying the constitutional requirements of bicameralism and presentment is taken by the legislature.”).
159 See Gersen, supra note 133, at 255–58 (providing examples and collecting sources); Mettler, supra note 61, at 379–83.
161 CBO REPORT, supra note 158, at 1.
162 Id. at 6 tbl.4.
these 971 authorizations expired in the 1980s, including the Equal Access to Court Act as well as certain authorizations for the Federal Election Commission, the Federal Energy Regulatory Commission, and the Department of Energy’s power marketing administration.\textsuperscript{163} The CBO, however, does not even attempt to “identify whether an enabling statute governing the relevant program or activity has expired.”\textsuperscript{164}

The process of (re)authorization of appropriations should not be confused with the appropriations process itself. These are separate legislative processes that originate from distinct committees in Congress. The authorization of appropriations generally goes through the Senate and House subject-matter authorizing committees—the same committees that conduct oversight and consider substantive legislation relating to the particular subject matter, including creating new federal agencies and programs, amending agency governing statutes, and reauthorizing federal agencies and programs when general authorization has expired.\textsuperscript{165} The CBO annual report breaks down the details of the expiration of appropriations by authorizing committee. In the 2019 CBO report, for instance, the Committees on Natural Resources (57 laws; 287 expired appropriations) and Energy and Commerce (49; 135) had the most expired authorizations in the House, whereas the Committees on Health, Education, Labor, and Pensions (40; 227) and Energy and Natural Resources (20; 159) led the way in the Senate.\textsuperscript{166} As illustrated below in a number of contexts, this (re)authorization of appropriations process often leads to major substantive modifications of the organic statutes that govern federal agencies and programs.

Appropriations legislation, by contrast, does not go through these authorizing committees. Instead, the House and Senate Committees on Appropriations have exclusive jurisdiction over all discretionary spending legislation in each chamber.\textsuperscript{167} Appropriations committees have no authority to authorize federal agencies and programs; indeed, they have an obligation under chamber rules to expressly identify any federal programs to be funded by proposed appropriations legislation that lack an authorization.\textsuperscript{168} But in the modern Congress, as Barbara Sinclair, among others, has chronicled, the appropriations and budget processes have evolved into a new and predominant form of unorthodox substantive

\textsuperscript{163}The searchable supplemental data file is available here: https://www.cbo.gov/publication/55015.
\textsuperscript{164}CBO REPORT, supra note 158, at 2.
\textsuperscript{165}See id. at 2. See generally CHAFETZ, supra note 20, at 267–301 (detailing how Congress has utilized its cameral rules powers to create standing committee to legislate on specific subject matters and oversee the administrative state).
\textsuperscript{166}See CBO REPORT, supra note 158, at 3–4 & tbls. 1–2.
\textsuperscript{167}See CHAFETZ, supra note 20, at 45–77 (providing an overview of Congress’s appropriations “power of the purse”).
\textsuperscript{168}CBO REPORT, supra note 158, at 2.
lawmaking, through the insertion of substantive riders in appropriations legislation that constrain agency action.169

Not only do different committees in Congress handle appropriations and authorizations, but it is also generally the case that different officials at the federal agencies handle appropriations (and budgeting) than those who deal with Congress on a regular basis with respect to agency oversight, substantive and technical statutory drafting, and the legislative reauthorization process.170 Indeed, the Administrative Conference of the United States has identified this agency structure as problematic, recommending that federal agencies “should strive to ensure that the [agency] budget office and [agency] legislative counsel communicate so that legislative counsel will be able to provide appropriate advice on technical drafting of substantive provisions in appropriations legislation.”171

If nearly one thousand federal programs lack reauthorization of appropriation, how do they continue to operate? After all, since the 1800s, both chambers of Congress have adopted rules that prohibit the appropriation of funding for unauthorized or expired purposes.172 For instance, current House rules detail that “[a]n appropriation may not be reported . . . for an expenditure not previously authorized by law . . . .”173

169 Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress 111–28 (1997); accord Jack M. Beermann, Congressional Administration, 43 San Diego L. Rev. 61, 84–91 (2006) (detailing the use of appropriations riders to substantively constrain federal agency action); Lazarus, supra note 117.


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

172 See Walt Lukken, Reauthorization: Let the Debate Begin, 24 No. 6 Futures & Derivatives L. Rep. 1 (2004) (“Dating back to the 19th century, House and Senate rules have generally banned appropriating monies for non-authorized purposes and have subjected the legislation containing an unauthorized appropriation to a procedural point of order on the House and Senate floors.”); accord CBO Report, supra note , at 2 n.3.

The Senate has a similar rule. To block unauthorized appropriations, however, a point of order must be raised. Apparently these points of order are never raised during the legislative proceedings. And, if they were, the Speaker of the House and the Presiding Officer of the Senate, respectively, would have to rule on whether the appropriation lacks authorization.

<To insert survey of existing reauthorization requirements and how they have been implemented/bypassed, including:
- Farm Bill reauthorization
- 2018 FAA reauthorization
- Elementary and Secondary School Act (ESEA)
- PSA and PHMSA reauthorization
- FDA user-fee regular reauthorization
- Ex-Im Bank reauthorization
- CFTC reauthorization
- National security/PATRIOT Act reauthorization
- Other successful examples?>

IV. REAUTHORIZATION AS A TOOL TO ADVANCE NONDELEGATION VALUES

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

This temporal delegation problem, however, has taken on added significance with the fall of lawmakers by legislation and the rise of lawmaking by regulation. Although counting words, pages, and laws is by no means a flawless method for capturing the extent of this trend in federal lawmaking, it provides at least an imperfect snapshot. For instance, by the end of 2016, the Code of Federal Regulations exceeded

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175 See, e.g., Lukken, supra note 172, n.3 (“Rule 21 of the House of Representatives and Rule 16 of the Senate generally prohibit the inclusion of unauthorized appropriations in appropriation and other legislation. However, these rules are not self-enforcing. Members of each body must raise a point of order at the appropriate time to enforce the rules. If a point of order is not raised, the unauthorized appropriation will continue through the legislative process.”).
176 See CBO REPORT, supra note 158, at 2 (“Whether an appropriation lacks authorization and whether it is in violation of a House or Senate rule are determined by the Speaker of the House or the Presiding Officer of the Senate on the basis of advice from the relevant chamber’s Office of the Parliamentarian.”).
175,000 pages, 100 million words, and tens of thousands of agency rules. In 2016, federal agencies reached a new regulatory record by filling over 95,000 pages of the Federal Register with adopted rules, proposed rules, and notices—nearly 20% more than the 80,000 or so pages published in 2015. Roughly two-fifths of those pages in 2016 were devoted to 3,853 final rules, an increase from the 3,410 final rules federal agencies promulgated in 2015. By contrast, the 114th Congress, over that same two-year period, enacted just 329 public laws for a total of 3,036 pages in the Statutes at Large.

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

We will not hold our breath that Congress will resume such legislative activity on its own, at least not on a voluntary basis. Nor is exhortation enough. The costs of regular legislative activity to members of Congress are apparently greater than its benefits and the accompanying costs of dealing with statutory obsolescence. But some form of temporary legislation or mandatory reauthorization could help force Congress to take its legislative role more seriously. As detailed in Part III, the idea of temporary legislation or regular reauthorization is not new. Congress has

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

178 CREWS, supra note 177, at 59 (reporting the total pages at the end of 2016 as 97,069, compared to 81,402 pages at the end of 2015). Of the 97,069 pages in 2016, 1,175 were blank. Id.

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

utilized it over the years in a variety of contexts, though mandatory reauthorization requirements are often ignored during the appropriations process.

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

A. Implementation of Regular Reauthorization Regime

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

Breadth of Reauthorization Mandate

History gives us a number of alternatives—some more sweeping than others—for tailoring the breadth of the reauthorization mandate. On the one extreme, Congress could consider enacting a universal sunset statute that would require the reauthorization of any federal agency or program within a certain number of years. As discussed in Part III.A, many state sunset laws, for instance, applied across the board. The failure to reauthorize would lead to sunsetting the entire agency or program and thus barring any subsequent appropriation.

This one-size-fits-all approach would be bold, yet foolish. It would certainly need to be designed to avoid the dramatic bottleneck Congress would encounter in potentially having to reauthorize everything at once; the legislation would need to spread out the reauthorization requirements over a number of years, taking into account the work of each authorizing committee. But more fundamentally, Congress can and should be more nimble in its reauthorization approach. Statutes vary, and action-forcing reforms may not be appropriate for all regulatory contexts.¹ For some federal programs and perhaps some entire federal agencies, it might make sense to incorporate express sunset provisions, such as the four-year window in the USA PATRIOT Act. Such a blanket sun-setting threat would force Congress to take a fresh look at the agency’s regulatory

¹ For an example of how different sorts of lawmaking reforms might be best suited to different sorts of problems, see Richard J. Lazarus, Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future, 94 CORNELL L. REV. 1153 (2009) (exploring the sorts of legislative precommitment strategies that might be most suited to addressing the problem of climate change).
activities and whether the program or agency continues to effectively fulfill the purpose for which Congress created it.

A narrower program- or agency-specific sun-setting approach has the additional benefit of involving the House and Senate authorizing committees in deciding whether to include, and how to design, the sunset provision. These committees are the same that exercise oversight functions over the particular programs, agencies, and subject matters, and thus are in a better position to tailor sunset provisions that take into account the unique characteristics of the particular regulatory areas. One critical decision the authorizing committees will need to make is the size of the authorization window before the sunset. For some regulatory contexts, that window will be quite small, perhaps even within the same presidential administration. As Romano has argued, such short time limits might be particularly appropriate for new, temporary, or emergency-driven agency programs. For others, however, one could imagine a larger window of five, seven, ten, or even more years. A longer time horizon may be particularly appropriate when the agency programs might generate too much uncertainty or brinksmanship for continuing programs. Such considerations may also counsel against the inclusion of any sunset provision.

Congress, moreover, does not face a binary choice between a complete sunset of an agency/program or permanent legislation. It may also incorporate statutory sunset defaults, to which the agency or program resets if not reauthorized. For instance, in 2015, when Congress failed to reauthorize the Import-Export Bank—a federal agency that provides trade financing solutions to help U.S. businesses better compete in the international market—for the first time in 81 years, the result was not the agency’s closure. Instead, the expiration of authorization merely resulted in the agency being unable to take on new customers; it would continue to have statutory authority to service existing customers. It is also worth noting that that particular lapse in authorization lasted only a matter of months, and the reauthorization resulted in a number of important legislative reforms to the agency and another seven years until the next sunset deadline.

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

Authorization for the Clean Air Act, to take one example, expired in 1998. Under this proposal, the EPA would lack the ability to promulgate

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182 See Romano, supra note 17.
183 For more information, see https://financialservices.house.gov/issues/extending-import-export-bank-charter.htm#Legislation.
new regulations, issue new permits to regulated facilities, and perhaps even initiate new enforcement actions unless and until the Act was reauthorized. The expired authorization would not affect the validity of regulations already promulgated, however, nor would it prevent state-level enforcement under previously approved state implementation plans or the filing of citizen suits against facilities for violating existing permits, regulations, or statutory provisions. Such a state of affairs would provide ample incentive for environmentalist organizations and regulated firms to support reauthorization, thus providing Congress with the opportunity—and, indeed, the need, to revisit and reconsider particularly obsolete or ineffective provisions in the law.

Similarly, in the immigration context, perhaps Congress would tie reauthorization together for U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE). Failure to reauthorize could result in these agencies being unable to issue new removal orders and new visa and work permits for those who are presently inside the United States, while preserving the agencies’ ability to regulate such matters at entry and exit to the country. In that sense, such a sunset default is reminiscent of the “hammer” provisions Congress has incorporated into certain rulemaking processes where an automatic agency action is triggered if the agency does not finish the rulemaking within the statutorily mandated deadline.184

The idea, in other words, would be to set the default to avoid catastrophic outcomes while still imposing significant costs on politically diverse groups so as to increase political pressure and prompt swift congressional action. And, again, the authorizing committees would be leading the way to craft such sunset defaults, leveraging their expertise with the subject matter and the agency gained through their oversight efforts. Sunset defaults may be particularly effective when they, in effect, stop the agency from growing but still allow the regulatory structure to remain in effect and the essential maintaining functions to continue. In that sense, this concept is somewhat analogous to what the federal government does when there is a complete shutdown, in that essential employees continue to ensure the agency’s provision of essential services.185 The difference would be that Congress would set by statute which services would continue under the sunset default.

A softer approach would shift away from reauthorization or sunset provisions in agency organic statutes that require a governing statute to be reauthorized and, instead, turn to the more modern innovation of

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185 For a nice overview, see http://www.crfb.org/papers/qa-everything-you-should-know-about-government-shutdowns.
reauthorization of appropriations. As outlined in Part III.B, in addition to temporary legislation and sunset provisions for certain federal programs and agencies, Congress frequently inserts authorizations of appropriations provisions in substantive legislation. Indeed, when we talk about reauthorization, these two concepts are conflated and confused.

Consider, for instance, the CFTC. The CFTC has operated without authorization of appropriations at least five times during its almost half-century existence.\textsuperscript{186} Then-CFTC Commissioner Walt Lukken referred to this legislative process as “periodic reauthorization,” but it is technically the process of periodic reauthorization of appropriations.\textsuperscript{187} By only tying agency funding to reauthorization, Congress can lower the stakes a bit for reauthorization. The agency remains in place; it just may have to stop certain operations and programs that are expressly tied to that particular appropriation.

One may respond that reauthorization of appropriations is toothless, because it does not force Congress to reconsider the agency’s substantive mandate, just its level of funding for operations. And that reauthorization could result in a one-sentence, rubber-stamp amendment just extending the authorization of appropriations. But that is not necessarily the case. After all, the authorizing committees—not appropriations committees—are in charge of reauthorizing appropriations, so they may invoke their oversight authority and leverage their substantive expertise. Indeed, Lukken has documented how CFTC reauthorization of appropriations has led to a dramatic modernization of the CFTC’s statutory mandate.\textsuperscript{188} It has also led to encouraging the CFTC to operate more effectively in order to achieve a more routine reauthorization process that some its sibling financial regulators enjoy. After all, “[r]outine reauthorizations,” Lukken observed, “must be earned over time, not simply granted.”\textsuperscript{189}

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

\textsuperscript{186} See Lukken, supra note 172, n.4 (“The CFTC has operated without authorization five times during its 30-year history: from September 30, 1982 to January 11, 1983; from September 30, 1986 to November 10, 1986; from September 30, 1989 to October 28, 1992; from September 30, 1994 to April 21, 1995; and from September 30, 2000 to December 21, 2000.”).

\textsuperscript{187} See 7 U.S.C. § 16(d) (“There are authorized to be appropriated such sums as are necessary to carry out this chapter for each of the fiscal years 2008 through 2013.”).

\textsuperscript{188} See Lukken, supra note 172.

\textsuperscript{189} Id.
incentives to respond to congressional wishes and secure congressional approval.

To be sure, asking Congress to rethink its approach to reauthorization or to reauthorization of appropriations is not a modest proposal. Perhaps Congress should begin with the more incremental approach to at least require, by statute, that the authorizing committees conduct some sort of oversight over the federal agency or program before Congress can pass appropriations legislation to renew funding for that agency or program. That would encourage authorizing committees to more closely monitor agency regulatory activities, and it would also encourage federal agencies to more carefully implement their statutory mandates and be more responsive to their congressional principals.\footnote{Cf. WALKER, supra note 118, at 17 (quoting an agency official, in explaining why federal agencies assist Congress in legislative drafting, that “oversight is always in the back of our minds”).}

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

\textbf{Means to Encourage Congressional Compliance}

Even if Congress were to utilize this reauthorization toolbox more systematically and effectively, such efforts would still fall short unless Congress more strictly enforced the more-than-a-century-old House and Senate rules that prohibit Congress from appropriating funds for unauthorized or expired federal agencies and programs. As noted in Part III.B, appropriations committees, by chamber rules, have a duty to identify proposed funding for unauthorized or expired federal agencies and programs, and Congress has charged the CBO, by statute, to report to Congress annually on which authorizations of appropriations have already expired or will expire during the given fiscal year. The CBO identified nearly 1,000 such expired authorizations of appropriations in its 2019 report.\footnote{CBO REPORT, supra note 158, at 1.}

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

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

The more lasting approach would be to encourage Congress to change its rules to make the prohibition of appropriations without authorization self-executing. A similar approach would be to include in the various authorizing legislation express statutory mandates that proscribe agencies from spending appropriated funding on unauthorized or unexpired programs or operations. An even more aggressive approach would be to provide for judicial review of agency actions on the basis that they lack statutory authorization of appropriations. Such a judicial-review provision could be inserted into reauthorization statutes of agency organic statutes. Or, more ambitiously, Congress could modernize the Administrative Procedure Act to expressly allow for judicial challenges to any agency action that lacks statutory authorization of appropriations.

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

B. Responses to Objections

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

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

**Congressional Incapacity**

A common argument against an Article I renaissance in federal lawmaking is that the federal government has become so vast and

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192 Others have attempted to advance that defense. <insert cites>
complicated that Congress lacks the capacity to be a primary lawmaker. This congressional incapacity argument is at least two-fold: Congress lacks the expertise to make the laws, and it lacks sufficient time to regularly legislate.

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

Whereas the time-constraint argument raises serious concerns, discussed below, the congressional expertise argument is less compelling. Congress has the capacity to enhance its institutional capacity and expertise; indeed, the historical innovation of standing authorizing committees was a direct response to lawmaking power shifting to the Executive Branch. More to the point, however, Congress does not legislate on their own. It turns out that federal agencies are deeply involved in helping to draft the legislation that grants them the discretion to regulate and constrains such discretion. They do so by both drafting substantive legislation to suggest to Congress to advance the agency’s or the Administration’s policy preferences. And they also “legislate in the shadows,” as one of us has framed it, by providing confidential technical drafting assistance on draft legislation proposed by Congress.

The substantial role federal agencies play in the legislative process may raise some separation-of-powers concerns—or perhaps not. But their role does dispense with any serious argument that Congress lacks access to the expertise necessary to effectively legislate in these increasingly complex regulatory areas. Federal agencies are their partners and agents in this legislative process. And regulated entities and other interest groups are similarly involved to share their expertise and lobby for their interests. One welcome side effect of regular reauthorization is that members and their staff serving on the various standing authorizing

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193 See, e.g., CHAFETZ, supra note 20, at 267–301 (detailing evolution standing committees in House and Senate).
194 Walker, supra note 35.
committees will necessarily gain greater subject-matter expertise, become more familiar with the federal agencies their committees oversee, and deepen the committees’ working relationship with those agencies.

The time constraints, however, are real. But they are not insurmountable. After all, Congress has developed a potent toolbox of procedural mechanisms to incentivize more responsive and timely legislative action. Congress may use unanimous consent or other methods to expedite consideration of relatively noncontroversial actions, including both legislative measures as well as the approval of nominees (of which there are hundreds with each new Presidential Administration). When sufficient consensus does not exist, Congress can turn to other legislative tools. The Congressional Review Act, discussed in Part II.B, provides one example. There, Congress approved of a simple-majority resolution process, such that the filibuster does not apply in the Senate. Trade promotion authority, formerly known as fast track trade authorization, is another example. That statutory innovation required Congress to approve or deny the President’s trade negotiation, without having the ability to amend or filibuster. One could imagine similar legislative innovations being developed to efficiently process mandatory reauthorization legislation. Bills could be fast-tracked and prioritized on the calendar, amendments could be prohibited, the filibuster could be bypassed, and floor debate time and amendment process could be severely limited—to just mention a few options.

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

**Anti-Regulatory Disposition**

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

The practical experience with sunset provisions and temporary legislation, at both the state and federal level, does not support the claim that such mechanisms are inherently anti-regulatory. At the state level,

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195 See Metzger, supra note 22, at 2.
sunrise requirements appear to have done more to encourage legislative engagement and oversight of administrative agencies than to eliminate or prevent regulation. At the federal level, periodic reauthorization has been used to update—and often to increase the complexity stringency of—regulatory statutes, such as the Clean Air Act and Clean Water Act.

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

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

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

196 See Baugus & Bose, supra note 134, at 19; Kearney, supra note 148, at 50.
201 See SCHOENBROD, supra note 199, at 29–38.
At the same time, it is undeniable that Congress is unlikely to support the continuation or reauthorization of costly and expansive federal regulatory programs where such programs face significant political opposition. In the early 1990s, there was significant political support for adopting a series of regulatory reform measures when reauthorizing federal environmental laws. Although the reforms had bipartisan support, they were opposed by the House leadership and most major environmentalist organizations. Because there were no real consequences from failing to renew the authorizations of “expired” statutes, the reauthorization bills were shelved, preventing the adoption of regulatory reforms for which there appeared to be significant political support.\(^{202}\)

Overall, the primary effect of sunsets or reauthorization requirements should be to bring more regular legislative engagement and greater democratic accountability. In some cases this is likely to result in greater federal regulation, and in other cases not. If there is broad support for increased regulation, requiring reauthorization should produce that result in a more accountable way than the status quo, particularly if reauthorization requirements are drafted in a way that incentivizes broad engagement in the reauthorization process and makes it difficult for Congress to shirk its responsibility. Yet while sunsets and reauthorization requirements may not tilt the playing field for or against regulation, we expect that the contours of existing agency authority would evolve quite differently than without such requirements in place.

**Regulatory Uncertainty and Distorted Policymaking**

A more potent objection might be that regular reauthorization requirements could induce greater regulatory uncertainty. There is no question that the prospect of regular legislative reauthorization introduces the prospect that existing regulatory requirements could change, and perhaps change more quickly than occurs with informal rulemaking. Others may be concerned that regular reauthorization and legislative engagement will result in distorted policymaking due to log-rolling and the influence of interest groups.

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

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

C. Implications Beyond Nondelegation

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

Central to this Article, such legislative activity would help Congress address the temporal problems of broad, decades-old delegations of lawmaking power to federal agencies. Regular reauthorization should encourage Congress to revisit such delegations—giving Congress an opportunity to update old statutory delegations, revisit unpopular ones, and rein in agency exercises of delegated authority that are not consistent with current congressional and electoral preferences. In so doing, Congress could more easily to modernize statutes in light of improved scientific understandings or other changes circumstances. And Congress would also be in a better position to more easily narrow overly broad delegations granted by prior Congresses.

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

Relationship Between Congress and Agencies

In their landmark study on statutory drafting within Congress, Lisa Bressman and Abbe Gluck reported that the congressional drafters surveyed perceived “agencies as the everyday statutory interpreters, viewed interpretive rules as tools for agencies, too, and made no distinction, as some scholars have, between agency statutory ‘implementation’ and agency statutory ‘interpretation.’”203 A companion study of federal agency rule drafters reached a similar conclusion: Federal

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agencies—and not federal courts—are the primary partners of Congress in agency statutory interpretation and law implementation.\(^{204}\)

As one of us has empirically explored in a report commissioned by the Administrative Conference of the United States (ACUS), federal agencies play a critical and substantial role in drafting statutes. “Indeed, they are often the chief architects of the statutes they administer. Even when federal agencies are not the primary substantive authors, they routinely respond to congressional requests to provide technical assistance in statutory drafting.”\(^{205}\) It turns out that federal agencies provide statutory drafting assistance on the vast majority of proposed legislation that directly affects them and on most legislation that gets enacted—regardless whether the legislation would be detrimental to the agency.\(^{206}\) Agency officials report that their agencies engage in this legislative drafting assistance for a number of reasons, including to maintain a healthy and productive working relationship with Congress and to educate the congressional staffers about the agency’s existing statutory and regulatory framework.\(^{207}\)

A regular reauthorization process would only increase the opportunity to meaningful interaction between the congressional principal and its administrative agents. Indeed, of the ten agencies studied in the ACUS report, one agency—the U.S. Department of Agriculture (USDA)—engaged in a regular reauthorization process. The USDA is involved in the Farm Bill reauthorization that takes place every 5-6 years. Those interviewed at the USDA emphasized how these reauthorization efforts greatly strengthened the agency’s relationship with its authorizing and oversight committees in Congress.\(^{208}\) If reauthorization were more common, other agencies would no doubt have similar opportunities to strengthen their relationship with Congress and thus be able to better understand, and be responsive to, current congressional preferences. Congress, in turn, would have more opportunities to reshape statutory mandates to respond to agency feedback on current challenges and new circumstances.

**Effects on Judicial Deference Doctrines**

In recent years, we have seen a growing call to rethink administrative law’s deference doctrines to federal agency interpretations of law.\(^{209}\) As is relevant here, *Chevron* deference commands a reviewing court to defer to

\(^{205}\) WALKER, supra note 118, at 1.
\(^{206}\) See *id.* at 13–20 (reporting relevant findings from agency interviews and follow-up survey).
\(^{207}\) *Id.* at 17–18.
\(^{208}\) See *id.* at 48–51 (USDA case study).
\(^{209}\) For a summary of these recent challenges, see Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103 (2018).
an agency’s interpretation of an ambiguous statute the agency administers so long as it is reasonable.\textsuperscript{210}

One of the core challenges to \textit{Chevron} deference is that it interferes with Congress’s legislative role. In particular, Article I vests Congress with “All legislative Powers,” yet \textit{Chevron} deference encourages members of Congress to delegate broad lawmaking power to federal agencies. As Third Circuit Judge Kent Jordan has put it, “The consequent aggrandizement of federal executive power at the expense of the legislature leads to perverse incentives, as Congress is encouraged to pass vague laws and leave it to agencies to fill in the gaps, rather than undertaking the difficult work of reaching consensus on divisive issues.”\textsuperscript{211}

The constitutional challenge to \textit{Chevron} deference strikes us as lacking, at least in its current form. But Judge Jordan’s observation nevertheless carries considerable force as a normative matter. Not only does \textit{Chevron} deference encourage agencies to delegate broadly, but it also discourages Congress from revisiting prior delegations. This is problematic not just because Congress is unlikely to revisit an agency statutory interpretation that a court has identified as a reasonable but not optimal interpretation. The lack of any serious threat of legislative action, moreover, may encourage federal agencies to be even bolder in their regulatory efforts. Indeed, empirical work on agency rule drafters suggests that the mere threat of more searching review—or, here, the threat of congressional attention—would encourage federal agencies to interpret statutes less “aggressively.”\textsuperscript{212} Unless there is a serious threat of legislative action, “agencies may come to view congressional oversight as just the cost of doing business and not a real constraint on regulatory activity.”\textsuperscript{213}

For many of us, \textit{Chevron} deference has become far more problematic in the current era of congressional inaction. Congress appears to have no capacity or willpower to intervene when an agency has used statutory ambiguity to pursue a policy inconsistent with current congressional wishes, much less when an agency’s organic statute is so outdated so as to not equip the agency with authority and direction to address new technologies, challenges, and circumstances. If Congress were to engage in a regular reauthorization process, however, many of these concerns would be alleviated. Congress would be required to revisit agency statutory interpretations and the delegations. Courts would not have to


\textsuperscript{211} Egan v. Del. River Port Auth., 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring in the judgment).


\textsuperscript{213} Walker, \textit{supra} note 105, at 1119; see also id. at 1119 n.68 (noting that “[t]his is a paraphrase of Philip Wallach’s excellent observation at the 2017 American Bar Association Administrative Law Conference”).
worry as much about broad delegations, and they would not have less occasion to rely on arguments concerning legislative acquiescence.

Regular reauthorization may also produce similar salutary effects for another judicial deference doctrine: statutory stare decisis. The doctrine of stare decisis commands courts to not revisit judicial precedent absent some “special justification” beyond mere wrongness. And, when it comes to statutory holdings—as opposed to constitutional ones—stare decisis carries “special force.” Indeed, the Supreme Court has stressed that statutory stare decisis applies “whether [the Court’s] decision focused only on statutory text or also relied . . . on the policies and purposes animating the law.” Stare decisis currently carries more force in the statutory context, the Court has explained, because those who think the judiciary got the issue wrong “can take their objections across the street, and Congress can correct any mistake it sees.”

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

**CONCLUSION**

The Supreme Court is unlikely to rediscover an administrable principle in the nondelegation doctrine any time soon. Congress will continue to face myriad incentives to delegate broad statutory authority to federal agencies and few incentives to revisit those broad delegations. And the President and federal agencies will continue to utilize such delegated authority. It will be difficult to change the legislative process (or constitutional doctrine) to decrease the breadth of statutory delegation to federal agencies.

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

217 *Kimble*, 135 S. Ct. at 2409.
So perhaps combatting the breadth of statutory delegations is the wrong focus. Instead, as this Article argues, we should shift our attention to the overlooked temporal problems of delegation. In other words, not only is the breadth of delegation problematic, but so is the fact that federal agencies utilize decades-old delegations of authority to regulate new technologies and circumstances that were wholly unanticipated by the enacting Congress and perhaps would not garner support in the current Congress.

Unlike the breadth problem of congressional delegation, the temporal problem has a path forward, albeit a difficult one. Congress needs to return to a regular practice of legislating and, in so doing, revisit prior delegations of authority to federal agencies. To encourage such legislative action, Congress should engage in regular reauthorization of federal agencies and programs and should take seriously its foundational rule against appropriation without authorization.