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Rational Non-Delegation

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Delegations and Nondelegation After Gundy

Rational Non-Delegation

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Last Term’s *Gundy v. United States*¹ portends far more than its narrow facts about federal sex offender lists. Only four Justices joined Justice Elena Kagan’s opinion upholding the Attorney General’s regulation about the retroactivity of the registration requirement. Justice Neil Gorsuch, joined by Chief Justice John Roberts and Justice Clarence Thomas, dissented from the broad grant of power to the administrative state.² Justice Samuel Alito concurred in the judgment but declared his support for “reconsider[ing] the approach we have taken for the past 84 years” of blessing broad transfers of power from Congress to the executive branch.³ Justice Brett Kavanaugh did not participate in *Gundy*, but in a separate dissent from denial of certiorari stated that the issue warrants “further consideration in future cases.”⁴

Count these votes up and it appears that the Court will consider whether to breathe new life into the nondelegation doctrine. According to this doctrine, Congress must make certain decisions by statute but it can delegate others to agencies. “The legislature makes, the executive executes, and the judiciary construes the law,” Chief Justice John Marshall observed in *Wayman v. Southard*.⁵ Nevertheless, the Constitution commits subjects to Congress that Congress can also confer on another branch. In upholding a federal statute allowing the courts to set their rules of procedure, Marshall acknowledged that “it will not be contended that these things might not be done by the legislature, without the intervention of the Courts. At the same time, however, “it is not alleged that the power may not be conferred on the judicial department” too.⁶

The dividing line between what Congress must decide for itself and what it can delegate remained obscure even to Marshall. “But the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry.”⁷ Marshall himself drew a distinction between “important subjects,

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¹ 139 S. Ct. 2116 (2019).

² Id. at 2131 (Gorsuch, J., dissenting).

³ Id. at 2131 (Alito, J., concurring in the judgment).

⁴ *Paul v. United States*, 140 S. Ct. 342 (2019).

⁵ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825).

⁶ Id. at 43.

⁷ Id. at 46.

which must be entirely regulated by the legislature itself,” and “those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”⁸ But he did give us a clue as to the difference between “important subjects” and “those of less interest,” and courts ever since have struggled to identify it. Nevertheless, Marshall made clear that Congress could not delegate “powers are strictly and exclusively legislative.”⁹

Striking down a federal law for delegating too much power to an agency would mark a sharp turn in the Court’s approach to the administrative state. The Court has not invalidated a law on nondelegation grounds since the New Deal revolution and FDR’s failed court-packing plan.¹⁰ Before 1935, the Court had never struck down a law for delegating too much power to the agencies, though Chief Justice Marshall had suggested such limits might exist.¹¹ After 1935, the Court has also never invoked the nondelegation doctrine. Indeed, a unanimous Court upheld the Clean Air Act, a law that seems fairly typical of the broad delegations to the agencies, as recently as 2001 in *Whitman v. American Trucking Association*.¹²

No Supreme Court decision has struck down a statute on nondelegation grounds because, in part, of the hollowness of the test that emerged from the New Deal confrontation. Even before the 1935 crisis, the Court had articulated a test that required Congress to establish “an intelligible principle” to guide the discretion of those who received delegated power.¹³ *Panama Refining* and *Schechter Poultry* invalidated parts of the National Recovery Act on the ground that Congress had “declared no policy . . . established no definition of circumstances and conditions” to guide the presidential exercise of power.¹⁴ But cases decided after 1935 have never found another congressional delegation to violate the intelligible principle requirement. In *Yakus v. United States*, the Court only demanded that the intelligible principle provided a standard against which a court could review the exercise of delegated authority.¹⁵ Under that standard, the Court has upheld broad transfers of authority from Congress, such as to the U.S. Sentencing Commission to devise a system to control all judicial sentencing under federal criminal law, and to the Environmental Protection Agency to set all standards for air pollution. All the intelligible

⁸ Id. at 43.

⁹ Id. at 42.

¹⁰ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹¹ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

¹² 531 U.S. 457 (2001).

¹³ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

¹⁴ *Panama Refining*, 293 U.S. at 430.

¹⁵ 321 U.S. 414, 426 (1944).

principle test seems to require is that Congress include a standard as broad as “the public interest” for regulations to survive review.¹⁶

The same problem that beset Chief Justice Marshall continues to trouble those who would resuscitate the nondelegation doctrine today. Even if the intelligible principle test raises no barrier to Congress to delegate almost all of its legislative power, judges have had little success devising a replacement that does not draw the courts into policymaking. As Justice Gorsuch pithily put it in his dissent in *Gundy*: “What’s the test?”¹⁷ Gorsuch identified three guiding principles to lawful delegations. First, Congress could set policy regulating private conduct, with another branch left to “fill up the details,” such as in *Wayman*. Second, Congress could grant the other branches the power to carry out a rule based on the finding of a specific fact, such as whether another nation had lifted an embargo on US products. Third, Congress could assign non-legislative duties where its power overlaps with those of other branches, such as when Congress delegates foreign affairs powers to the executive branch.¹⁸ Gorsuch, however, did not explain how these principles would reduce into a test that courts could apply to broad statutes such as the Clean Air Act.

Scholars have sought to make sense of the nondelegation doctrine by focusing primarily on its textual, structural, and historical justification. Perhaps the liveliest debate centers around whether the Framers would have understood the Constitution’s separation of powers to establish a principle against nondelegation.¹⁹ Others claim that the nondelegation doctrine improves democratic accountability, while critics argue that modern government could not function effectively without broad delegation to agencies. Another debate concerns whether the judiciary can truly police delegation in a principle manner on whether judicial review would simply embroil the courts in policy disputes between the legislative and executive branches.

This paper will address instrumental reasons for the nondelegation doctrine. Consequentialist justifications offered for nondelegation include ensuring congressional responsibility for basic policy choices, limiting the scope of federal power, protecting individual liberties, and removing decisions from unaccountable bureaucracies. On the other hand, supporters of delegation believe it necessary for modern government to adapt to new social, economic, and scientific circumstances. Congress could not spend the time and resources, or even develop the expertise, necessary to legislate on all of the matters within its jurisdiction. Others argue that broad delegation transfers technical questions from politicians to experts, which should improve the outcome of the regulatory process.

¹⁶ *Mistretta v. United States*, 488 U.S. 361, 416 (Scalia, J., dissenting).

¹⁷ *Gundy v. United States*, 139 U.S. 2116, 2135 (2019) (Gorsuch, J., dissenting).

¹⁸ *Id.* at 2136-37 (Gorsuch, J., dissenting).

¹⁹ See, e.g., Ilan Wurman, *Nondelegation at the Founding*, 130 *Yale L.J.* ____ (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, __ *Colum. L. Rev.* __ (2020).

This paper takes a different approach. It will ask why the branches of government themselves would rationally want a nondelegation doctrine. It analyzes the issue using standard game theory models of the legislative process.²⁰ While legal scholars have used such approaches to study the administrative state for some time,²¹ this is less the case in constitutional law.²² My basic argument here is that a rational legislator might favor a nondelegation doctrine due to concern over the ideological variability of agency decisions in the future. A Democratic Congress, for example, may wish to achieve broadly pro-environmental outcomes, but it cannot be confident that agencies in the future will use their discretion as it would wish, especially under Republican presidents. Article I, Section 7's barriers to enacting legislation to override regulations, in addition to the usual transaction cost and information problems for congressional bargaining, might present a nondelegation doctrine as a second-best alternative to prevent shirking by agencies. This paper considers how the introduction of other branches and their changing policy preferences over time alter this basic principal-agent relationship.

I.

Under a principal-agent model, generally applied to administrative law by positive political scientists,²³ Congress is the principal and agencies are the agent. Because it does not have the time and resources to make rules on a certain subject, a principal will delegate that authority to an agency for several possible reasons. It can save time and resources for other, more important duties. It can take advantage of the agency's specialization and technical knowledge. It can avoid political responsibility for unpopular decisions or over unpredictable areas with high stakes involved. But even though it does not seek to make every decision, Congress still has a preference for the direction of policy, due to its electoral mandate, partisan ideology, or even to its allegiance to interest groups. Here, the underlying theory of legislative motivation is not as important as the positive description of Congress has a policy preference that it seeks to advance through delegation to the agencies.

²⁰ The literature using these models is vast. A leading work is David Epstein & Sharyn O'Halloran, *Delegating Powers* (1999).

²¹ See, e.g., Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 *Harv. L. Rev.* 1035 (2006); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 *Geo. L.J.* 97 (2000); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J. L. Econ. & Org.* 81 (1985).

²² The only law journal article that applies game theory to nondelegation appears to be Sean P. Sullivan, *Powers, but How Much Power?: Game Theory and the Nondelegation Principle*, 104 *Va. L. Rev.* 1229 (2018). That article differs in this one in that it uses game theory to attempt to define the legislative power and then to create a sliding scale for enforcement of the intelligible principle test. This article examines the broader question of the nondelegation doctrine as a part of the principal-agent problem with congressional control of agency discretion.

²³ Matthew D. McCubbins, Roger Noll, & Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *Va. L. Rev.* 431 (1989); Terry Moe, *The Politics of Bureaucratic Structure*, in *Can the Government Govern?* (John E. Chubb & Paule E. Peterson eds. 1989).

As in other areas of law, the problem in such relationships is that principals and agents have their own preferences. Given enough leeway, the latter may benefit itself rather than the principal. The classic example from corporate law occurs when management locates a corporation in a state with plentiful takeover defenses, which reduces the value of shareholders' equity. Agents may prevail by manipulating information or events or by taking advantage of deference to their expertise to convince the principal to approve policies that allow them to capture more of the benefits. Or agents may be able to conceal self-dealing behavior from the observation of principals, who delegated authority in the first place to reduce their management of the issue. In the public administration context, the deviation between the principal's preferences and the actual policies carried out by the agent is known as "agency slack"²⁴ or "bureaucratic drift."²⁵

The fundamental tradeoff becomes the principal's desire that the agent carry out his wishes, but without consuming resources in excessively tightening its control over the agent. If the principal attempts to control the agent too tightly, it will raise its costs and counteract the advantages of granting power to a specialized agent. In order to ensure that agents exercise their delegated authority as the principal would wish, the principal can establish monitoring mechanisms to detect agency slack. If these mechanisms detect a deviation between the wishes of the principal and the actions of the agent, the principal can take corrective measures, which can include changes to a governing statute, reductions in funding, oversight investigations and refusal to confirm appointments. Part of the goal in designing laws and institutional structures, from the perspective of the principal, is to achieve the right balance between the efficient delegation of authority and the costs of monitoring and sanctioning the agent.

In principal-agent models of business activity, the interest of the agent is usually taken to be shirking. In other words, the employees of a company wish to be paid for working, but wish to work as little as possible. In the public administration context, shirking does not make as much sense. Instead of wanting to do less work, agents have a different interest than principals. Agents in the bureaucracy want to maximize their autonomy and follow their preferred policies, not necessarily the policies preferred by the principal. Exactly what counts as the principal or the agent prevailing can be difficult, at times, to determine. If the agent has succeeded, for example, by manipulating information and events such that the principal has its way, but only in a very limited sphere, shirking has probably still occurred. If the agent, who presumably has specialized experience and better information, provides advice to the principal that influences the latter's decision, shirking may not have occurred.

A primitive version of this model would only proceed in three stages. Congress delegates authority; the agency promulgates a regulation; Congress responds if it disagrees. Legislative disapproval could take the form of a statutory override, budget cuts, or oversight. Because the

²⁴ See, e.g., Matthew Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 58 (2008).

²⁵ Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post 9/11 World*, 94 CAL. L. REV. 1655, 1702 (2006).

relationship between the principal and agent is strategic, we would expect Congress to rarely, if ever, enact overriding legislation. Each actor makes decisions to maximize its own interests, taking into account its understanding of the interests and likely responses of the other. Therefore, the agency should promulgate regulations within the boundaries of congressional preferences. To prompt a congressional override would risk limits on the original delegation of power and a narrowing of the agency's discretion. The agency might have difficulty determining congressional preferences if it is acting in an area of uncertainty – such as new circumstances or information asymmetry – but it still seeks to act within what it anticipates congressional preferences to be.

But the relationship between Congress and the agencies is not a one-shot game. Congress creates agencies that are long-lived, if not permanent, with which it has long-term interactions. This fact creates conditions that may give agencies more incentive and freedom to act outside of Congress's preferences. Reversing regulations would require an overriding act. The Article I, Section 7 process is notoriously difficult due to bicameralism and presentment, especially when combined with the Senate filibuster requiring a three-fifth's vote to proceed to floor consideration. The agency then will promulgate policies that not only rest beyond congressional preferences, but up to the preference of a filibustering Senate minority or of the President, depending on which one is further out on the policy spectrum. Because the game is dynamic and continuing into the future, the odds of a congressional overriding statute become even steeper when we take into account that Congress has limited resources to monitor and may have many more pressing items on its political agenda.

Agencies have multiple means to pursue a policy at odds with that of the principal. An agency could refuse to promulgate new regulations desired by Congress, or it could issue rules outside of Congress's acceptable range of policies. Agencies can "slow roll" congressional initiatives simply by delaying implementation. Even if the regulations satisfy legislative preferences, agencies could use prosecutorial discretion to reach their own preferred outcomes. Agencies can take more systematic approaches to creating slack. Greater agency slack may result from information asymmetries that may favor the agencies, such as information and expertise about policies and cases, adverse selection that may cause the promotion of officials resentful of legislative meddling, and moral hazard in which the inability of Congress to directly observe the performance of the agencies may allow the latter to pursue their own preferences.

In a dynamic game, therefore, Congress will have to take up stiffer measures to guard against the wider opportunities for agency slack. Congress will have an incentive to invest in mechanisms to monitor the agencies, not just to gain information on one policy decision, but to gain cumulative information about the agency over time. The most important and obvious is to limit the amount of delegation. Delegation with few standards, such as providing only the goal and allowing the agency complete freedom in planning and achieving the objective increases the moral hazard problem. Instead, Congress could enact more detailed legislative rules, principles, and priorities to constrain agency discretion. But handcuffing agencies to such an extent raises the costs of delegation and could harm the achievement of the agency's mission, especially if

Congress lacks knowledge and expertise, as elected leaders sometimes do. Congress can recognize the agency's autonomy in certain areas such as enforcement in return for obedience on the broader, more important policy decisions. Members and staff can attempt to influence the hiring and promotion of officials who agree with congressional preferences.

Congress can also monitor agencies, both to reduce information asymmetries and to identify cases for information, by involving third parties. Congress can look to think tanks or the media to provide "fire alarms" of agent deviations from policy. "Police patrols," such as investigations, oversight hearings, and budget processes, are more intrusive monitoring options. Congress can also create institutional checks within the agents, such as by fostering interagency rivalries. Perhaps the most significant means of monitoring of this kind is that established by the Administrative Procedure Act. In the APA, Congress requires agencies to produce information on its rulemaking and allows the public, and then authorizes judicial review over the result.

Monitoring, however, would prove of little effectiveness without the ability of the principal to undertake corrective action. Principals would prefer that the agent act in line with their preferences, but monitoring and sanctioning are necessary to respond to an agency that seeks to impose its own preferences.²⁶ While monitoring and corrective action can be expensive for the principals, they will be more likely to establish more intrusive forms as the costs and frequency of policy drift increase. Like efforts to force disclosure of more information, congressional responses to agency action will generate its own record that will be of use to Congress in controlling a wayward agency. Congress, for example, might not detect every or even many examples of agency shirking, but when it does, it can deliver an extremely costly response to deter future drift from its preferences.

II.

This game theory perspective gives us two ways to understand the non-delegation doctrine. First, Congress may well wish to create a series of escalating sanctions in cases where it cannot devote extensive resources to monitoring. Congress should create an expected cost to impose on an agency that considers promulgating a rule that goes beyond legislative preferences. We can think of each response – congressional inquiries, oversight hearings, funding cuts, overriding statutes, and even permanent changes in an agency's fundamental governing law – as occupying a place on a spectrum of responses to agency shirking. An agency seeking to act outside of congressional preferences would take into account not just the magnitude of a response, but also the probability of detection and response. The expected cost of the response, rather than just the magnitude of the response itself, is what matters. The agency would then balance whether it made sense to shirk based on the benefit of achieving its policy preferences against the expected cost of congressional sanction.

The nondelegation doctrine would occupy a place as a fairly severe sanction, but one so far with limited expected cost. In terms of simply magnitude, it would occupy a place between

²⁶ McCubbins et al., *supra* note, 75 Va. L. Rev. at 433–34.

purely congressional actions. It would seem to be more expensive to an agency than congressional action overriding a specific regulation, which would reverse an individual rule. But nondelegation might be less costly a sanction than a statute that permanently eliminated agency authority or reduced its jurisdiction. On the other hand, because the Supreme Court has not overturned a regulation on nondelegation grounds since 1935, the probabilities of reversal are so small that the expected cost of the sanction may have approached zero. Congress might want the probability of the nondelegation doctrine to be greater than nothing, so that it can fill a certain place on a spectrum of responses.

A feature of this analysis is that it is agnostic as to the exact test used by courts to enforce the nondelegation doctrine. What matters is not so much the exact wording of the doctrine, but how often courts are willing to enforce it. Critics have attacked the intelligible principle test as unsupported by precedent, inadequate as a doctrine, or circular.²⁷ Eric Posner and Adrian Vermeule would go farther and say that there should be no test, because the Constitution creates no principle for courts to enforce, short of a bar on the actual transfer of Congress's right to vote on legislation.²⁸ Even vocal supporters of a nondelegation doctrine, such as Larry Alexander and Sai Prakash, shy away from providing a workable test.²⁹ But even if the intelligible principle test had meaningful content, it would not pose any restraint on strategic, rational agencies if the courts never invalidated any exercise of delegated power. Courts could also develop a new test, but if they do not intend to apply it, agencies would still continue to face sanctions for shirking with a gap between legislative reversal of a regulation and statutory withdrawal of delegated authority.

Note that a more vigorous nondelegation doctrine might not produce a great number of decisions. If Congress and agencies are acting strategically, and they know that courts will apply a nondelegation doctrine, they should act within the bounds of preferences set by the courts. They might also see warning signs. Courts will first begin striking down individual rulemakings as arbitrary and capricious or start rejecting agency interpretations even under *Chevron*. Agencies might start to see their loss of deference doctrines altogether, which could be already happening. As John Manning and Cass Sunstein have separately observed, courts could also use the nondelegation doctrine as a norm by which to interpret statutes.³⁰ But if agencies continue to press beyond the preferences of the enacting Congress even after experiencing these setbacks,

²⁷ See David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993).

²⁸ Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002).

²⁹ Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297 (2003).

³⁰ John Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223 (2000); Cass Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000).

they will approach the boundaries of the nondelegation doctrine. Agencies should pull back before they encounter a wholesale restriction on their exercise of delegated power.

A second way to understand nondelegation from a game theory perspective is as means of reducing uncertainty on the part of Congress. If a majority in Congress is unsure about its future electoral support, it will seek to insulate policymaking by delegating power to an agency. This will make it more difficult for a future Congress, with a majority from the opposition party, to completely change policy direction. The agency will run on the original course set by Congress even after the original legislators have left office.³¹ A congressional majority might especially favor delegation to an agency if it is electorally weak and the political processes presents several vetogates in the way of any future overriding legislation. Delegation may allow that temporary majority to set the agency on policy autopilot with few opportunities by successors to alter course.

But if Congress is also unsure about agency preferences over time, it may not wish to delegate power that remains fully insulated from control outside an agency. The logic of the principal-agent game suggests that if a majority in Congress remains confident of its electoral success in the future, it would not seek extensive limits on delegation. It would have the power to sanction shirking or enact overriding legislation easily. Any restrictions on the exercise of delegated authority either in terms of rulemaking procedure or judicial review would increase the ineffectiveness of agency action without any corresponding benefit. We would expect, for example, a parliamentary system along the British model to have almost no judicial review of agencies or anything like a nondelegation doctrine. But because of the difficult process of enacting statutes set out by Article I, Section 7, and the possibility that the executive branch could fall under the control of a different political party – which has been the case for a majority of the years since 1968 – Congress cannot override agencies so easily. It may rationally look for other mechanisms to reverse agency action that do not depend on the enactment of statutes.

The nondelegation doctrine here is similar to the choices that Congress faces when it chooses to delegate a decision wholly to an agency or wholly to a court.³² If Congress chooses an agency, such as with the Clean Air Act's broad delegation to the EPA, it is assuming that the agency will pursue a consistent ideological pattern in the future, one that is consistent with Congress's preferences. This is even more so the case in light of the deference doctrines, such as *Chevron*, that benefit agency interpretations of ambiguous statutes or their rulemaking choices. But if Congress is uncertain about an agency's future preferences, it could choose to delegate a decision to the courts, as it did with the Sherman Antitrust Act. Courts will probably pay more

³¹ Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, Administrative Procedures as Instruments of Political Control, 3 J. L. Econ. & Org. 243 (1987)

³² See Matthew Stephenson, Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts, 119 Harv. L. Rev. 1035 (2006); Rui J.P. de Figueiredo, Jr., Electoral Competition, Political Uncertainty, and Policy Insulation, 96 Am. Pol. Sci. Rev. 321 (2002); Morris P. Fiorina, Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?, 39 Pub. Choice 33 (1982).

attention to maintaining the preferences of the enacting Congress given their allegiance to interpreting statutes based on legislative intent. Precedent will also make it less likely that a court will change its interpretation over time. That is not to say that courts do not change their interpretation and enforcement policy over time, only that from the standpoint of comparative institutional politics, they are less likely to than agencies, which can have a mandate to carry out an agenda set by an election.

Consideration of whether to vest greater oversight of agency policymaking in the judiciary also requires an expansion of the definition of the principal. In most models, the Congress is the sole principal and the agency is the agent. But the Presidency also plays a rival role. Presidents are involved in the original delegation through their powers to propose legislation and to veto. The executive branch commonly uses a veto threat as leverage to negotiate changes in statutes, usually in coordination with the President's partisan supporters in Congress.

Once Congress passes a law, the President will compete with Congress over the agency's exercise of the delegated. Presidents seek that power because the electorate may hold them politically responsible for agency choices, especially those that impact the economy or influence policy on highly contested issues. If President takes office during a sharp recession, as Ronald Reagan did in 1981, he will seek greater control over regulations that affect economic growth. The Reagan administration responded to these incentives by aggressively centralizing cost-benefit review over all major regulations in the Office of Management and Budget. Despite several changes in partisan control of the White House since, none of Reagan's successors relinquished that power. While the Constitution does not explicitly state that the agencies need take direction from the White House in promulgating regulations, the Court has held that the President's constitutional duty to take care that the laws are faithfully executed gives him the power to command subordinate executive officers.

Presidents may even have greater ability to control agency implementation than Congress. They appoint the top leadership of the agencies, though with the advice and consent of the Senate for the highest positions. They have the power to remove principal officers and perhaps all others not members of the civil service. They can determine promotions. Under the Take Care Clause, Presidents exercise prosecutorial discretion to allocate resources and personnel to pursue their enforcement priorities. They can even use the Take Care Clause, combined with the threat of removal, to direct inferior officers to follow their orders. Congress may delegate to an agency, but it risks presidential influence over the regulators that causes the final rules to swing even farther beyond legislative preferences. Congress would not just have to take into account the President at the time of enactment, with whom it might agree, but future Presidents, with whom it is likely at some point it would disagree.

Taking time into account also means considering future Congresses as well. Suppose Congress wants to set policy in a strongly pro-environmental direction in the Clean Air Act. It could delegate broad power to the agency, which it might predict will keep policy moving in the same direction. But also suppose a President wins election who seeks to prioritize industrial

activity over the environment, and his appointments to the EPA repeal previous regulations and enact less protective replacements. The enacting Congress might command enough of a majority to override the regulation, but it cannot be confident that the Congresses of the future will share the same preferences.

Within this framework, a nondelegation doctrine would appeal to a risk-averse legislator. If he delegated broadly to an agency, the legislator would take a greater chance that a future agency might shirk, that a different President might pull the agency even farther beyond the enacting Congress's wishes, or that a future Congress would have different preferences and decline to override the regulation. Such a legislator would look to a third party, such as the courts, to restrain the agency. Much of the existing scholarship looks at the choice between handing a decision over to an agency or to the courts. But they neglect the intermediate possibility of giving courts greater review over agency decisions. Congress could do this by pushing the courts to change their current approach of deference to agencies both in their rulemaking and their interpretation of ambiguous laws and regulations. Congress could also do this by encouraging courts to apply a non-delegation doctrine that prohibits excessive, standardless transfers of power to the agencies.

The enacting Congress would prefer this for two reasons. First, expanding judicial review over agencies would keep the guiding range of preferences to those of the enacting Congress. Dynamic theories of statutory interpretation expect that agencies will pay attention to the preferences of the current Congress, not the one that enacted the law.³³ It is only the current Congress that can cut the agency's budget, delay its appointments, and override its policies. But because courts still reject dynamic theories of interpretation in favor of a formal quest for the intentions of the enacting Congress, expanding judicial review has the effect of keeping the possible range of policy outcomes in the future closer to the median legislator at the time of enactment. This should be true both for increasing judicial scrutiny of individual regulations, which falls under arbitrary and capricious review, and of a bundle of agency actions, which amounts to the nondelegation doctrine.

Second, broader judicial scrutiny would have the effect of providing stability in the exercise of delegated power over time. Agencies need not obey *stare decisis*. They can change their rules based on new information, theories of regulation, or even political preferences due to elections. Presidents can use their constitutional powers to effect even more dramatic change in agency rulemaking. Increasing judicial scrutiny of these decisions can force regulatory change to be more gradual, less unpredictable, and less partisan. A nondelegation doctrine will place outer limits on how far agencies can press its power and may serve as a broader restraint on the overall exercise of delegated power across issues within an agency's jurisdiction.

This is not to say that judicial scrutiny of delegated lawmaking is certain where agency decisions are not. Just as agencies can shift their positions over time, courts can as well. Courts

³³ William Eskridge Jr., *Dynamic Statutory Interpretation* (1994).

will apply their review over agency decisions within a range of preferences, just as the Congresses and Presidents at the time of statutory enactment and in the future try to shift the exercise of delegated power in the direction of their preferences. But unlike agencies, legislatures, and Presidents, courts decide in a comparatively slow, decentralized manner that will produce less change over time. Presidents increasingly seek to appoint judges that hew to their ideological preferences in constitutional interpretation. But even as today's Presidents seek to shift the ideological makeup of the courts, such change takes time because of the gradual nature of the judicial appointments process. Even after two terms in office, a President may well not appoint a majority of the Justices of the Supreme Court or of the judges on the appellate courts.

III.

The last section used game theory approaches to public law to understand the circumstances when Congress might want a nondelegation doctrine. This section will take up the question whether a nondelegation doctrine might support presidential interests as well. This view runs contrary to the general assumptions of the principal-agent analysis of bureaucratic politics. In the game set out in Part II, the legislature delegates to agencies but wishes to keep strings attached, while the President uses his powers over the executive branch to break those strings and pull policy toward his preferences. Under this approach, observers assume that Presidents are happy to receive ever greater grants of power. The President seeks more authority over domestic policy because the electorate commonly holds him responsible for it, even if the executive branch does not actually have control. Indeed, much political science scholarship about the presidency emphasizes the lack of actual power in the office to affect change over domestic matters.³⁴ Presidents will welcome grants of delegated power from Congress, which allows them to live up to their electoral promises, affect change in their ideologically preferred direction, and increase the power of their office. Presidents therefore should oppose the nondelegation doctrine.

The maneuvering around *Gundy* presents a more complicated picture. The Solicitor General defended Congress's delegation of power to the Justice Department to decide whether sex offenders convicted before passage of SORNA had to comply with any of its terms.³⁵ In the case itself, the Attorney General used the delegated power to require "sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."³⁶ At the same

³⁴ See, e.g., William G. Howell & Terry Moe, *Relic: How our Constitution Undermines Effective Government – And Why We Need a More Powerful Presidency* (2016); Theodore Lowi, *The Personal President: Power Invested, Promise Unfulfilled* (1986). This theme of a weak presidency runs back to Richard Neustadt, *Presidential Power and the Modern Presidents* (1960) if not Woodrow Wilson. But see William Howell, *Power Without Persuasion: The Politics of Direct Presidential Action* (2003).

³⁵ Brief for the United States, https://www.supremecourt.gov/DocketPDF/17/17-6086/58355/20180802190422595_17-6086bsUnitedStates.pdf

³⁶ *Gundy*, 139 S. Ct. at 2122 (quoting 75 Fed. Reg. 81850).

time, the Justices appointed by the Trump administration, Justices Neil Gorsuch and Brett Kavanaugh, are the ones leading the charge for re-examination of the nondelegation doctrine. Justice Gorsuch wrote the dissenting opinion calling for a resurrection of the doctrine and Justice Kavanaugh in a separate case also appealed for the Court to take up the question. If their appointments represent the Trump administration's approach to constitutional interpretation, their stance on non-delegation runs counter to the actual positions taken by the same administration in litigation.

This Section will examine why a President might support a non-delegation doctrine. It shifts its use of game theory to the model of bargaining failures. We can look to delegation as part of a broader effort relationship between the President and Congress over sharing power. As the Court observed in cases such as *Chadha* and *Bowsher*, the Framers designed the separation of powers in part to make cooperation difficult so as to protect individual liberty. But, as James Madison observed in *The Federalist*, the Constitution also creates political incentives for the two branches to overcome these barriers to enact laws in the public interest. In a certain set of cases, both branches will be better off if they can come to an agreement on sharing power. If that legislation involves the delegation of significant authority from Congress to the President, the two branches will more easily agree if the two branches can make credible promises on how the executive will carry out the law once it has passed. A nondelegation doctrine might help them in making and keeping such commitments, and hence facilitate bargaining that is in the President's interests.

Here, I borrow from the literature on conflict, which is itself based on the same models used to examine the choice between litigation and settlement.³⁷ Rational actors with complete information should always prefer a negotiated settlement to fighting to resolve a dispute (whether of wars or of going to court). They could reach a bargain that would mirror the likely outcome of any conflict, while avoiding the costs of fighting. Wars, for example, often conclude with bargains—in the form of treaties—that both sides prefer to continued conflict. Both sides would have been better off by simply agreeing to the peace settlement and avoiding the deadweight costs of war. Nevertheless, wars continue to break out, in particular – since the end of World War II – civil wars, which now far outpace interstate wars in their level of casualties and destructiveness. Similarly, parties to a litigation should agree to a settlement that follows the likely outcome of litigation, while avoiding the attorneys' fees and other costs of going to court.

Rational nations with full information should always seek such settlements. Suppose a majority and a minority dispute the control of territory. The smaller group issues a threat that it is willing to fight unless the government concedes. The government must decide whether to accede

³⁷ See James D. Fearon, Rationalist Explanations for War, 49 Int'l Org. 379, 379–81(1995); Robert Powell, Bargaining Theory and International Conflict, 5 Ann. Rev. Pol. Sci. 1 (2002); Kenneth A. Schultz, Do Democratic Institutions Constrain or Inform?: Contrasting Two Institutional Perspectives on Democracy and War, 53 Int'l Org. 233 (1999). See also Robert D. Cooter & Daniel L. Rubinfeld, An Economic Model of Legal Discovery, 23 J. Leg. Stud. 435 (1994).

to the demand or to fight. Both the majority and the minority have an expected value of fighting, which is a function of the probability that each will win times the value of controlling the territory, minus the expected cost of fighting. If the majority knows that the expected value of the territory is lower for the minority group than the likely cost of any conflict, it will not back down because it knows that the minority rationally will not fight. Likewise, if the majority knows that the expected value of controlling the territory is higher to the minority group than the likely cost of war, the majority will concede and or seek a settlement. In both cases, both the majority and the minority avoid the deadweight loss of conflict, the only change being whether the territory remains within the control of the minority group or the government.³⁸

But conflict can break out even when both sides to the dispute act rationally. First, incomplete information can cause the groups to make errors in estimating important variables. The majority may not know the minority group's expected value of going to war. It may understand the value of the territory to the minority, but it may still misestimate the probability that the group will prevail in a conflict. Winning will depend on several factors, such as military and political capabilities, popular support, and external allies. Much of this information is likely to be private to the other side. The government might lack intelligence, for example, on the other side's military units, armament, or fighting effectiveness. Conversely, the minority may have little information on the true capability of the majority's forces, its abilities, or its political support.

If the two groups could reveal private information in a credible way, they could reach an agreement to avoid conflict. But problems stand in the way. First, they might feed each other false information in the hopes of exaggerating their chances of winning and getting a better deal.³⁹ Bluffing may produce a more favorable settlement than a player's true resources should demand. Second, to reveal private information credibly, the player must send a costly signal. One way that a group can send a credible signal is to issue a threat or make a promise that will incur internal political costs if he or she is bluffing.⁴⁰ If a political leader makes a public threat to fight, for example, but then backs down during negotiations, he or she could experience a loss of public support or backing among political elites. A leader can also send a signal by undertaking a course of action that requires significant *ex ante* investments or produces high *ex post* costs, such as building bases or local infrastructure in a disputed region. Or parties can send credible signals

³⁸ Several assumptions underlie this model. There must be a real probability that either group can win, and that both groups can estimate this probability. Neither group in this model is risk-seeking, in the sense that they would gamble to win a low-probability victory. Additionally, the territory in dispute can be bargained over and divided, rather than transferred as a whole, through side payments, linked deals, or different spheres of influence. Also, neither group can prevail in the first stage of bargaining by completely eliminating the other, so that any armed conflict may result in the loss of the territory, but not the end of the conflict.

³⁹ See Sebastian Rosato, *The Flawed Logic of Democratic Peace Theory*, 97 *Am. Pol. Sci. Rev.* 585, 599 (2003); James D. Fearon, *Domestic Political Audiences and Escalation of International Disputes*, 88 *Am. Pol. Sci. Rev.* 577, 578 (1994).

⁴⁰ See Schultz, *supra* note, at 241.

through a third party. Both sides must trust the third party to provide accurate, reliable information that is not biased toward either party. In litigation, for example, discovery allows parties to share private information credibly due to the broad scope of relevance and judicial supervision of the process.

But even if parties to a dispute can solve asymmetry information, commitment problems will pose an even greater obstacle. Full information allows each party to identify the acceptable range of outcomes for the other and hence reach a resolution and a distribution of the surplus from cooperating. But even if groups have full information about their rival's probability of prevailing in conflict, they still may be unable to reach a bargain. Parties may understand that they will both be better off by cooperating rather than fighting. But nations may not trust each other to abide by the agreement in the future. This problem will prove particularly acute in situations where a settlement changes the status quo between the parties, rapid changes are already affecting the balance of power, or parties are more concerned with relative gains than absolute gains.⁴¹ One party will find it difficult to trust the other to keep a promise if the latter will become even more powerful as a result of the agreement. The latter will be tempted simply to break the agreement and use its increased power to seek even more gains.⁴²

In private law, we do not encounter this problem because private parties can rely on the courts to enforce their contracts. But in an environment governed, if at all, by weak institutions, parties to a dispute might have little reason to trust each other to keep their commitments. In international relations, James Fearon and Robert Powell have argued that the lack of supranational institutions with real enforcement power will make it more difficult for states to reach international agreements even with perfect information.⁴³ This problem will also be true, as Thomas Schelling first notably observed, in a series of domestic settings where enforcement will be weak.⁴⁴ Separation of powers disputes between the President and Congress share this feature. If the courts hold that the political question doctrine prevents judicial involvement in an area, the lack of enforcement could discourage the branches from reaching agreements to settle their political or constitutional disputes. Bargaining may also prove difficult if the courts refuse to honor mechanisms that signal credibility. In *INS v. Chadha*, for example, the Court declared that it would not enforce the outcomes of legislative vetoes, but instead would allow the underlying executive branch action – there, a decision by the Attorney General to block a removal order of an alien – to go forward. But without a legislative veto, Congress will have less reason to trust the President's promises that the executive branch will respect legislative preferences, and hence delegation is less likely to occur.

⁴¹ Powell, Commitment Problem, *supra* note **Error! Bookmark not defined.**, at 171–72.

⁴² See, e.g., Robert Powell, War as a Commitment Problem, 60 *Int'l Org.* 169 (2006); Robert Powell, The Inefficient Use of Power: Costly Conflict with Complete Information, 98 *Am. Pol. Sci. Rev.* 231 (2004).

⁴³ James D. Fearon, Rationalist Explanations of War, 49 *Int'l Org.* 379 (1995); Robert Powell, *In the Shadow of Power: States and Strategies in International Politics* (1999).

⁴⁴ Thomas C. Schelling, *The Strategy of Conflict* 5 (1960) (emphasis omitted).

This model would explain why the President might favor greater judicial review over the delegation of power to the agencies. Suppose that Congress and the President both wish to expand federal regulation of a certain issue. They could choose to cooperate through enactment of legislation that delegates rulemaking power to an agency within the control of the executive branch. Congress is willing to delegate authority, but only if it knows that the executive will commit to exercising the power within a certain range of policy outcomes. The President reveals that his political preferences in using that power overlaps with Congress's preferences. If regulation within Congress's preferences leaves the President better off, the President should promise to stay within Congress's range in order to persuade the legislature to delegate the power. The President and Congress should be able to reach a deal because both branches are better off cooperating than doing nothing.

But the problem is that Congress may have few reasons to trust the President to keep his promise. Once Congress passes the law, the President could break the deal, use the delegated power outside the spectrum of policies to which he originally agreed, and suffer little chance of reversal thanks to his veto power over any reversing statute. If Congress does not have a credible commitment from the President that he will keep his word, and the President's use of delegated power would leave Congress worse off, it will not reach an agreement and pass the statute. Without any judicially enforceable agreement, Congress can retaliate by cutting funding and holding oversight of executive exercise of the delegated power, which may not much discourage the President. Congress's most meaningful sanction for a presidential renegeing is the same used in infinitely-repeating tit-for-tat games: a loss of presidential reputation for keeping promises and, therefore, legislative refusal to cooperate in the future.

As scholars of bargaining theory have argued, the parties have a way out. They can send costly signals that reveal their intent to keep their commitments. In the context of constitution-making, for example, one group can send a costly signal that it intends to keep its promises by agreeing to a Constitution that freezes its political power. Parties to a Constitution might agree to judicial review as a commitment that they intend to live up to their promises and not seek to use the power of the new government to break the original bargain.

A more vigorous nondelegation doctrine may play a similar role in the relationship between Congress and the President. Congress may distrust the President in his promises on how he will wield delegated power in the future. This may especially be the case if the delegation will enhance the legal and political standing of the President compared to Congress. Congress will also have little reason to trust a President's promises about the exercise of the power by his successors, over whom he is unlikely to have much influence. For his part, the President would benefit from the delegation, but does not have many tools to credibly commit to exercising the power within the range of congressional preferences. The President can agree to a judicially-enforced nondelegation doctrine as a costly signal that he intends to abide by his promise. A nondelegation doctrine would not interfere with every exercise of the delegation, but it would allow courts to correct for any significant deviations from the agreement between the branches. A nondelegation doctrine would also place the question in the hands of an

independent third party with which both branches have greater trust to detect violations of the agreement and impose remedies. The doctrine advantages the President, but it actually benefits both parties because it allows both to invite external enforcement of the agreement, and thus solve the most difficult obstacles to bargaining.

Of course, the nondelegation doctrine is not a cure-all nor unique in its benefits. The Administrative Procedure Act and judicial review over agency action generally also perform the same function. Vesting review over agency action in the courts, though it reduces the efficiency of delegated power, smooths the way toward an agreement between the executive and legislative branches to share power in the first place. Rather than an obsolete mechanism, the nondelegation doctrine similarly should help the President and Congress agree to cooperate. Of course, it would not have the same value in every area of inter-branch bargaining. In certain areas, Congress may have such great incentives to delegate power that it would do so even without the need for such commitments. These could include areas where the potential harm to the nation due to inaction is great, such as in emergencies, crises, or war, or where the political benefits of shifting policymaking is especially high, such as politically controversial questions or technically difficult problems. But as the Court has increasingly looked askance at other means of executive-legislative cooperation, such as the legislative veto, insulated decisionmakers, and unusual agency forms, mechanisms such as the nondelegation doctrine may become more important.

Conclusions

This paper does not undertake the difficult task of constructing a neutral doctrinal test that could enforce a non-delegation doctrine. Even if a majority on the Court wishes to dispense with the current intelligible principle test, federal judges have yet to produce a replacement that does not call on the courts to pick and choose among their favored delegations. This paper has taken a different tack. It has sought to analyze the non-delegation doctrine using a public choice approach to the relationship between Congress, the President, and the agencies. It argues that, in certain situations, Congress would favor a non-delegation doctrine that invites greater judicial scrutiny over agency action. It concludes that a more vigorous non-delegation doctrine might actually encourage greater cooperation between the branches by assuring them that their bargains over sharing power will be enforced.