

# DECONSTRUCTING NONDELEGATION

CYNTHIA R. FARINA\*

*This Essay suggests that the persistence of debates over delegation to agencies cannot persuasively be explained as a determination finally to get constitutional law “right,” for nondelegation doctrine—at least as traditionally stated—does not rest on a particularly sound legal foundation. Rather, these debates continue because nondelegation provides a vehicle for pursuing a number of different concerns about the modern regulatory state. Whether or not one shares these concerns, they are not trivial, and we should voice and engage them directly rather than continue to use nondelegation as a stalking horse.*

If Academy Awards were given in constitutional jurisprudence, nondelegation claims against regulatory statutes would win the prize for Most Sympathetic Judicial Rhetoric in a Hopeless Case. At the end of the nineteenth century, Justice Harlan, writing for a majority of the Supreme Court, declared: “That congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”<sup>1</sup> At the beginning of the twenty-first century, Justice Scalia, for a unanimous Court, insisted: “Article I, § 1, of the Constitution vests ‘[a]ll legislative Power herein granted . . . in a Congress of the United States’ . . . [and] permits no delegation of those powers.”<sup>2</sup> Yet in both these cases—and in virtually every intervening delegation challenge—the court sustained the statute at issue.<sup>3</sup> Indeed, Justice Scalia’s opinion, which fol-

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\* Professor of Law, Cornell Law School; Director, Cornell e-Rulemaking Initiative (CeRI); Director, Cornell Law & Public Policy Program.

1. *Field v. Clark*, 143 U.S. 649, 692 (1892).

2. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (first alteration in original) (quoting U.S. CONST. art. I, § 1).

3. See PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, GELLHORN & BYSE’S ADMINISTRATIVE LAW 66–77 (rev. 10th ed. 2003).

lowed an array of interesting and sophisticated D.C. Circuit opinions debating the constitutionality of delegating authority to the EPA to set national ambient air quality standards,<sup>4</sup> is one of the blandest, most pedantic opinions the Justice has ever penned. He stops just short of consigning this ostensibly vital and unqualified constitutional principle to the netherworld of nonjusticiability.<sup>5</sup> Like the Ninth Amendment and the Guaranty Clause, nondelegation appears to be a constitutional lost cause.<sup>6</sup>

The courts' hesitance to enforce nondelegation, however, does not deter challenges to the legality of regulatory delegations. Symposia devoted to the debate appear with regularity,<sup>7</sup> and nondelegation articles often appear in symposia on other topics as well.<sup>8</sup> Earlier this year at a conference on presidential power, Judge Ginsburg reiterated his conviction that delegations such as those in the Clean Air Act are constitutionally unacceptable and deprecated what he views as judicial abdication to legislative judgment.<sup>9</sup> In remarks concluding the conference, Professor Steven Calabresi proposed forcing Congress to reconsider the scope of hundreds of federal programs by treating the legislative veto provisions that

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4. See *Am. Trucking Ass'ns v. EPA*, 195 F.3d 4 (D.C. Cir. 1999) (per curiam); *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (per curiam).

5. *Whitman*, 531 U.S. at 474–75 (“[W]e have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’” (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))).

6. State constitutional opinions similarly tend to begin with a ringing declaration of the constitutional centrality of an absolute nondelegation principle, after which they sustain the challenged statute. See, e.g., *State ex rel. R.R. & Warehouse Comm'n v. Chicago, Milwaukee & St. Paul R.R. Co.*, 37 N.W. 782, 786–88 (Minn. 1888); *Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs of Clinton County*, 1 Ohio St. 77, 87–91 (1852).

7. E.g., Symposium, *The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 CARDOZO L. REV. 731 (1999).

8. See, e.g., James Boyle, *A Nondelegation Doctrine for the Digital Age?*, 50 DUKE L.J. 5 (2000); Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1750–51 (2006); Jim Rossi, *“Statutory Nondelegation”: Learning from Florida’s Recent Experience in Administrative Procedure Reform*, 8 WIDENER J. PUB. L. 301 (1999).

9. See Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. (forthcoming 2010). Judge Ginsburg was in the majority of the panel that initially held the delegation unconstitutional, *Am. Trucking Ass'ns*, 175 F.3d at 1033, and then denied the government’s petition for rehearing, *Am. Trucking Ass'ns*, 195 F.3d at 6.

commonly accompanied regulatory delegations before *INS v. Chadha*<sup>10</sup> as nonseverable.<sup>11</sup>

This Essay reflects on the remarkable durability of nondelegation arguments. It begins by exploring why the legal case against delegation is not sufficiently robust to account for the persistence of the nondelegation debate in the face of nearly two hundred years of rejection by the courts<sup>12</sup> and political branches. It suggests that the controversy endures because nondelegation offers a vehicle for pursuing several serious concerns about federal regulation. Each of these concerns at least arguably implicates constitutional values, and all arise from the *cumulative effect* of Congress's practice of broad delegation over time rather than from the act of delegating itself. As a simultaneously time-honored and perennially unpersuasive framing, nondelegation provides a constitutional home for these concerns but ultimately prevents the kind of direct engagement on the merits that they deserve.

## I.

The existence of a constitutional nondelegation principle is typically accepted as given, so the focus of debate moves immediately to whether the existing doctrinal approach correctly operationalizes this principle. But consider, for a moment, the basis for assuming that the Constitution forbids Congress to give significant policymaking authority to another entity, such as a regulatory agency. The Constitution's text is of little help, for it says nothing explicit about delegating the power Article I confers.<sup>13</sup> The early cases that vehemently pronounced the in-

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10. 462 U.S. 919 (1983).

11. See Steven G. Calabresi, Closing Remarks at the University of Pennsylvania Journal of Constitutional Law Symposium: Presidential Power in Historical Perspective (Feb. 7, 2009).

12. The earliest federal nondelegation challenges—and losses—came within decades of the ratification of the Constitution. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825); *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813).

13. Some scholars do insist that the Article I vesting clause itself establishes the nondelegation principle. See, e.g., Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 807 (1999) (“The language of the Constitution would seem to prescribe a bright-line doctrinal approach.”). With respect, this position seems unsupported. Within our legal system, a simple grant of power without more does not conclusively resolve whether or when an agent

dispensability of a nondelegation principle invariably spent their energy demonstrating why the statutes under attack did not violate the principle, rather than explaining the principle's origins.<sup>14</sup> Moreover, these demonstrations were largely functional assessments of the pragmatic needs of government. The conspicuous absence of typical constitutional interpretive concerns with text, intent, and purpose, coupled with the presentation of delegation as self-evidently problematic and the focus on practical justifiability, suggests that these courts were drawing on background legal understandings neither specific to the Constitution nor open to serious contention.

In other words, nondelegation cases historically looked more like the ordinary application of general common law principles than like extraordinary moments of constitutional exegesis. For example, a mid-nineteenth century Ohio Supreme Court opinion—eventually quoted approvingly by Justice Harlan in *Field v. Clark*<sup>15</sup>—describes as “too clear for argument” the proposition that “the general assembly can not surrender any portion of the legislative authority with which it is invested, or authorize its exercise by any other person or body.”<sup>16</sup> The court explained: “This inability arises no less from the general principle applicable to every delegated power requiring knowledge, discretion, and rectitude, in its exercise, than from the positive provisions of the constitution itself.”<sup>17</sup> Similarly, when Chief Justice Taft established the modern “intelligible principle” standard in 1928, he placed nondelegation squarely on ordinary contractual principles:

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can subdelegate. See *infra* text accompanying notes 21–43. Moreover, if the Article I vesting clause prevents delegation, so, it would seem, must the Article II and III vesting clauses. Yet the President's ability to delegate executive power is well established. See *infra* text accompanying notes 27–28. As for Article III, the relationship between Article III judges and non-Article III decision makers, such as magistrates and bankruptcy judges, is a perennial conceptual maze. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 363 (6th ed. 2009) (stating that “the Supreme Court has brought little but confusion to this area”). It blinks reality, however, to assert that no part of the judicial power of the United States has been delegated to those officials.

14. See, e.g., *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 405–11 (1928); *Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs of Clinton County*, 1 Ohio St. 77, 87–88 (1852).

15. 143 U.S. 649, 693–94 (1892).

16. *Cincinnati, Wilmington & Zanesville R.R. Co.*, 1 Ohio St. at 87.

17. *Id.*

The well-known maxim “*Delegata potestas non potest delegari*” [“No delegated powers can be further delegated”], applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law.<sup>18</sup>

Modern explanations of nondelegation emphasize political theory rather than the common law, tracing the principle to John Locke’s *Second Treatise of Government*.<sup>19</sup> Even in Locke, though, the contractual paradigm is evident, with the legislative part of government conceptualized as receiving its power from the people “by positive voluntary Grant” to act as their agent.<sup>20</sup>

It is thus worth considering what agency law actually says about an agent’s authority to delegate further the power conferred by the principal. According to the first Restatement of Agency, the general rule is indeed that, “[u]nless otherwise agreed, authority to conduct a transaction does not include authority to delegate to another the performance of acts incidental thereto which involve discretion or the agent’s special skill.”<sup>21</sup> Yet this rule—captured in the *delegata potestas* maxim—only begins the analysis. A second general rule is that “authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably neces-

18. *J. W. Hampton, Jr. & Co.*, 276 U.S. at 405–06.

19. See, e.g., *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 672–73 (1980) (Rehnquist, J., concurring); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1297 (2003); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1725, 1729 (2002).

20. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ¶ 141 (C.B. Macpherson ed., Hackett Publ’g Co., Inc. 1980) (1690). Locke wrote:

The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they, who have it, cannot pass it over to others. . . . And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those, whom they have chosen, and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.

*Id.* at ¶ 141 (emphasis omitted).

21. *RESTATEMENT (FIRST) OF AGENCY* § 78 (1933).

sary to accomplish it.”<sup>22</sup> This authority includes the power to appoint other agents or subagents when such appointment is “reasonably require[d]”<sup>23</sup> or “it is impracticable for the agent to perform [the task] in person.”<sup>24</sup> The rationale for this second rule is straightforward and sensible: Because “[a]ll authority is granted for the accomplishment of certain purposes of the principal,”<sup>25</sup> “it is inferred that the principal is not doing a vain thing, but intends to give a workable and effective consent”<sup>26</sup> when creating the agency relationship.

Although the *delegata potestas* maxim is more familiar, this second general rule of agency law is no stranger to structural constitutional interpretation. Indeed, it is central to how scholars understand the authority conferred by the People in Article II: The President may delegate his power to subagents because delegation is reasonably necessary to accomplish his constitutional functions.<sup>27</sup> Presidential delegation rests no more expressly on the text than does congressional delegation. Indeed, the President is not explicitly authorized, as Congress is, to take actions “which shall be necessary and proper for carrying into Execution” constitutionally conferred powers.<sup>28</sup> Particularly in light of the Necessary and Proper Clause, it is difficult to understand why background principles of agency law would operate more restrictively when it comes to appointing subagents necessary to accomplish the “purposes of the principal”<sup>29</sup>—that is, the people—in Article I than in Article II. Of course, broad grants of regulatory power to administrative

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22. *Id.* § 35.

23. *Id.* § 79 (“[A]n agent is authorized to appoint another agent for the principal if,” among other contingencies, “the proper conduct of the principal’s business in the contemplated manner reasonably requires the employment of other agents.”).

24. *Id.* § 80 (“[A]uthority to appoint a subagent is inferred from authority to conduct a transaction for the principal if,” among other things, “the business is of such a nature . . . that it is impracticable for the agent to perform it in person.”).

25. *Id.* § 34 cmt. d.

26. *Id.* § 35 cmt. c.

27. *E.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242 (1994) (“Of course, the President cannot be expected personally to execute all laws.”).

28. U.S. CONST. art. I, § 8, cl. 18.

29. RESTATEMENT (FIRST) OF AGENCY § 34 cmt. d.

agencies can be justified as “reasonably require[d]”<sup>30</sup> subdelegations only if achievement of the statutory objectives is within the charge that the people, through the Constitution and the ordinary political process, have given Congress to accomplish. The scope of Congress’s authority is thus an important issue, to which this Essay will return shortly.

Another basic component of agency law is worth noting: the impact of changed conditions. When a principal engages an agent to act for him over time, the scope of actual authority cannot be static or the course of external events might leave the agent unable to achieve the goals of the principal. The general rule, therefore, is that “authorization is interpreted *as of the time it is acted upon*, in light of the conditions under which it was made *and* changes in conditions subsequent thereto.”<sup>31</sup> As a result, “a change of circumstances may increase, diminish, or terminate [the agent’s] privilege to exercise a power for the principal.”<sup>32</sup> The principal need not have anticipated the consequences of the changed conditions.<sup>33</sup> To be sure, what ultimately defines the agent’s actual authority is “the principal’s manifestations of consent to him.”<sup>34</sup> But this inquiry asks whether the “conduct of the principal . . . , reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal’s account.”<sup>35</sup> When the agent is acting under substantially changed circumstances, the consent of the principal is reasonably inferred if “the principal is aware of the change and its effect and is in a position to change his orders if he desires such change.”<sup>36</sup> More generally, an inference of authority reasonably arises when the agent performs “a series of acts of a similar nature” and the principal, knowing of those acts, does not manifest disapproval.<sup>37</sup>

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30. *Id.* § 79 (“[A]n agent is authorized to appoint another agent for the principal if . . . the proper conduct of the principal’s business in the contemplated manner reasonably requires the employment of other agents.”).

31. *Id.* § 33 (emphasis added).

32. *Id.* § 33 cmt. a.

33. *Id.* § 35 cmt. c (“It is not essential to the authorization of an act that the principal should have contemplated that the agent would perform it as incidental to the authorized performance.”).

34. *Id.* § 7.

35. *Id.* § 26.

36. *Id.* § 33 cmt. a.

37. *Id.* § 43 cmt. b.

All these principles of agency law go to the scope of the agent's *actual* authority. They are not defining the "apparent" authority upon which a third party may reasonably rely but which does not alter the relationship between the agent and his principal,<sup>38</sup> nor are they addressing the distinct question of when an agent's unauthorized acts can be legitimated after the fact by the principal's affirmance or ratification.<sup>39</sup> They comprise the primary framework for defining the bounds of the agent's legitimate authority to act—a framework in which constraint on (sub)delegation is only one of several interrelated components.

Within this framework, the historical course of nondelegation jurisprudence is more explicable. *Delegata potestas non potest delegari* begins, but does not end, judicial analysis. The pragmatic assessment of government needs<sup>40</sup> and the notice taken of changing national and international circumstances<sup>41</sup>—inquiries that seem odd, perhaps even irresponsible, as part of enforcing a fundamental constitutional prohibition—are quite unexceptional ways to determine whether a general agent may lawfully delegate power to others to perform tasks "impracticable for the agent to perform . . . in person."<sup>42</sup> Indeed, in *United States v. Grimaud*, a famous early twentieth century case that rejects a nondelegation challenge to a criminal conviction for violating an administrative regulation, the Court made explicit the common law reasoning that informed the constitutional inquiry: "Congress might rightfully entrust" to others the power to make regulations just "as an owner may delegate

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38. See, e.g., *id.* §§ 49, 159 (discussing apparent authority and the rules that apply to unauthorized acts taken under apparent authority).

39. See *id.* §§ 82–84, 93 (defining ratification and affirmance).

40. See, e.g., *United States v. Grimaud*, 220 U.S. 506, 516 (1911) (noting that "[i]n the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management" of federal reserved lands).

41. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

42. RESTATEMENT (FIRST) OF AGENCY § 80 ("[A]uthority to appoint a subagent is inferred from authority to conduct a transaction for the principal" if, among other things, "the business is of such a nature . . . that it is impracticable for the agent to perform it in person.").

to his principal agent the right to employ subordinates, giving to them a limited discretion."<sup>43</sup>

## II.

In sum, the indefatigable fervor with which we cling to non-delegation arguments is difficult to justify based on either the language of the Constitution or the background understandings of agency law from which the *delegata potestas* maxim derives. Rather, it appears to be anxiety about the consequences of two centuries of statutory delegation to agencies that keeps the delegation debate alive. This disquiet about modern regulatory government comprises several distinct concerns.

The first is that broad congressional delegation to agencies has made it too easy for the federal government to establish, over time, a huge regulatory regime reaching virtually every significant aspect of our social and economic lives. Lawyers and political scientists alike have charged that delegation enables the legislature to punt the really tough policy choices.<sup>44</sup> Because Congress can do more when it is allowed to do less, the result has been a proliferation of federal social and economic regulation, much of which arguably should not exist. The *constitutionally* based version of this concern, most clearly articulated by Gary Lawson, sees overly broad constructions of the Commerce Clause, the spending power, and the Necessary and Proper Clause as working in conjunction with overly narrow applications of the Due Process and Takings Clauses and the Tenth Amendment to allow the national government a far greater scope of action than was originally intended.<sup>45</sup> Unconstrained delegation enables Congress to exploit these interpretive errors to the fullest, producing a regime of unconstitutional federal regulatory overreaching.<sup>46</sup> The *policy* based version insists that, as a matter of good government, less is more. Delegation has made it so easy to create federal regulatory programs that the national government now intervenes in

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43. *Grimaud*, 220 U.S. at 516 (internal quotation marks omitted).

44. See, e.g., THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 92–126 (2d ed. 1979); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

45. Lawson, *supra* note 27, at 1233–37.

46. *Id.* at 1237–41.

matters that the market, or local governments, would more efficiently and effectively manage.<sup>47</sup> A related worry is that delegation has expanded the federal regulatory agenda to the point of irredeemable unmanageability.<sup>48</sup> Were Congress forced to focus and prioritize more, the regulation that does result could be better coordinated, assessed, and adjusted.

Even those who (like the Author) do not share this concern at the wholesale level would find it hard to deny that careful attention to the “whether,” “who,” and “how” of regulation in specific circumstances is important, and often lacking. Attempting to remedy this deficit through nondelegation, however, merely diverts the focus to questions, such as the adequacy of particular statutory standards, that are tendentious and ultimately trivial in comparison to the underlying issues.

A second concern is that allowing Congress to avoid the kinds of detailed policy specification that would founder in the bicameralism and presentment process has increased the production of federal statutory law. Insightful articles by Jonathan Macey<sup>49</sup> and others<sup>50</sup> have demonstrated how the Article I, Section 7, lawmaking requirements work in practice to restrict the production of legislation and preserve the status quo. The history of the Framing provides some basis for believing that an antistatute bias was deliberate. State constitutions adopted shortly after the Revolution reacted to perceived abuses of the king by creating government structures dominated by a popularly elected, often unicameral, legislature.<sup>51</sup> Many of these legislatures dealt with the economic chaos and hardship of the post-war period by passing statutes that cancelled private (as well as public) debt and took various other steps endangering

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47. Cf. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 106–10 (1990) (advocating, among other things, “a presumption in favor of flexible, market-oriented, incentive-based, and decentralized regulatory strategies”).

48. Cf. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993) (describing the overlap, inconsistency, and irrationality of health and safety regulatory programs).

49. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

50. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528–29 (1992).

51. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 214–21 (1996); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 403–13 (2d ed. 1998).

existing property rights.<sup>52</sup> Hence, for many of the well-propertyed Framers, the course of events between 1779 and 1787 demonstrated that popularly elected legislatures were inclined to be reckless and that legislation threatened property. So it is not implausible to argue that less federal statutory law is itself an original constitutional value.<sup>53</sup>

Even if this were true, a meaningful question remains: What weight should we accord today to a Framing-era distrust of legislation? We now recognize that the common law is itself a system of government regulation—no more the “natural” order of things than any other legal approach. With the post-eighteenth-century spread of democratic government structures, statutory law created by popularly elected officials has become the preeminent form of social ordering in industrial and post-industrial societies. It now seems quaint, if not actually undemocratic, to treat statutes as a suspect incursion on judge-made law.<sup>54</sup> To interpret our Constitution as locking in one particular approach to regulating social and economic activity—particularly, a court-centered approach—uncomfortably highlights the “dead hand” potential of a two-hundred-year-old document. It threatens to make the Constitution irrelevant in a society whose more recent political history has included not only President Roosevelt’s New Deal and President Johnson’s Great Society, but also at least three decades of well-documented public opinion insisting that the federal government should take responsibility for solving environmental, health and safety, educational, and other core social problems.<sup>55</sup>

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52. RAKOVE, *supra* note 51, at 216; WOOD, *supra* note 51, at 403–13.

53. See, e.g., John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 910–20 (2001).

54. See, e.g., WILLIAM D. POPKIN, STATUTES IN COURT 201 (1999) (“[T]he dominance of statute law in modern government requires reconsideration of the presumption that . . . statutes in derogation of the common law should be narrowly construed.”); PETER L. STRAUSS, LEGISLATION: UNDERSTANDING AND USING STATUTES 144–51 (2006) (noting that the early twentieth century “was a time when statutes began to replace case decision (i.e. the common law) as the primary source of law in American jurisprudence”).

55. See Christopher Ellis & James A. Stimson, Operational and Symbolic Ideology in the American Electorate: The “Paradox” Revisited 2–5, 37 (Apr. 7, 2005) (unpublished manuscript), available at [http://www.allacademic.com/meta/p85321\\_index.html](http://www.allacademic.com/meta/p85321_index.html) (reviewing data from 1970–2002 showing that Americans, on average, prefer policies through which the government spends and does more to solve social problems, and that this clear preference varies within a relatively small range, never quite touching the neutral point even at its most extreme con-

It now seems more important to consider how Article I, Section 7 operates within the regulatory system that Americans of the twentieth and twenty-first centuries have chosen. *Stability* in regulatory programs, as in law more generally, is valuable; it enables private planning and protects expectations. *Entrenchment* is dangerous because some degree of regulatory failure—approaches that produce unintended negative consequences, impose disproportionate social costs, and so on<sup>56</sup>—is inevitable given the complexity and intractability of the problems Americans now expect government to solve. The constitutionally specified process makes amending and repealing statutes as difficult as enacting them. Indeed, once regulatory programs have given rise to communities of interest in their continuation, amending or repealing a regulatory statute may be more difficult than enacting it in the first place.<sup>57</sup> Ambitious regulatory agendas require adaptability if they are not to do more harm than good. Given the status-quo-favoring bias of the Article I, Section 7, process, less specificity in regulatory statutes may, ironically, be a virtue rather than a vice.<sup>58</sup>

This observation leads to what is doubtless the most broadly resonant set of concerns voiced through the rubric of nondelegation: Delegating so much policymaking power to administrative agencies has created serious problems of control and accountability. Agencies, according to this critique, are making policy with little external oversight and less democratic accountability to the people.

We have good reason to worry about these things. Currently, close to two hundred distinct entities have rulemaking authority—that is, the power to make regulations having the force of

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servative moments); see also Cynthia R. Farina, *False Comfort & Impossible Promises: Information Overload, Uncertainty and the Unitary Executive*, U. PA. J. CONST. L. (forthcoming) (on file with author) (reviewing political science literature on the majority's "liberal" regulatory preferences).

56. See SUNSTEIN, *supra* note 47, at 107–09.

57. For example, the emergence of the lucrative environmental cleanup industry is often blamed for difficulty in amending the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. See Cynthia R. Farina, *Faith, Hope and Rationality: Or, Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 123–24 (2000).

58. See, e.g., BREYER, *supra* note 48, at 39–42 (identifying "congressional reaction to perceived risk and to regulatory problems, which takes the form of detailed statutory instructions," as one significant cause of inefficient, ineffective regulation).

law.<sup>59</sup> They make about four thousand rules per year,<sup>60</sup> an average of seventy-five per week. To be sure, many of these are minor or uncontroversial. But, as administrative law professors know well, rules are only one of the many ways in which agencies make important regulatory policy. They issue “guidance” documents that, as a practical matter, the regulated community ignores only at its peril;<sup>61</sup> they grant permits and other authorizations; they require product recalls and undertake enforcement actions. Agencies even make significant regulatory choices by *not* acting. Consider that *Massachusetts v. EPA*,<sup>62</sup> which many know (not quite correctly) as directing the EPA to regulate greenhouse gases, arose from the agency’s decision *not* to begin a rulemaking.<sup>63</sup> The extent and diversity of regulatory activity is so great that we actually do not know, empirically, how many of these activities occur across the federal government annually.

For cognitive and psychological reasons, humans seek to simplify complexity.<sup>64</sup> The nondelegation doctrine, as traditionally articulated, represents one simplifying response to the concern that the mass of federal regulatory policymaking power is uncontrolled and unaccountable: Congress itself should exercise the power. A more recent twist presents a different simplifying response: The President should exercise, or at least direct the exercise of, the power. This unconventional deployment of nondelegation reasoning goes like this: Although the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left

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59. COMM. ON THE STATUS AND FUTURE OF FED. E-RULEMAKING, *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING* 3 (2008), available at <http://ceri.law.cornell.edu/documents/report-web-version.pdf> [hereinafter *ACHIEVING THE POTENTIAL*].

60. John Ashlin et al., *Regulations.gov Federal Regulatory Portal*, 30 J. GOV'T INFO. 81, 82 (2004).

61. See Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803 (2001).

62. 549 U.S. 497 (2007).

63. See *id.* at 511. Although the case was widely reported as requiring the EPA to regulate, the majority held only that the EPA has authority to regulate carbon dioxide and other greenhouse emissions and must provide a rational, legally valid explanation for not doing so. See *id.* at 533.

64. See Farina, *supra* note 55.

to “agencies in regulatory statutes,”<sup>65</sup> the Constitution “permits no delegation of [Article I] powers.”<sup>66</sup> Therefore, the power exercised by agencies in regulatory programs that have passed constitutional muster by satisfying the “intelligible principle” standard<sup>67</sup> cannot be *legislative* power. Rather, as the Constitution speaks of only three types of power, the authority conferred in regulatory statutes must be *executive* power. “To be sure, some administrative agency action—rulemaking, for example—may resemble ‘lawmaking.’”<sup>68</sup> But “a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action.”<sup>69</sup> Because Article II vests the President with all the federal executive power, the President’s duty to take care that federal law be faithfully executed entails the power to direct the decisions of regulatory decision makers.<sup>70</sup>

Either simple solution to the concern about control and accountability of regulatory policymaking—the power should be wielded either by Congress or by the President—will be, at best, inadequate and disappointing. The sheer size and complexity of the federal regulatory enterprise defeats rational, coordinated, democratically responsive decision making by *any* single entity, be it the 535 members of Congress or the 1,500 people in the Cabinet and Executive Office of the President who are the President’s eyes, ears, and often voice with respect to regulatory decisions.<sup>71</sup> Even with respect to particular, highly salient regulatory policy choices, it is far from obvious that a congressional or presidential decision is a significant gain in democratic control and accountability. As the judiciary has elaborated on the basic procedural framework of the Adminis-

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65. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

66. *Id.* at 472 (emphasis added).

67. *See J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

68. *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983).

69. *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting); *accord. Freytag v. Comm’r*, 501 U.S. 868, 912 (1991) (Scalia, J., concurring in part and concurring in the judgment) (“It seems to me entirely obvious that the Tax Court, like the Internal Revenue Service, the FCC, and the NLRB, exercises executive power.”); *Chadha*, 462 U.S. at 953 n.16 (“It is clear, therefore, that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act.”).

70. *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 29 (2008).

71. *See* LYN RAGSDALE, *VITAL STATISTICS ON THE PRESIDENCY* 253, 257–62 (1996).

trative Procedure Act, agency decision making is often far more broadly participatory, transparent, and publicly justified than is congressional or presidential action. Moreover, the growing interest in using the Internet and other information and communication technologies in the regulatory process—e-government—has great potential to make agency decision making even more open, comprehensible, and accessible to citizens.<sup>72</sup>

Absent a fundamental revision in Americans' expectations of what the federal government should accomplish, we must rely on multiple entities and processes to meet the challenge of democratic control and accountability in the regulatory state: the House and the Senate through their overlapping, and often competing, oversight and appropriations committees;<sup>73</sup> the multiple centers of executive influence in the Cabinet and the various White House offices that orbit the President and often compete to be his authentic voice in the administration;<sup>74</sup> the courts in their role as reviewers; and private individuals, entities, and interest groups in their role as litigants, lobbyists, repeat players, and watchdogs.

### III.

For nearly a century, Congresses and presidents of both parties have responded to perceived economic and social problems by creating regulatory agencies that wield substantial policymaking authority. For decades, public opinion polls have revealed solid and remarkably stable majority support for active federal government engagement in environmental, health and safety, and economic issues. If all this is not the authentic working out of representative democracy, then it is hard to see what self-government would mean for the people of a large, heterogeneous nation. Of course, *legitimate* government action in our system is subject to the proviso that simple majoritarian preferences may not override requirements and prohibitions of

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72. See *ACHIEVING THE POTENTIAL*, *supra* note 59, at 8–11.

73. In the 110th Congress, more than twenty-five committees and subcommittees have jurisdiction over the EPA and its regulatory programs. See U.S. EPA, MAJOR CONGRESSIONAL COMMITTEES WITH JURISDICTION OVER EPA ISSUES 1–3, <http://epa.gov/ocir/leglibrary/pdf/110housejuris.pdf>.

74. See, e.g., Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 68–69 (2006).

the Constitution. But it is hardly surprising that courts would not deploy a prohibition that is neither explicit in the constitutional text nor absolute in the background common law understandings to block sociopolitical developments that have bipartisan, cross-branch, and enduring popular support.

The real problem with framing concerns about regulatory government as a question of power is that when the inevitable confirmation of congressional authority comes, we tend to act as if there is nothing more to say. Debates about whether Congress can delegate have crowded out debates about whether Congress ought to delegate. Do we really believe that the sum and substance of congressional and presidential responsibility is to avoid doing that which they are prohibited from doing? Surely the power that we, the people, have given them through the Constitution comes impressed with an obligation to reflect carefully upon whether what *may* be done *should* be done. Whether or not any of the various concerns that continue to impel “nondelegation talk” merit a systemic revision of U.S. regulatory objectives and structures, they should be part of serious discussion about regulatory proposals in Congress, the White House, and broader public discourse. Continuing to sublimate these concerns in an ultimately unproductive argument about constitutional first principles disserves us all.