NON-DELEGATION AS NON-DELIBERATION

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INTRODUCTION

The phrase "administrative agency lawmaking" should unsettle anybody with even a minimal concern for the separation of powers. In reality, the practice is regular, and significant lawmaking authority is systematically delegated to the modern administrative state through open-ended congressional acts. Not much work has been done, however, to rationalize administrative agency lawmaking beyond pragmatism values, technical expertise, and efficiency. Even more, the courts appear unconcerned about the practice and unwilling to entertain the idea that a delegation of the legislative power to an administrative agency could be unconstitutional. In this Note, I argue that it is possible to identify a constitutionally firm basis for most modern delegation practice by tethering it to congressional deliberation as a core value.

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This would not provide blanket constitutional justification for all modern delegation practice, however; instead, my theory places enforcement on non-delegation grounds back within the reach of judges by making reference to familiar lines of judicial inquiry. Specifically, this Note works to reclaim the ideal of congressional deliberation as a requirement for constitutional delegations of the legislative power to administrative agencies—an ideal that has been lost in the modern form of the non-delegation doctrine. By drawing upon deliberative values embedded in theoretical and early historical understandings of the separation of powers, I expand upon the uncomfortable and unhelpful truism that administrative agencies are valid out of necessity, despite being ostensibly unconstitutional.[1] Helpful insights deriving from early historical practice[2] supplement the pragmatism and efficiency justifications that currently do all of the work to rationalize the modern administrative state.[3] In drawing upon congressional deliberation as an independent and necessary virtue of the federal lawmaking process, I provide a theoretical account of delegation and propose a workable standard for distinguishing valid from unconstitutional delegations of the legislative power.

I begin in Part I by examining the nature of the legislative power as it pertains to administrative agency lawmaking. When Congress delegates to administrative agencies, the recipient agency in turn exercises legislative power when promulgating rules and regulations pursuant to that delegated authority. Furthermore, modern conceptions of the non-delegation doctrine, which distinguish constitutional from unconstitutional delegations of the legislative power, have proven both practically unworkable and theoretically unsound. After uprooting the modern doctrine, I turn in Part II to early understandings of the separation of powers in theory and historical practice. These insights form the basis of a tradition of congressional deliberation in lawmaking,

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1. *See* Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2100 (2004) ("[A]ll three branches of government appear to be engaged in unconstitutional behavior."). We should strive to supply a firmer grounding for such behavior because such a "massive breach of the Constitution can only encourage cynicism about government." *Id.* at 2100–01.

2. Whether historical practice alone is sufficient to provide an indisputable constitutional basis for delegation is unclear, but that is not the subject of this Note. At the very least, historical practice has proven important in topics relating to constitutional structure. *See generally* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (theorizing the invocation of historical practice as it relates to the constitutional separation of powers).

3. For instance, in order to produce the most socially desirable laws taking into account the most relevant information, "perhaps [delegation] is what voters want." Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 323 (2000).

which must inhere in any valid description of delegation. Finally, Part III will reformulate the non-delegation doctrine in terms of promoting legislative deliberation, through what I label the non-deliberation doctrine. The non-deliberation doctrine consists of three requirements, all of which must be satisfied for a delegation to be constitutionally valid: first, an object-means sufficiency requirement; second, formal congressional oversight; and third, retention of essential attributes of the legislative power. Understanding the fact that congressional deliberation is a necessary part of the administrative lawmaking process allows courts to distinguish constitutionally valid from unconstitutional delegations based in non-deliberation principles.

I.
THE LEGISLATIVE POWER AND DELEGATION

The federal lawmaking process is grounded in the Article I Vesting Clause, which reads: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[4] Administrative agency lawmaking is not similarly vested by the Constitution. Hence, "[e]xecutive officials generally cannot exercise legislative powers on their own initiative because they are not granted any such power by the Constitution."[5] If the executive branch is to be able to engage in lawmaking at all, it may do so only when such power is properly delegated to it.

A textual argument against delegation proceeds predictably. The legislative power, as vested, is read very narrowly, because it includes the qualifier "herein granted" not present in Article II or Article III.[6] Since the Article I Vesting Clause is unique in specifying that "all legislative Powers *herein granted* shall be vested,"[7] and delegation has no express authorization anywhere in the text of the Constitution, it follows that delegation is not a valid congressional power.[8] The fact

4. U.S. CONST. art. I, § 1.

5. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 334 (2002).

6. *Id.* at 337. The inclusion of the "herein granted" language is the strongest argument for literalism in Article I. However, the rejection of strict literalism in Article III would at least give pause before relying too strongly on literalism in Article I. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 925 (1988).

7. U.S. CONST. art. I, § 1 (emphasis added).

8. *See* Lawson, *supra* note 5, at 345. This is where Justice Scalia would have ended his inquiry. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests 'all legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers

that delegation exists, however, reveals a deficiency in this purely textual argument. At this point, some commentators attempt to anchor delegation in the Necessary and Proper Clause,[9] which provides that Congress shall have the power "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States."[10] Surely statutes delegating lawmaking power to administrative agencies "must be traceable to some grant of power in the Constitution."[11] I do not believe that the text of the Constitution excludes the possibility of delegation; it is plainly ambiguous on the point, and so we must look elsewhere for definitive support.

Various theories have emerged to justify the regular delegation of the legislative power to the administrative state. Some deal with the realities of the legislative process itself. For instance, Congress might elect to delegate when the legislative process is least efficient.[12] Most justifications, however, are pragmatic. To take an example, it is commonly argued that delegation promotes good legislation by virtue of agencies' expertise and political isolation.[13] Given the natural restric-

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. . . ."); Loving v. United States, 517 U.S. 748, 776–77 (1996) (Scalia, J., concurring) ("While it has become the practice in our opinions to refer to 'unconstitutional delegations of legislative authority' versus 'lawful delegations of legislative authority,' in fact the latter category does not exist. Legislative power is nondelegable."); Mistretta v. United States, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting) ("Strictly speaking, there is *no* acceptable delegation of legislative power."); *cf.* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* ("The legislative power is the power to make laws, not the power to make legislators. It is nondelegable. Congress can no more authorize one committee to 'fill in the details' of a particular law in a binding fashion than it can authorize a committee to enact minor laws."), *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 35 (Amy Gutmann ed., 1997).

9. *See, e.g.*, Lawson, *supra* note 5, at 346–50.

10. U.S. CONST. art. I, § 8, cl. 18. It is possible that "there is nothing else in the Constitution that will do the trick." Lawson, *supra* note 5, at 346.

11. Lawson, *supra* note 5, at 345. The Court's decision in *A.L.A. Schechter Poultry Corp. v. United States* cites both the Vesting Clause and the Necessary and Proper Clause in its discussion of the non-delegation doctrine. 295 U.S. 495, 529 (1935).

12. DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 10 (1999). This Note does not provide an analytical framework for deciding under what conditions Congress *best* delegates its lawmaking power. I seek only to determine *whether* delegation is constitutionally rooted, and to uncover an identifiable distinction between constitutionally legitimate and illegitimate delegations.

13. *But see, e.g.*, JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 58, 62–69 (1978) (discussing agency capture and various forms of political control). *See generally* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (comprehensively examining elements of institutional agency design that are important for political insulation).

tions of language,[14] legislation might be unable to set forth the manner of dealing with all individual situations in advance.[15] Administrative agencies may additionally "have systematically better information than legislators."[16] Due to some combination of these reasons, Congress may be unable to legislate at all.[17] Such pragmatic considerations, though appealing, are insufficient to allay constitutional concerns. In order to ensure the respect of the people and confidence in the federal government, it is better that we find an account of delegation that is also consistent with constitutional principles. The difficulty in locating delegation in the words of the Constitution has unfortunately shrouded the concept. As I explain next, the Supreme Court's refusal to develop a conceptually sound framework for delegations of the legislative power has led to enormous enforceability problems.

A. Unsteady Theoretical Foundations

The precise theory underlying the modern non-delegation doctrine is somewhat unclear. The conceptual evolution usually begins with a strict separation of powers principle, such as "Congress may not constitutionally delegate its legislative power to another branch of Government."[18] But this formulation would outright ban delegation of the legislative power (not supported by historical practice) and probably result in the invalidation of most of the administrative state if strictly enforced (an impractical result). Emphasizing this separation of powers principle, the Supreme Court has engaged in linguistic acro-

14. *See* H.L.A. HART, THE CONCEPT OF LAW 126 (3d ed. 2012) ("In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide.").

15. *Schechter Poultry*, 295 U.S. at 529–30 ("We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly.").

16. Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 337 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010). Congress may not only be at a comparative disadvantage compared with administrative agencies, but also might even be completely incompetent to legislate in a particular area.

17. Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in 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.").

18. Touby v. United States, 500 U.S. 160, 165 (1991); *Mistretta*, 488 U.S. at 371. This derives from John Locke's principle that the legislature has the power "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." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 363 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

batics when characterizing what precisely Congress does when it "delegates." A typical description—what I label the "discretion formulation"—provides that Congress delegates lawmaking power by enacting a law that enables the recipient to exercise discretion in executing the law. Hence, under the discretion formulation, Congress permissibly legislates (by delegating) when it does so "in broad terms, leaving a certain degree of discretion to executive or judicial actors."[19] In order to define when discretion becomes unconstitutionally excessive, the Supreme Court has made an implicit move by prohibiting "the exercise of *unconstrained discretion* in making rules."[20] This is as far as the Court is typically willing to go, however, in theorizing delegations.

In keeping with this paltry description supplied by the Court, Eric Posner and Adrian Vermeule argue that Congress properly exercises its legislative power when it gives authority to an administrative agency, which in turn exercises executive power when acting under the terms of such a statutory grant.[21] Thus, the administrative agency creating binding rules and regulations pursuant to valid statutory authority is engaging not in Article I "lawmaking," but rather execution of the laws consistent with the Take Care Clause in Article II, Section 3 of the Constitution.[22]

Thomas Merrill has made significant progress by proposing that the Vesting Clause stands not for non-delegation, but rather for exclusive delegation.[23] This exclusive delegation formulation relies on the fact that the Constitution by its own terms does not expressly forbid delegation of the legislative power.[24] Thus, under Merrill's interpretation, Article I, Section 1 means "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to

19. *Touby*, 500 U.S. at 165.

20. Merrill, *supra* note 1, at 2099; *see, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001). What discretion means is notoriously complicated. I take the meaning of discretion in the delegation context to be a commitment to *ordinary* discretion, given that the Supreme Court has made reference to the notion of a constraint. *Cf.* Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32 (1967) (discussing types of discretion).

21. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002).

22. *Id.* at 1725–26.

23. Merrill, *supra* note 1, at 2099.

24. Sunstein, *supra* note 3, at 322. This draws incidental support from Justice Stevens's concurrence in *Whitman*, in which he stated that "[t]hese provisions do not purport to limit the authority of either recipient of power to delegate authority to others." *Whitman*, 531 U.S. at 489 (Stevens, J., concurring).

the authority delegated by Congress."[25] Then, courts may police delegation through the slightly more tenable distinction between administrative lawmaking that is legally binding on the public, and those delegations whereby administrative lawmaking is not legally binding on the public.[26] This amounts to a requirement that Congress clearly authorize an agency to make legislative rules (that is, binding "law").[27] Such clear authorization is required by the exclusive delegation theory, first, through an "anti-inherency principle" attached to the exclusive delegation reading of Article I, Section 1, which provides that "executive and judicial officers have no inherent authority to act with the force of law, but must trace any such authority to some provision of enacted law."[28] The theory is then completed through the "transferability principle," which posits that "Congress has the power to vest executive and judicial officers with authority to act with the force of law, including the authority to promulgate legislative regulations functionally indistinguishable from statutes."[29]

Because administrative agency rules and regulations promulgated pursuant to a statutory grant "prescribe[ ] the rules by which the duties and rights of every citizen are to be regulated,"[30] I believe that such administrative agency actions with the "force of law" must involve use of the legislative power by the agency. In order for us to characterize delegations properly, then, we must examine them along two dimensions that the Court has failed to coherently address: first, the nature of the power exercised by the delegatee, and second, the line separating lawful from unconstitutional delegations.

B. Delegation as Delegation

The Supreme Court has been guarded in describing the *nature* of delegation, that is, the kind of constitutional power being exercised by

25. Merrill, *supra* note 1, at 2099 (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)) (internal quotation marks omitted).

26. *See id.* at 2099–2100. This kind of distinction should be familiar to courts under traditional statutory interpretation and administrative law principles. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("[I]t can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law . . . ."); *see also* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (finding agency interpretations as expressed in opinion letters, policy statements, agency manuals, and enforcement guidelines to lack the force of law for *Chevron* purposes).

27. Merrill, *supra* note 1, at 2100.

28. *Id.* at 2101.

29. *Id.*

30. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

the recipient of the delegated power.[31] It appears that the Court is committed to understanding delegation as enabling administrative agencies to act pursuant to an expanded or reaffirmed *executive* power.[32] I label this "delegation as enablement,"[33] as distinguished from a description of the nature of delegation as delegation of the legislative power exercised as legislative by the recipient. I call the latter description "delegation as delegation." It is a silly phrase, no doubt, but one that is necessary to capture what I believe to be the true nature of delegation, as distinguished from the strained interpretation of delegation that merely authorizes the executive branch to exercise its own power.

The fairest reading of the discretion formulation, combined with a blanket prohibition on delegation of the legislative power,[34] provides strong evidence that the Court has implicitly adopted delegation as enablement to justify delegations to the administrative state. But the Court's conclusory endorsement of the discretion formulation without further analysis places pressure on whether we can truly understand all lawmaking power exercised by the delegatee as executive, particularly since modern delegations (in the form of open-ended statutes) enable administrative agencies to set rules and regulations that carry the force of law.

Where the executive branch either has independent authority or shares authority with Congress over a particular subject matter, the delegation as enablement description is at its strongest. Legislation in the area of foreign affairs is the paradigmatic example. In *United*

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31. When describing the nature of delegation, I focus on the power exercised by the delegatee because nobody disagrees that when Congress legislates (permissibly) in this manner, Congress is exercising legislative power.

32. A typical statement appears in *Marshall Field & Co. v. Clark*, in which the Court declared that "[w]hat the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect." 143 U.S. 649, 693 (1892).

33. As it is used in this context, "delegation" is something of a misnomer, because Congress acts with the legislative power, but the delegatee acts with its own power.

34. Justice Scalia, for instance, was consistent in stating that delegation of the legislative power is never constitutionally permitted. *See supra* note 8. This position traces back to an early statement in *Clark* distinguishing the two descriptions of delegation:

> The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

143 U.S. at 693–94 (quoting Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs of Clinton Cty., 1 Ohio St. 77, 88–89 (1852)) (internal quotation marks omitted).

States v. Curtiss-Wright Export Corp., the Court invoked "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."[35] Under these circumstances, legislation would not appear to be delegations of the legislative power, but rather congressional approval of the executive branch wielding its own power. Such purported "delegations," however broad, would likely be constitutionally valid. More expansively, where Congress and the executive branch have concurrent or complementary authority over a particular subject matter, broad delegations are also likely valid.[36]

Delegation as enablement, then, is still a helpful description in these limited situations. To accommodate these delegations, Gary Lawson's hybrid description of delegation is instructive and the closest to modern reality. In his formulation of the non-delegation doctrine, "[s]tatutes that purport to authorize executive and judicial officials to exercise discretion that extends beyond the reaches of the executive and judicial powers are delegations of legislative power."[37] I would agree with this characterization because it accommodates situations in which the executive has independent or residual authority under the Constitution over the subject matter at issue, and properly characterizes those statutes as not truly delegation, but rather delegation as enablement.[38] "Adjudicative" cases that merely apply a rule to

35. 299 U.S. 304, 320 (1936).

36. *See* Loving v. United States, 517 U.S. 748, 773 (1996) ("Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes."); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 684 (1980) (Rehnquist, J., concurring in the judgment) ("In some cases where broad delegations of power have been examined, this Court has upheld those delegations because of the delegatee's residual authority over particular subjects of regulation."). Although focusing on the delegation of authority to regulate the introduction of liquor in Indian country to Indian tribes, the Court in *United States v. Mazurie* stated the important general principle that "limitations [on Congress's authority to delegate its legislative power] are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." 419 U.S. 544, 556–57 (1975). Incidentally, I recognize but ignore complications that arise with respect to delegations to private parties. *See, e.g.*, FREEDMAN, *supra* note 13, at 90–94 (approving of delegation to private parties, particularly when such delegations serve "important public purposes and give promise of adequately considering and protecting the interests of all of those subject to regulation").

37. Lawson, *supra* note 5, at 345; *see* Mistretta v. United States, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting).

38. *Cf.* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (Marshall, C.J.) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise it-

certain factual situations—such as those resembling the Interstate Commerce Commission's rate-setting in *Goodrich*[39]—would also fit the delegation as enablement description. Any other delegation must be delegation of the legislative power to the administrative state (in my terms, delegation as delegation). In particular, modern, open-ended delegations are not captured adequately by the delegation as enablement description.[40] It would be called the legislative power if Congress were to legislate the same end-result; why not when done by an administrative agency? When the legislative power is delegated to the executive branch, any resulting lawmaking action is an exercise of the legislative power.[41]

With this understanding of delegation as delegation, we can properly characterize what Congress does when it delegates. Delegation means that Congress has legislated a bounded portion of its lawmaking (legislative) power away to be exercised by an administrative agency as legislative. This more accurately captures the typical, modern case in which Congress passes framework legislation enabling administrative agencies to promulgate laws that affect the rights and responsibilities of the people.

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self."). Where the executive branch has independent or residual authority to act in the subject area of the putative delegation, I would find no non-delegation problem, so long as the statutory command did not enable the executive branch to exceed its own authority without satisfying the requirements of my non-deliberation theory. *See infra* Part III.

39. In *Interstate Commerce Commission v. Goodrich Transit Co.*, the Court approved of delegating to the ICC the discretion to set particular carrier rates. The majority stated:

> The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.

224 U.S. 194, 214 (1912).

40. This distinction resembles the difference between "rules statutes" and "goals statutes" as the terms have been coined by David Schoenbrod:

> Rules statutes state rules demarcating permissible from impermissible conduct; the job of deciding what these rules mean in particular situations is interpretation. Goals statutes state goals, which usually conflict, and delegate the job of reconciling any such conflicts to others who are entrusted with promulgating the rules of conduct necessary to achieve those goals. Goals statutes delegate legislative power.

David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1253 (1985).

41. *But see* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 389 (1989) ("When the legislature directs an agency to implement a program of some sort, the legislature is exercising its power, not giving that power away.").

C. *Lawful and Unconstitutional Delegations*

The non-delegation doctrine, in addition to requiring a characterization of the nature of the power exercised by the delegatee, requires judges to assess statutory language in policing the line between lawful and unconstitutional discretion. Thus, courts generally find that delegation exceeds Congress's power only when Congress has delegated absent an "intelligible principle."[42] So the non-delegation doctrine might distinguish permissible and impermissible delegations on the basis of "unconstrained discretion" or the lack of an "intelligible principle." The modern formulation of the non-delegation doctrine, at least according to the Court, has consistently upheld delegations on a flattened theory that virtually anything constitutes an intelligible principle on which an administrative agency may validly create laws.[43]

Two successful non-delegation challenges finding a lack of an intelligible principle provide an outer limit on the non-delegation doctrine.[44] In *Panama Refining Co. v. Ryan*, Congress authorized the President in section 9(c) of the National Industrial Recovery Act ("NIRA") to prohibit "the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn [by state law or regulation]."[45] This was struck down decisively by the Court for giving the President "unlimited authority":

> Section 9(c) . . . . does not qualify the President's authority by reference to the basis, or extent, of the State's limitation of production. Section 9(c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the State's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in § 9(c) thus

42. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); Merrill, *supra* note 1, at 2099; *see* Posner & Vermeule, *supra* note 21, at 1721. Specifically, *J.W. Hampton* states that "[i]f Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton*, 276 U.S. at 409.

43. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes . . . .").

44. These are aberrations in what is otherwise a tradition of non-enforcement. *See* Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) ("As the Court points out, we have invoked the doctrine of unconstitutional delegation to invalidate a law only twice in our history, over half a century ago.").

45. Pan. Ref. Co. v. Ryan, 293 U.S. 388, 405 (1935) (quoting Exec. Order No. 6199 (1933), *reprinted in* 2 PUB. PAPERS 281 (July 11, 1933)).

> declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.[46]

The other successful challenge on non-delegation grounds was in *A.L.A. Schechter Poultry Corp. v. United States*.[47] There, section 3 of the National Industrial Recovery Act gave power to the President to approve "codes of fair competition." The Court asserted a strong commitment to enforcement on non-delegation grounds in declaring that "the constant recognition of the necessity and validity of [delegations] . . . cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."[48] Accordingly, that section 3 of the NIRA did not set out any standards and "authorize[d] the making of codes to prescribe [rules of conduct]" instead of directly prescribing them was enough to invalidate the delegation.[49]

Other than these two early New Deal cases striking down excessive delegations for lack of an intelligible principle, the non-delegation doctrine has remained effectively unenforced. Commentators and the Court have referred to this modern trend as the "death" of the non-delegation doctrine. For instance, in *Federal Power Commission v. New England Power Co.*, Justice Marshall in concurrence declared that the non-delegation doctrine "has been virtually abandoned by the Court for all practical purposes."[50] To take one typical example of under-enforcement, in *Yakus v. United States*, the Supreme Court rejected a non-delegation doctrine challenge to the Emergency Price Control Act of 1942, which delegated authority to the newly created Office of Price Administration to set "fair and equitable" prices.[51] One commentator (in my view, correctly) has labeled this standard "vacuous."[52] The non-delegation doctrine shows no hope of revival in any enforceable form after the Supreme Court approvingly cited non-delegation precedent when finding the Federal Sentencing Guidelines,

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46. *Id.* at 415.

47. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

48. *Id.* at 530.

49. *Id.* at 541. The Court went on to declare that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." *Id.* at 537–38.

50. 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring); *see* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131 (1980); Merrill, *supra* note 1, at 2099; Sunstein, *supra* note 3, at 315.

51. Yakus v. United States, 321 U.S. 414, 427 (1944).

52. Lawson, *supra* note 5, at 328 n.8.

which had been promulgated by the United States Sentencing Commission, to be constitutionally valid under a grant of authority delegated by Congress.[53]

Before moving on, I find it worth summarizing the framework for understanding delegation and the corresponding positions I adopt. First, delegation means delegation of legislative power, exercised by the recipient as *legislative*. The remainder of this Note will use the term "delegation" to refer to delegation of the legislative power, which is then exercised (as legislative) by the administrative agency. Second, for purposes of distinguishing lawful from unconstitutional delegations, the "intelligible principle" formulation is severely lacking. I seek to construct anew the necessary features of a lawful delegation. To motivate discovery of these features, I next turn to early practices and understandings of the delegation of administrative functions to the administrative official. A history and tradition of preserving deliberative values in lawmaking is compelling support for my theory of valid delegation to the modern administrative lawmaking state.

II.
Delegation in Historical Practice

With an understanding of how the doctrinal form of non-delegation has failed to provide any principled substance to the notion of an unconstitutional delegation of lawmaking power, I turn to historical practice. First, I examine how delegations of the legislative power were recognized at the time of the Founding. Then, I explore how historical delegation practice comports with separation of powers principles and evinces a commitment to a deliberative democracy. By identifying deliberation values in historical delegations, perhaps courts will feel more comfortable confronting the reality that there exists a meaningful principle to guide their review of legislation on non-delegation grounds.

A. Congressional Deliberation

The Constitution vests the lawmaking power in Congress. This is the fundamental backdrop against which delegations must operate. Because "[t]he nondelegation doctrine is rooted in the principle of sepa-

53. Mistretta v. United States, 488 U.S. 361, 374 (1989) ("In light of our approval of these broad delegations, we harbor no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirements.").

ration of powers that underlies our tripartite system of Government,"[54] I begin with early understandings of the separation of powers as it pertains to lawmaking in an attempt to understand the value of deliberation as it occurs in the national legislature.

Theoretical notions of the separation of powers were importantly espoused by James Madison in *The Federalist No. 47*, and leave open the idea of administrative lawmaking.[55] Separation of powers is broadly understood to be an "essential precaution in favor of liberty," for "[t]he accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[56] To be clear, only "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."[57] Madison thus advances his formulation of separation of powers not from the view that there ought to be strict separation, but rather from the view that there is permissible commingling of the powers so long as it does not lead to dangerous accumulation to the point of tyranny.[58]

This dangerous accumulation of powers has been advanced as a compelling argument against delegations, which threaten "the integrity and maintenance of the system of government ordained by the Constitution."[59] However, nowhere do *The Federalist Papers* expressly contemplate delegation of the legislative power to administrative agencies or the executive. *The Federalist No. 47* cites only one example of the commingling of powers between the executive and

54. *Id.* at 371. I am responding to Justice Thomas's call to reexamine the text of the Constitution to determine "whether [the Court's] delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

55. Probably because it was not contemplated, at least not the modern form of the administrative state. *See* THE FEDERALIST NO. 47, *supra* note 30, at 301 (James Madison). Madison draws directly from Montesquieu's *The Spirit of Laws* for most of the theoretical propositions that follow. *See id.*

56. *Id.*

57. *Id.* at 302–03. "The Framers understood that a 'hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.'" Loving v. United States, 517 U.S. 748, 756 (1995) (quoting Buckley v. Valeo, 424 U.S. 1, 120–21 (1976)).

58. *See* THE FEDERALIST NO. 48, *supra* note 30, at 308 (James Madison) ("[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.").

59. *Mistretta*, 488 U.S. at 371–72 (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892)) (internal quotation marks omitted).

legislative branches. It provides that the "executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns which, when made, have, under certain limitations, the force of legislative acts."[60] It would be an obvious mistake to conclude from the exclusion of other examples that the only power possible of being shared (in any sense) between the executive and legislative departments involves treaties.[61] Madison goes on to tell us that "[t]he magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law."[62] Thus, the President has no inherent authority to make laws; he may only veto them.[63] The notion of delegating portions of the legislative power to the President is not at all discussed, nor is it expressly prohibited.[64] What follows from *The Federalist Papers* is that the conceptual viability of delegations is inconclusive.

But seeking a neat theoretical justification for delegation is not why we began our discussion in *The Federalist Papers*; this would make for a fruitless task, or a murky one at best. All we can notice is that administrative lawmaking is not precluded by separation of powers principles. The next step is to characterize the quality and manner of lawmaking in Congress (in theory and in practice) and ensure that the most salient features appear in modern administrative lawmaking. In particular, I emphasize the deliberative nature of congressional lawmaking.

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60. THE FEDERALIST NO. 47, *supra* note 30, at 302 (James Madison).

61. The most direct example is the veto power. Shared power also includes the appointment power, U.S. CONST. art. II, § 2, cl. 2, and war powers. *Id*. art. I, § 8, cls. 11–16; *id.* art. II, § 2, cl. 1; *see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (discussing the relative balance of power between the Executive and Congress in foreign affairs).

62. THE FEDERALIST NO. 47, *supra* note 30, at 303 (James Madison).

63. This is not to deny the role of the veto power in shaping legislation.

64. It is possible to argue that *The Federalist No. 47* stands for a strong proposition that delegation is impermissible because the only approved blending of the three powers of government under the federal Constitution are those explicitly written into the Constitution. I do not find it plausible to draw a conclusion that the Constitution therefore excludes any other blending of the three branches. The impossibility of the wholly separate departments formulation of the separation of powers principle means that there should be no necessary constitutional problem with other, unwritten mixtures of the legislative and executive power, in a way that does not give the entirety of the legislative power to the magistrate wielding the entirety of the executive power. *See* THE FEDERALIST NO. 47, *supra* note 30, at 301 (James Madison). At any rate, modern delegations hardly reach this outer limit; even the broadest delegations today do not come close to the situation in which Congress delegates away all of its power and adjourns *sine die*.

Deliberation—particularly within the national legislature—was a background constitutional ideal internalized by the Framers.[65] In designing the national government, the Framers sought to "promote informed, reasoned, and responsible policymaking while also 'preserv[ing] the spirit and the form of popular government.' "[66] Only by crafting a national government to address the danger of majority factions[67] would it be possible to "establish[ ] representative institutions capable of sound political deliberation."[68] The structural design of our Constitution and the background understandings of the Framers make it clear that deliberation is an essential virtue of lawmaking.

Take *The Federalist No. 70*, which finds that the (national) legislature is "considered . . . best adapted to *deliberation* and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests."[69] We can see this from the structure of Article I, which lays out "precise rules of representation, member qualifications, bicameralism, and voting procedure[s] mak[ing] Congress the branch most capable of responsive and deliberative lawmaking."[70] Deliberation derives its value by "serv[ing] to check excesses in the majority."[71] So important is deliberation, then, that though it "may sometimes obstruct salutary plans," the benefits derived from "deliberation and circumspection" in the national legislature are essential to the character of our government.[72]

Some might argue that the administrative state in modern practice may yet possess such a deliberative attitude when working within the confines of administrative lawmaking, particularly given proceduralization under the Administrative Procedure Act.[73] If the chosen struc-

65. *See* JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT 1 (1994) (defining deliberative democracy as "one which would foster rule by the informed and reasoned judgments of the citizenry"). Bessette's work generally lays out how the basic structure of the federal government was crafted with the unifying theme of promoting deliberation. *See id.*

66. *Id.* at 13 (alteration in original) (quoting THE FEDERALIST NO. 10, *supra* note 30, at 80 (James Madison)).

67. *See* THE FEDERALIST NO. 10, *supra* note 30, at 77 (James Madison).

68. BESSETTE, *supra* note 65, at 16.

69. THE FEDERALIST NO. 70, *supra* note 30, at 424 (Alexander Hamilton) (emphasis added). This is in contrast to the Executive, which gains its unitary status through "energy." *Id.*

70. Loving v. United States, 517 U.S. 748, 757–58 (1995) (citing Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983)).

71. THE FEDERALIST NO. 70, *supra* note 30, at 427 (Alexander Hamilton).

72. *Id.* To be sure, "promptitude of decision is oftener an evil than a benefit." *Id.* at 426.

73. 5 U.S.C. §§ 551–559 (2014).

ture in the Constitution favoring deliberation in a numerous legislature does not caution against such a reading, then perhaps the conscious decision to vest the veto power in the President might give a push in the right direction. The Framers specifically contemplated "that a spirit of faction may sometimes pervert [Congress's] deliberations; that impressions of the moment may sometimes hurry it into measures which itself, on maturer reflection, would condemn."[74] From this worry arose the veto as the appropriate check on the national legislature, not substantive participation in the deliberative lawmaking process; the Executive derives power to influence legislation by staking out a position out of reach by a supermajority of Congress. So naked, free-flowing deliberation among all political actors—the pure ideal—is not a necessary precondition to valid legislation. *Congressional* deliberation is required. As such, any account of lawmaking—including administrative lawmaking—must be consistent with the values and virtues of congressional deliberation.

Historical practice should caution against too strong a reading, since even early Congresses understood well that they would be unable to achieve the perfect deliberative ideal acting alone *and* build an entire nation from scratch. It is sufficient to observe that the careful structural design of the Constitution, which favors congressional deliberation, should at least require *some* amount of deliberation in Congress before the executive branch becomes involved in the further explication of laws through administrative lawmaking. Only in this way can we ensure that the requisite deliberative spirit is not lost upon delegation of the legislative lawmaking power to the administrative state.

B. Building a Tradition of Deliberation

It was previously believed that the Framers did not contemplate the administrative state, and that administrative agencies themselves did not materialize until the Interstate Commerce Commission was established in 1887.[75] Jerry Mashaw has provided a much richer account by examining historical evidence dating back to the Founding.[76] In view of legislation going back to the First Congress, it is clear that administrative powers and functions were contemplated and utilized both extensively and consistently even in the period of nation-building

74. THE FEDERALIST NO. 73, *supra* note 30, at 443 (Alexander Hamilton).

75. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 325 n.26 (2012).

76. *See* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE. L.J. 1256 (2006).

through a "complicated, various, practical set of arrangements."[77] These include, importantly, various forms of delegations to executive officials, resembling what we understand to be administrative functions today. In this early period, Congress carefully wielded its power and tightly controlled most matters before it,[78] meting out only very measured delegations of power to the executive branch when necessary. In light of this nation-building context, the regular and substantive delegation of administrative functions to the executive branch is compelling support for its constitutional propriety. At the very least, the practice gives pause to arguments that the Constitution forecloses delegation of the legislative power entirely. Even more, the historical practice of delegating measured subsets of the legislative lawmaking power illustrates the preservation of deliberation values within Congress—even as the executive branch engages in further elaborative lawmaking—and forms a foundation for valid delegations as we should understand them today.

A survey of just a few examples is highly suggestive of early delegation practice. On the more adjudicative side, resembling "rules statutes,"[79] the administration of pensions constituted an especially significant, early administrative function. The First Congress granted the payment of military pensions "under such regulations as the President of the United States may direct."[80] Congress later passed an act granting authority to circuit judges to adjudicate claims to pensions for disabled veterans of the Revolutionary War, subject to revision by the Secretary of War.[81] Detailed adjudication was available in case of leaky ships to resolve issues of the necessary repairs, costs as between masters and seamen, and even imprisonment of seamen refusing to proceed if the ship was found fit to proceed on its intended journey.[82]

77. MASHAW, *supra* note 75, at 33; Sunstein, *supra* note 3, at 322.

78. *See* Mashaw, *supra* note 76, at 1292 ("Early Congresses also micromanaged administration . . . .").

79. *See supra* note 40.

80. An Act Providing for the Payment of the Invalid Pensioners of the United States, ch. 24, 1 Stat. 95, 95 (1789); *see* Sunstein, *supra* note 3, at 322.

81. Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792). Although no opinion was issued in this case, we learn a lot from the Reporter's footnote, which includes writings from groups of circuit justices (including a few Supreme Court Justices riding circuit). The circuit judges, in various panels, refused to carry out this administrative task assigned to them by Congress on the grounds that such a determination was not of a judicial nature, and because they were subject to revision by the Secretary of War. *Id.* at 411. The theory of *Hayburn's Case* is not at issue here; what is important is that Congress understood early on that various tasks might be better assigned to the coordinate branches, even if Congress did not get the mechanics quite right in this case.

82. An Act for the Government and Regulation of Seamen in the Merchants Service, ch. 29, § 3, 1 Stat. 131, 132–33 (1790).

Another early example of delegation comes in the tax collection context. Despite the fact that early revenue collection statutes were nauseatingly specific (evidence of significant deliberation by Congress), Congress left room for administrative discretion in tax collection. Tax collectors were empowered to excuse offenses when there was "substantial compliance, no intent to defraud, or when a violation was caused by unavoidable circumstances."[83] Similarly, customs officials who attempted to levy additional duties on ships could do so as long as they received the consent of two reputable merchants who could value the goods and confirm that the goods did not conform to the ship's papers and invoices.[84] These kinds of arrangements provided for a complex administrative system of revenue collection that reveals a carefully chosen "balance between effective tax collection and the protection of the individual rights of reluctant taxpayers."[85] At the same time, implementation was left to delegatees within a narrow range of discretion, and in the customs example, the means by which additional duties could be levied was specified.

Perhaps one of the most open-ended delegations resembling those we might see in the modern administrative state involves the establishment of the postal roads and the Post Office. Congress provided for main postal stations and postal rates through detailed legislation.[86] Remarkably, despite this specificity, the Postmaster General was delegated "authority to provide for additional post roads and to decide where to set up post offices."[87] The delegation is noteworthy because it implicated significant local interests in postal roads that one might expect to be hashed out in the chambers of Congress and subject to extensive bargaining by representatives. Even more, this precision from Congress in mandating the locations of main postal stations through which the main postal road should pass demonstrates a meaningful constraint in two ways that guides the Postmaster General in exercising his power. First, the legislation is physically (geographically) constraining, since the Postmaster General must draw postal roads through congressionally selected post offices. It is also constraining in the sense that Congress has given representative examples

83. Mashaw, *supra* note 76, at 1293.

84. *Id.* at 1280. This example looks very much like Congress delegating some kind of administrative function to the administrative official, who could make decisions given the appropriate evidence—here, an understanding of the market value of goods, as well as construction of papers and invoices.

85. *Id.* at 1278.

86. *See id.* at 1294.

87. *Id.* Mashaw notes how remarkable this is given the heated debates in the legislative history over delegation concerns regarding the Post Office. *Id.*

(paradigms) of necessary post offices, all of which are the product of the give-and-take of ordinary legislation. The most important feature of this delegation is that Congress has actually participated in the law-making process.[88]

Congress also established various agencies through framework legislation. For instance, the statute establishing the First Bank of the United States contained a provision resembling modern legislation stating that directors "shall be capable of exercising such other powers and authorities, for the well governing and ordering of the affairs of the said corporation as shall be described, fixed and determined by the laws, regulations and ordinances of the same."[89] However, Congress did not stop there. In setting up the Bank, it also provided for its articles of incorporation specifying shareholder voting, director eligibility, official meetings and procedures, restrictions on land holdings and debts, payment of dividends, and inspection of records by the Treasury, among other details relating to transactions with the United States.[90] The legislative history shows that Congress reviewed an extensive report by the Secretary of the Treasury detailing the principal advantages of a national bank.[91] These advantages were summarized in the preamble to the act.[92] These principles, along with specific procedures, provide both the necessary flexibility for the Bank and sufficient material on which the hybrid corporation may conduct its business consistent with the needs of the United States. Thus, mean-

88. I do not mean to suggest that modern delegations need involve such specificity and micromanaging. Participation in the deliberative process can take many forms, of which this is simply one.

89. An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, § 6, 1 Stat. 191, 193 (1791).

90. *Id.* § 7, 1 Stat. at 193–95.

91. Alexander Hamilton, Report of the Secretary of the Treasury (Dec. 14, 1790), *reprinted in* 4 LEGISLATIVE HISTORIES: AMENDMENTS TO THE CONSTITUTION THROUGH FOREIGN OFFICERS BILL [HR-116] 174 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

92. The preamble states:

> Whereas it is conceived that the establishment of a Bank for the United States, upon a foundation sufficiently extensive to answer the purposes intended thereby, and at the same time upon the principles which afford adequate security for an upright and prudent administration thereof, will be very conducive to the successful conducting of the national finances; will tend to give facility to the obtaining of loans for the use of the government, in sudden emergencies; and will be productive of considerable advantages to trade and industry in general.

An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, 1 Stat. 191, 191 (1791). This provides some evidence of congressional deliberation. Perhaps a little more open-endedness is acceptable here given the public-private nature of the Bank.

ingful and constrained direction came directly out of Congress, as evidenced by the words that Congress chose to include in the legislation.

An example of unconstrained, open-ended delegation arises from legislation regulating trade with Indian tribes. Congress mandated licenses for trade with Indian tribes.[93] Aside from the requirement that licensees post bond for the licenses, the executive branch was given virtually unlimited authority to set forth the "regulations or restrictions" governing trade.[94] I agree with Jerry Mashaw that "commerce with the Indian tribes may have seemed less like regulating interstate commerce than like some combination of the exercise of the war and foreign affairs powers."[95] That is, the open-ended delegation here was more Congress's explicit acquiescence in residual executive authority for what they assumed was more of a shared power with the executive branch than a purely congressional power.[96] This was a highly sophisticated understanding of shared powers and the possibility of unconstrained "delegation" (that is, delegation as enablement) where the executive branch has independent authority to act.

From these early historical examples, we see that "early Congresses created departments and officers, charged them with administrative tasks, and subjected them to political supervision in a variety of ways that exhibit modest concern for rigid or formal conceptions of the separation of powers."[97] Historical evidence suggests that delegation was a regular feature of Congress's work,[98] even during a time when Congress jealously guarded its power and legislated with precision over every possible matter. We should, of course, be wary of drawing generalized conclusions from the early evidence.[99] However, even if these historical examples give rise to a disputable constitutional basis for delegation,[100] the background principle of legislative deliberation emanating from early historical practice is compelling;

93. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790).

94. *Id.* § 2, 1 Stat. at 137.

95. Mashaw, *supra* note 76, at 1300.

96. *See supra* notes 35–36 and accompanying text (noting that this principle survives in modern non-delegation doctrine through the residual authority of the Executive).

97. Mashaw, *supra* note 76, at 1291. Congressional delegations in the early years of the republic are particularly revealing because "delegation of discretionary authority was by no means inevitable." *Id.* at 1297.

98. *See* Sunstein, *supra* note 3, at 322.

99. Jerry Mashaw argues that it would be a wholly futile endeavor. *See* Mashaw, *supra* note 76, at 1270; *cf.* Lawson, *supra* note 5, at 341 n.51 ("I do not invoke the sparse historical sources in the main text as proof of any grand propositions about separation of powers or constitutional design.").

100. *See* Sunstein, *supra* note 3, at 323.

and it forms a basis for distinguishing lawful from unconstitutional delegations of the legislative power.

C. Deliberation in the Modern Administrative State

Before developing such a theory, I want to sketch out some issues that arise when locating deliberation in the modern administrative state. I do not intend to go into great detail; instead, the objective is to identify a few areas of mismatch between the formal legislative process and the administrative lawmaking process in order to focus my non-deliberation theory of delegation.

The modern administrative agency appears, at least cursorily, to represent the pure deliberative ideal similar to that desired in Congress. Deliberation is promoted in smaller institutions[101] and with officials who have greater institutional and subject matter expertise (so the argument goes), as well as longer tenure.[102] Administrative agencies, as federal institutions, should not have the problems of yielding to local spirit, which was found to be disruptive to the interests of the nation as a whole.[103] Furthermore, administrative agencies, when acting with force of law, ideally must comply with fairly rigid procedural requirements under the Administrative Procedure Act.[104]

On the other hand, the administrative agency has the capability to act quickly and decisively—its comparative advantage over Congress—in a manner consistent with the energetic Executive. This might be at odds with the Framers' provision for "a numerous legislature . . . best adapted to deliberation and wisdom."[105] Of course, this could be accounted for in certain situations in which Congress simply legislates specific standards and principles up front that administrative agencies may apply in concrete cases. Administrative agency elaboration also requires careful deliberation, but of a different *quality*; the rules and regulations promulgated by an administrative agency are based on a wider range of concrete facts and evidence, necessarily apply a policy that Congress has already established, and are often restricted in terms of the available means by which to implement a

101. *See* BESSETTE, *supra* note 65, at 21.

102. *See id.* at 23.

103. *See id.* at 25; THE FEDERALIST NO. 46, *supra* note 30, at 297–98 (James Madison).

104. 5 U.S.C. §§ 551–559 (2014).

105. THE FEDERALIST NO. 70, *supra* note 30, at 424 (Alexander Hamilton). So a tension is revealed between "a full-fledged deliberative process within a legislative body" and "the kind of immediate decisionmaking central to energetic administration." BESSETTE, *supra* note 65, at 32.

congressionally chosen policy.[106] Additionally, while the modern administrative lawmaking process might appear to be faster when measured in days, each administrative agency has the benefits of expertise in a particular subject area and a limited field in which to create laws, which is contrasted from the general and wide-ranging topics that inundate the national legislature. Thus, the federal administrative agency, with the appropriate procedures in place, might in fact resemble quite well the "more deliberative [public voice], taking longer to develop and resting on a fuller consideration of information and arguments."[107] The most common form of administrative agency lawmaking—notice-and-comment rulemaking—however, appears to depart drastically from the measured stagnation and give-and-take that characterize congressional lawmaking.

Accountability also promotes deliberation, because the people may decide to vote out their representatives if they believe their substantive positions are not being vigorously represented in the lawmaking process. Administrative agency officials are not directly accountable to the voters, however, and are only accountable (sometimes only indirectly) to the Executive. John Hart Ely disdainfully attributes delegation to the political environment favoring "running errands" for one's constituency over legislating.[108] This allows congressional representatives "quite shrewdly" to point the finger at other officials who "take the inevitable political heat."[109] What results is that our legislators "escap[e] the sort of accountability that is crucial to the intelligible functioning of a democratic republic."[110] To mitigate these accountability issues, we might require that oversight mechanisms accompany any valid delegation, because requiring formal oversight incentivizes Congress to remain involved even after they have

106. Often, the individual case-by-case approach is said to inform the original policy, since the original policy necessarily could not take into account every possible situation that might occur, which might have weighed into the deliberations setting the initial policy. This reveals a potential for abuse by administrative agencies to set rules that modify an initial policy set by Congress to the point of obfuscation or transmutation. I later find that congressional oversight and retention of the essential components of the legislative power help to combat this possibility. *See infra* Sections III.B–.C. More importantly, the courts should safeguard this congressionally chosen policy.

107. BESSETTE, *supra* note 65, at 35.

108. ELY, *supra* note 50, at 131. Ely goes on to write that "it pays more visible political dividends, to play errand-boy-cum-ombudsman than to play one's part in a genuinely legislative process." *Id.*

109. *Id.* at 132 (quoting Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1400 (1975)).

110. *Id.*

delegated elaboration power to administrative agencies.[111] It has also never been clear to me why our constituency must be thought of as unable to appreciate the administrative lawmaking process to the point that it would retain congressmen who sit by idly while executive branch officials act inconsistent with the values of their constituents. If Congress lacks the inertia to act in the best interests of its constituency, the people will, in theory, replace the ineffective legislators.[112] Additionally, with some of the most politically charged areas of regulation, such as environmental regulation, Congress continues to exercise formidable oversight, particularly through hearings,[113] in which it requires executive officials to justify how their rules and regulations are consistent with the basic policies enshrined within the broad delegation. Accordingly, this optimal back-and-forth deliberation found in congressional lawmaking makes an appearance in administrative lawmaking.

We might notice that modern legislation is characteristically different from historical legislation in that modern legislation largely structures administrative procedures and sets basic policies and standards, which enable administrative agencies to implement more specific legal rules that affect individual rights. We might feel more comfortable about a statute that asks for a kind of adjudication based on factual investigation pursuant to a rule established by Congress, and less comfortable with more modern, open-ended legislation that leaves explication of the rule itself to administrative agencies. If administrative agency lawmaking is to resemble the deliberative ideal that comes from understanding legislation, then these complications should require not only a closer working relationship *between* Congress and administrative agencies, but also deliberation *within* Congress, both of which are promoted through my non-deliberation theory.

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111. *See infra* Section III.B. The lack of accountability argument itself seems unconnected to actual practice. That is, "delegations often stem not from a desire to evade accountability but from a problem of lack of relevant information." Sunstein, *supra* note 3, at 323–24.

112. *See id.* at 323 ("Congress may face electoral pressure merely by virtue of delegating broad authority to the executive; this is a perfectly legitimate issue to raise in an election, and 'passing the buck' to bureaucrats is unlikely, in most circumstances, to be the most popular electoral strategy.").

113. *See, e.g.*, *EPA's Proposed 111(d) Rule for Existing Power Plants: Legal and Cost Issues: Hearing Before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 114th Cong. (2015).

III.
NON-DELIBERATION

The propriety of administrative lawmaking may be rationalized through what I call the non-deliberation form of the non-delegation doctrine. This theory supplies the requirements of a valid delegation. The non-deliberation theory consists of (1) a clear statement of policies, objectives, and means evincing congressional deliberation (the "object-means sufficiency requirement"); (2) formal congressional oversight mechanisms; and (3) retention by Congress of the essential attributes of the legislative power. A delegation lacking any of these features would therefore be invalid for non-deliberation reasons.[114] Important to the protection of deliberation values is robust judicial review, which again is possible given these more familiar and workable principles on which to rest judgments that Congress has delegated unconstitutionally. The goal is to have "administrative institutions that are responsive to the democratic will as expressed through constitutionally legitimate forms of political action."[115] Each of these requirements will be discussed in turn, with reference to their ability to promote deliberation in administrative lawmaking, and keeping in mind that deliberation ought to occur not only within an agency,[116] and between an agency and Congress, but also within Congress in every instance.

A. The Object-Means Sufficiency Requirement

Congress must participate in the deliberative process of lawmaking before administrative agency elaboration.[117] This is a necessary feature of delegation, evidence of which is required to withstand constitutional scrutiny. Adopting the general approach of the *Schechter Poultry* Court, I would assess "whether Congress . . . has itself estab-

114. Although in the common sense of the term, deliberation might evoke a sense of lengthy back-and-forth discussion, deliberation as I use it here does not necessarily imply continuous, bilateral discussion between Congress and the administrative agency. It does, however, require that the objectives and means that Congress ultimately chooses after careful consideration are clearly stated so that those chosen positions may be assimilated into any product of administrative agency lawmaking.

115. Mashaw, *supra* note 76, at 1263.

116. Bureaucratic, intra-agency oversight provides an important dimension to deliberation which helps to legitimize administrative lawmaking. This Note focuses on inter-branch relationships, however, and ignores purely intra-agency features of administrative lawmaking.

117. *But cf.* Sunstein, *supra* note 3, at 321 (suggesting that non-delegation might be more in line with a deliberative democracy). I suggest, in contrast, that delegation may be more protective of a deliberative democracy when exercised in accordance with the principles set forth in this Section.

lished the standards of legal obligation, thus performing its *essential legislative function*, or, by the failure to enact such standards, has attempted to transfer that function to others."[118] This essential legislative function, as suggested by political theory and historical practice, involves congressional deliberation resulting in sufficient direction to the administrative agency in promulgating rules and regulations that necessarily affect rights and responsibilities. The evidence of congressional deliberation comes in the form of a sufficient statement in the statutory text as to the objective and the means by which further administrative agency lawmaking is bound. Both ideally are present in open-ended legislation; however, recognizing that this would be an incredibly arduous burden not necessarily required from deliberation principles alone, a particularly clear statement as to the object or policy of legislation would forgive omission of an equally clear statement of means.[119]

Laying down meaningful policies and standards to guide administrative agency conduct—what I label the "object-means sufficiency requirement"—is one way in which Congress deliberates with administrative agencies in enacting precise laws, rules, and regulations that govern our lives and have binding legal effect. "Courts thus should ensure not only that administrators follow those legislative policy directions that do exist . . . but also that such directions are given."[120] This would prevent the unfortunate reality that "policy direction is what is lacking in much contemporary legislation."[121] Legislation that purports to delegate to an agency without any basic policy on which an official may rely is truly violative of the deliberation principle, and must be an invalid delegation of the legislative power. So, in keeping with the theme of deliberation, I would require that Congress, in enacting a delegation of the legislative power to an administrative agency, include in the statutory text statements revealing congressionally chosen policies and standards—or means by which policies are carried out—at a meaningful level of guidance to demonstrate that congressional deliberation has occurred.

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118. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935) (emphasis added).

119. As it is used here, "means" is distinguished from formal procedure, which I assume (in the usual case) follows the Administrative Procedure Act and other applicable laws. *See* 5 U.S.C. §§ 551–559 (2014). This might include, inter alia, standards by which an administrative rule or regulation is to be evaluated, and the actual framework by which a congressionally set policy is to be implemented.

120. ELY, *supra* note 50, at 133.

121. *Id.*

At this point, one might complain that this is merely a semantic difference from the intelligible principle standard. However, the object-means sufficiency requirement is different from the intelligible principle standard in two meaningful ways. First, it is a more arduous requirement; it requires that a reviewing court assess whether Congress has objectively, through its enabling legislation, stated enough to restrict the lawmaking power of the delegated-to administrative agency within the realm of congressionally chosen policy, and ideally, a congressionally chosen range of implementation mechanisms or means. Even in complex regulatory spaces, where much is unknown at the time Congress speaks, this is possible. Without at least some measure of clear policy and a basic regulatory approach in a particular area, it would be unclear how an administrative agency ought to go about addressing the issue. Second, whereas the intelligible principle requirement (when enforced) only ensures that administrative agencies acting pursuant to independent executive power to implement the laws have a bounded range of discretion within which to act, the object-means sufficiency requirement derives from congressional deliberation values essential to Congress's constitutionally vested lawmaking function. As such, the object-means sufficiency requirement is of a more stable pedigree than the intelligible principle requirement.

Let us begin with an easy example of delegation that fails to meet the object-means sufficiency requirement. Recall an earlier example in which Congress enabled an administrative agency to set "fair and equitable" rates.[122] We can readily see that such a statute would fail on non-delegation grounds because of non-deliberation: Congress has failed to show evidence of deliberation by not stating a policy and offering no standards by which such rates might be set. Such delegation could be made permissible if, for instance, Congress included in the enabling legislation a list of specific factors that an administrative agency must incorporate into its regulations to extract evidence-based rates.[123] The reason that I would require evidence of deliberation in the enabling legislation is that the phrase "fair and equitable" truly means something different to everybody, and would not guide an agency in any meaningful way. Administrative rules arising from such an amorphous and subjective standard would license an administrative

122. *See supra* note 51 and accompanying text.

123. One might argue that such a standard-setting function is more efficiently or competently performed directly by an administrative agency. Thus, the optimal decision might inefficiently be precluded by requiring that Congress first set certain boundaries within which an administrative agency must act. Simply put, constitutional requirements do not bend to pragmatic wishes. If we are to locate delegation in Article I, we must also locate the corresponding requirements and burdens.

agency to supply whatever theory it found appropriate, as if Congress were never involved in the decision-making process. Thus, at minimum, a basic statement of what constitutes an appropriate rate should be required.[124] In this way, not only has Congress *actually deliberated* to produce the standards to guide administrative agency behavior, but also such *evidence of congressional deliberation* becomes meaningfully incorporated into the administrative lawmaking process, which ultimately produces legally binding rules that guide our conduct and implicate rights and responsibilities.

To illustrate further the mechanics of the object-means sufficiency requirement in practice, consider section 10(b) of the Securities Exchange Act of 1934. The section reads as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[125]

Gary Lawson found that "[h]owever one chooses to verbalize the nondelegation principle, this statute clearly fails it."[126] Under my formulation of non-delegation as non-deliberation, these words taken alone would fail to provide ample direction demonstrating reasoned, deliberative participation by Congress. There is no principle on the face of the statute to indicate what must be "in the public interest or for the protection of investors."[127] Even if a core policy behind the Act is readily identifiable, the overly broad authority delegated to the Securities and Exchange Commission ("SEC") to expand or contract the list of offending situations always presents the potential for distortion far beyond what Congress initially intended, and without any indication of how the SEC is to evaluate whether the offending "device

124. Noting a particular unfair or inequitable practice that motivated the enabling legislation is a great start, but such motivating examples rarely make it into the text of legislation.

125. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78(j) (2014).

126. Lawson, *supra* note 5, at 379.

127. If we understand "for the protection of investors" to explain what is "in the public interest," then this brings us closer to a lawful delegation, but this is a very weak statement of the objectives or policies to guide administrative agency lawmaking, particularly because such a paternalistic standard has tremendous potential to affect individual investors' rights.

or contrivance" is of the kind that we can reasonably say that Congress wished to regulate. My requirement is, of course, less flexible to future developments than what appears currently in section 10(b). If experience later shows that a change is necessary, however, Congress theoretically can pass another law modifying its basic assumptions and expanding or contracting the basic policies that it wishes the SEC to consider. This not only provides the requisite amount of congressional deliberation up front, but also encourages Congress's periodic (though not necessarily continuous) involvement in administrative lawmaking.

Briefly, I do not intend for the object-means sufficiency requirement to appear overly rigid and reliant on disfavored literalist methodologies. Drawing on basic principles of statutory interpretation, judicial review of delegations for a sufficient statement of objectives and means should look fairly to *context* for evidence of congressional deliberation.[128] To take some examples, we can look to other delegations "in the public interest." In *New York Central Securities Co. v. United States*, the Court rejected a non-delegation challenge that asserted that what is in the "public interest" suffers from having no ascertainable meaning.[129] They found that "[i]t is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the [statute], the requirements it imposes, and the context of the provision in question show the contrary."[130] Looking to context, the *New York Central Securities* Court found a permissible delegation:

> [T]he term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission

128. *See* Scalia, *supra* note 8, at 23 ("A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means.").

129. 287 U.S. 12 (1932).

130. *Id.* at 24. This same reasoning was adopted later in the context of regulation of radio station chain broadcasting "in the public interest" by the Federal Communications Commission. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 224–26 (1943). Similarly, the Court in *Panama Refining* stated that "[w]e examine the context to ascertain if it furnishes a declaration of policy or a standard of action, which can be deemed to relate to the subject of § 9(c) and thus to imply what is not there expressed." Pan. Ref. Co. v. Ryan, 293 U.S. 388, 416 (1934). While I do not agree with the textually untethered use of "purpose," the kinds of requirements actually imposed and the context of a delegation *might* provide evidence of deliberation, so long as they clearly relate to and provide a meaningful restraint on administrative agency lawmaking by evincing a congressional policy choice or by imposing a bounded universe of means to be employed in implementation.

> has constantly addressed itself in the exercise of the authority conferred.[131]

While I agree that context is relevant, where I diverge from the reasoning in *New York Central Securities* is in rejecting delegations in the "public interest" when Congress has not provided any meaningful standard, policy, or set of tools by which to evaluate whether a given regulation satisfies the requirement of operating in the "public interest." Despite the Court's indication otherwise, the statutory context in *New York Central Securities* did not provide any meaningful guidance to the ICC or meaningfully limit the Commission's range of administrative action in acquiring control of the railroad systems at issue. If not the delegating text, the context must still supply enough direction to guide agency conduct so that it satisfies the object-means sufficiency requirement.

Though far from the strong commitment to deliberation that I would like to see, the Court would presumably agree that entirely standardless delegations are invalid.[132] In *Industrial Union Department v. American Petroleum Institute*, the Court wrote: "We may not expect Congress to display perfect craftsmanship, but it is unrealistic to assume that it intended to give no direction whatsoever to the Secretary [of Labor] in promulgating most of his standards."[133] By refusing to read the delegation in *American Petroleum* as standardless, the Court ensured that the delegation was accompanied by evidence of ex ante congressional deliberation. We can see this from the words of the delegation:

> [I]n promulgating standards dealing with toxic materials or harmful physical agents under this subsection, [the agency] shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if

131. *N.Y. Cent. Sec.*, 287 U.S. at 25.

132. This probably led the Court to develop non-delegation as a kind of avoidance canon when they said that "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980). I would not try to offer *American Petroleum* as a kind of avoidance canon, although I recognize that many modern non-delegation doctrine challenges are sidestepped through use of this so-called avoidance canon. For discussion of the problems with such an approach, see John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223. Therefore, while I would approve of *American Petroleum* in this single instance, given the context, I note that it is a borderline case and that allowing judges to approve open-ended delegations on such a presumption swallows up their duty to strike down standardless delegations through meaningful judicial review.

133. 448 U.S. at 640 n.45.

> such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.[134]

Consistent with the requirements of my non-deliberation theory, there is enough here to demonstrate deliberation within Congress and guide further agency lawmaking. This open-ended statute appropriately sets forth a clear statement of objectives by specifying the criterion that "no employee will suffer material impairment of health or functional capacity" in setting standards "dealing with toxic materials or harmful physical agents." Futhermore, the statute specifies that the best available evidence (that is, the means) be used in the agency's decision-making process. Basic standards ought to be ironed out in Congress *before* delegation occurs. Note that even this standard is fairly open-ended, leaving much to be supplied by the agency; the exact regulatory implementation mechanism is left open so long as the stated goal (satisfaction of which is based on the best available evidence) is achieved.

To put it explicitly, my object-means sufficiency requirement does not require Congress to legislate with a high level of technical detail. I would agree, for instance, that Congress is not required to enact "statutes [that] provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.' "[135] The object-means sufficiency requirement also does not require so much detail. A meaningful sense of the realm of tools available to the agency in implementation, for instance, or a set of policies that the agency must consider as part of its later determination would be all that is required to evince congressional deliberation. Aside from promoting actual deliberation and evidence of deliberation on the face of the statute, the object-means sufficiency requirement provides the extra benefit that Congress will remain accountable to the people by having to provide a clear statement of the policies that the people desire.[136]

B. Deliberation Through Oversight

Formal oversight mechanisms are a second necessary feature of valid delegations. This requirement is usually satisfied unless enabling legislation somehow insulates administrative agency lawmaking from

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134. *Id.* at 612 (quoting 29 U.S.C. § 655(b)(5)).

135. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001) (quoting Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).

136. *Cf.* Lawson, *supra* note 5, at 374 ("A reviewing court will be able to determine whether the necessary political commitment has been made by deciding whether the voters would be better informed about their representatives' positions by learning how their representatives voted on the statute." (quoting MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 136–37 (1995))).

scrutiny and revision by Congress. Oversight is particularly crucial—while administrative agency adjudication decisions are typically not self-enforcing, administrative agency lawmaking is often automatically effective after a short waiting period. Whatever shortcomings that might arise from the self-executing feature of administrative agency lawmaking are mitigated through the various oversight mechanisms available to Congress. Congress has a much higher burden of acting to disapprove of or reverse any product of administrative agency lawmaking; and so requiring the establishment of sufficient objectives and means ahead of administrative agency lawmaking has the additional benefit of moving up congressional deliberation before the delegation, as opposed to after the fact when rights and responsibilities have already been affected. However, since the law is necessarily incomplete at the time of the delegation, it would be an abdication of the legislative power, as well as the cessation of congressional deliberation, if these oversight mechanisms were absent. Such mechanisms ensure that congressional deliberation continues so long as administrative agencies continue to elaborate upon and change the law. As a congressional deliberation enhancing feature, oversight is second-best to ex ante deliberation by Congress; but it is still a necessary feature of deliberation in the broader sense as between Congress and agencies.

Hearings provide Congress with an opportunity to both assess agency lawmaking and participate in the deliberative process directly. Through lines of questioning, the impressions of Congress on the issues under fire can be noted by administrative officials as a way of evaluating their compliance with the policies specified by Congress. For the representatives themselves, this ensures accountability to the people, in that administrative agency decisions and accompanying reasoning become more publicly scrutinized than run-of-the-mill notice-and-comment rulemaking. While this cannot happen in every case, Congress will take the limited opportunities it has to conduct hearings on the most important issues.[137]

Reporting requirements also facilitate congressional participation in agency actions through monitoring. Since the passage of the Administrative Procedure Act, these have become strict requirements. On the informal rulemaking side, the most deliberation-enhancing reporting measure is the requirement that notice of any proposed action be posted to the *Federal Register*, which provides for more public scru-

137. Because oversight obviously is not possible in every case, it is important to remember that congressional silence does not indicate implicit approval of any administrative action.

tiny.[138] In general, a properly documented report of the various considerations, proposals, factors, and data considered by an administrative agency to Congress should be sufficient for Congress to deliberate on these issues and write overriding legislation if it appears that administrative agencies are acting in ways that are inconsistent with congressional policies.[139]

The Congressional Review Act, and in particular its disapproval procedure, presents another important check on the exercise of delegated legislative power.[140] Admittedly, the disapproval procedure has been used only once.[141] However, the frequency of its use does not belie its usefulness, at least as a formal mechanism important to my non-deliberation theory. It is enough that Congress has the ability to overturn administrative agency products of delegation through the democratic lawmaking process,[142] because delegation does not and should not imply abdication of congressional power over the subject of the delegation. Thus, the Congressional Review Act is a residual power, the absence of which would bring into question whether any delegation is valid, because Congress should always have the ability to decide for itself the questions it has previously delegated. A similar exercise of the review power may be accomplished through legislation that clarifies enabling acts, or simply through action on the matter directly after delegation if Congress is dissatisfied with the agency's

138. 5 U.S.C. § 553(b) (2014).

139. It does not go unnoticed that appropriations give teeth to reporting and hearing requirements, and allow Congress indirectly to regulate products of agency lawmaking. Thus, for an agency like the Consumer Financial Protection Bureau, which is virtually outside the scope of congressional oversight altogether, *see* Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 888–89 (2013), these ex post mechanisms are at their weakest, which should compel clearer, more upfront congressional direction.

140. 5 U.S.C. § 801(b)(1) (2014) ("A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.").

141. *See* Act of Mar. 20, 2001, Pub. L. No. 107-5, 115 Stat. 7 ("Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Department of Labor relating to ergonomics (published at 65 Fed. Reg. 68,261 (2000)), and such rule shall have no force or effect.").

142. As opposed to a one-house legislative veto, which would be invalid. *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983). The attempt to exert control over administrative agency lawmaking in this manner reveals the difficulties of ex post mechanisms. *Chadha* is clearly correct in protecting the traditional lawmaking process, and the resulting doctrine places pressure on Congress to legislate clear objectives and means ahead of time as opposed to allowing agencies broad leeway to stake out extreme positions subject to legislative veto.

result.[143] The Congressional Review Act might be the least disruptive way of acting, though. Furthermore, it enhances deliberation by indicating to an agency that it needs to revisit its implementation of the standards and policies—which are themselves the product of congressional deliberation.

C. Retaining Essential Attributes of Legislative Power

The final component of the non-deliberation doctrine requires that Congress, at all times, retain essential attributes of the legislative power. One aspect of this was foreshadowed earlier in the discussion of congressional oversight. Congress must retain the ability to act directly and with finality on any matter it may elect to delegate. The second aspect of the essential attributes of the legislative power places certain topics outside the realm of pragmatic justification and excludes the administrative state entirely from having any role in lawmaking. It is a judgment that legislative deliberation, and not administrative deliberation, is exclusively appropriate for lawmaking in certain areas. This prevents the most important aspects of the legislative power from being delegated away, swallowed up, or shirked entirely by the body entrusted with that power by the Constitution. This is consistent with the understanding of the legislative power as the foundation of democracy, and prevents a total collapsing of the political branches.

Thus, certain "highly sensitive decisions"[144] are entirely non-delegable. These particular subject areas are best left solely to Congress, which is in the best position for the most meaningful deliberation on the subject, thus making any topics within this realm outside the scope of administrative agency elaboration.[145] For instance, in *Hampton v. Mow Sun Wong*, an administrative agency was barred from banning aliens from working for the United States Civil Service, while the Supreme Court suggested that had Congress itself legislated on the subject, such a ban might be valid.[146] Uniquely national interests at stake might make certain topics of legislation non-delegable. For such top-

143. It is not clear from a purely theoretical discussion exactly which set of review powers needs to be retained by Congress in order to support a delegation. Certainly, the absence of any review mechanism would seriously endanger a delegation of legislative power. This question might be better answered by analyzing the effectiveness of the various forms of congressional review, but the specifics are not best handled here.

144. Sunstein, *supra* note 3, at 317.

145. *Cf.* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825) (Marshall, C.J.) ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.").

146. 426 U.S. 88, 114–17 (1976).

ics—for instance, foreign affairs and war powers—a deep tradition and history of the subject of regulation being within the exclusive province of the national legislature would bar delegation to administrative agencies.[147] This fits neatly with Chief Justice Marshall's "observ[ation] that 'it will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.' "[148]

It is a modern reality that "[m]uch of the law is thus effectively left to be made by the legions of unelected administrators whose duty it becomes to give operative meaning to the broad delegations the statutes contain."[149] The deliberation-enhancing formulation of delegation accommodates this reality. In the same way that we are accepting of Congress allocating portions of the judicial power to administrative agencies that do not enjoy the salary and life tenure protections of Article III judges, the various virtues in protection of Congress's ultimate authority and retention of the legislative power guard against constitutional impropriety. As long as the requisite statement of policy or meaningful standard is supplied, Congress retains oversight mechanisms, and certain sensitive areas are left to the exclusive province of Congress, a delegation is valid. These three features, taken together, promote congressional deliberation in line with theory and practice.

D. Judicial Review of Delegation

There is a need for active judicial review in order to safeguard these deliberation values and police the line between permissible and impermissible delegations. One of the most important features of any theory of non-delegation "ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards."[150] My non-deliberation theory provides both a stronger, constitutionally tethered justification (which increases the need for judicial review and enforcement) and a more workable distinction for courts to properly adjudicate non-delegation actions. The difficulty of discerning the line between permissi-

147. I do not anticipate objections to delegation on these grounds to come up often. Indeed, in the sensitive areas contemplated presently, Congress has a strong incentive not to delegate away that power.

148. Lawson, *supra* note 5, at 342 (quoting *Wayman*, 23 U.S. at 42–43). This, of course, applies to delegations to the judicial branch, but the concept that there are certain subjects that should be exclusively legislative and non-delegable also applies here.

149. ELY, *supra* note 50, at 131.

150. Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring in the judgment).

ble and impermissible delegations is one of the strongest criticisms against administering the canonical non-delegation doctrine more strictly.[151] The difficulty of the question does not mean that judges may "opt out of exercising their check."[152] Under the non-deliberation theory of delegation, when Congress participates meaningfully in the deliberative lawmaking process, delegations of the legislative power are constitutionally valid. Where a court finds non-deliberation, administrative agency lawmaking ought to be invalidated as the product of an improper delegation.[153]

Once a delegation is determined to be valid, a court then determines whether an agency has acted within its delegated authority, in such a way that the will of Congress has been obeyed. This is a familiar issue under the *Chevron* framework,[154] and the inquiry becomes a cleaner issue of statutory interpretation because more meaningful standards have necessarily been identified from the enabling legislation.[155]

This non-delegation framework rooted in non-deliberation will enable courts to begin enforcing impermissible delegations, thereby reclaiming constitutional values. Granted, what is proposed in this Note is not a trivial inquiry, and there is room for judicial maneuver-

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151. *See, e.g.*, *Wayman*, 23 U.S. at 46 ("[T]he 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, into which a Court will not enter unnecessarily."); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324–28 (1987); Sunstein, *supra* note 3, at 321. Even Justice Scalia believed that "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts." Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

152. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1221 (2015) (Thomas, J., concurring).

153. At this point, one might object that the problem of under-enforcement could morph into one of over-enforcement, or worse, something that appears to invite the courts to legislate from the bench. I do not think that this necessarily follows from the non-deliberation theory. What a court seeks to find when invalidating a delegation is not that Congress has given a policy position with which the court disagrees, but rather that Congress has not given any policy position or standard that can guide further lawmaking as the result of a deliberative process. As such, the inquiry under judicial review appears to be well within the competence of the courts. Incidentally, adopting a constitutional avoidance approach might invite the courts to legislate from the bench by adopting strained interpretations to open-ended delegations. *See* Schoenbrod, *supra* note 40, at 1271–72.

154. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 942–43 (1984).

155. I note that my non-deliberation theory tends to shift authority over explication of congressional legislation to Article III courts, particularly as such open-ended legislation becomes more detailed to satisfy the requirement of a meaningful standard. As such, there might be some tension with the principle of deference to administrative agency elaboration embodied broadly by *Chevron*.

ing.[156] But judicial modesty and reverence for tradition are visible and vibrant features of the federal courts, and they engender faith that the judiciary will entertain these questions with the appropriate judicial attitude.

CONCLUSION

Tying delegation to congressional deliberation is a way of "ensur[ing] that certain choices are made by an institution with a superior democratic pedigree."[157] In this way, we see delegation not as derived solely from some combination of non-accountability and efficiency principles, but rather as rooted in liberty- and democracy-enhancing virtues derived from background understandings and the history of our Constitution. By championing congressional deliberation, the non-deliberation form of the non-delegation doctrine thus recovers important constitutional principles and breathes life into the practice of delegation to the administrative state in a way that promotes careful and deliberate lawmaking.

156. *Cf.* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring in the judgment) ("We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era.").

157. Sunstein, *supra* note 3, at 317.