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Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce

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**CONSENT OF THE GOVERNED:
A CONSTITUTIONAL NORM THAT THE COURT
SHOULD SUBSTANTIALLY ENFORCE**

DAVID SCHOENBROD*

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INTRODUCTION

The Declaration of Independence proclaims that governments derive “their just powers from the consent of the governed.”¹ To condition the federal government’s powers upon such consent, the Constitution vested responsibility for exercising certain basic powers, including the power to make rules of private conduct, in the branch of government most directly accountable to the governed, Congress.² Members of Congress would then bear personal responsibility for the exercise of these legislative powers, and the governed could withhold consent by refusing to reelect these legislators. This arrangement was central to the compact that the Framers of the Constitution offered to the people.³ As James Madison wrote in *Federalist No. 51*, “A dependence on the people is, no doubt, the primary control on the government”⁴

1. The Declaration of Independence para. 2 (U.S. 1776).

2. U.S. CONST. art. I, § 8.

3. *See infra* Part I.

4. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

That members of Congress bear such personal responsibility is a constitutional norm. As originally conceived, this norm required Congress to make all the rules of private conduct. Given the quantity of rules now being issued, it is hard to believe Congress could bring itself to make them all.⁵ This limitation on Congress's ability to provide rules impedes the courts from fully enforcing the norm as originally conceived.

The Supreme Court has, however, erred in how it dealt with this impediment to judicial enforcement. It has held that Congress does not delegate its legislative powers so long as it states an "intelligible principle" to guide agency rulemaking.⁶ Thus, though the norm as originally understood required Congress itself to make the rules of private conduct, the "intelligible principle" test allows Congress to leave such rulemaking to agencies so long as Congress says enough about the goals that the agency should pursue in making the rules. "Enough," however, is a question of degree. Judges would inevitably have difficulty in comparing the degree to which statutes guide agency rulemaking given the quite different topics of regulation. The test is therefore mush and, as such, judicially unmanageable and unenforceable. The upshot is that Congress can outsource responsibility for the laws by giving lip service to the vaguest of goals.⁷

Emblematic of this trivializing of the norm, some of the Justices' opinions began a half century ago to call it the "nondelegation doctrine." This label conceals the norm's vital consent-of-the-governed purpose, much as if equal protection of the laws was

5. My past scholarship on delegation minimized the need for Congress to delegate legislative powers, at least after a period of transition. *See, e.g.*, DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 135–52, 165–79 (1993) [hereinafter *POWER WITHOUT RESPONSIBILITY*] (arguing delegation creates incentives for Congress to make regulation more complex and that, without those incentives, Congress could enact a simpler set of rules that would achieve regulatory objectives more effectively and efficiently); *see also* DAVID SCHOENBROD, RICHARD B. STEWART & KATRINA M. WYMAN, *BREAKING THE LOGJAM: ENVIRONMENTAL PROTECTION THAT WILL WORK* (2010) [hereinafter *LOGJAM*]. Nonetheless, I now see that the Court could not enforce the original norm completely without risking overwhelming political opposition, as discussed in Part II of this Article.

6. The "intelligible principle" language first appeared in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Justice Gorsuch's dissent in *Gundy v. United States*, 139 S. Ct. 2116, argues that only later did the Court begin to use it as a test of the constitutionality of statutes. *Id.* at 2139–41 (2019) (Gorsuch, J., dissenting).

7. *See infra* Part II.

called the “nondifferentiation doctrine” or freedom of the press was called the “nonfiltering principle.”⁸

The “nondelegation doctrine” label thus makes congressional responsibility sound like a technicality beloved only by cranks who oppose regulatory protection, although the overwhelming majority of the governed want such protection. In my own experience as an environmental advocate, I concluded that delegation often allows members of Congress to avoid blame for failing to deliver regulatory protection. Because the governed overwhelmingly want both protection and a Congress accountable for the rules of private conduct, I refer to the “consent-of-the-governed norm” rather than the “nondelegation doctrine.”⁹

Yet, if the Court suddenly began enforcing the norm, even a less stringent version than the original norm, the reversal could cast a pall of doubt over the validity of a massive number of rules in the Code of Federal Regulation. It would take many years of litigation to determine the validity of these rules and years more, if not decades, for Congress to repair the resulting chinks in the regulatory system. Thus, our nation’s reliance on massive delegation also impedes enforcement of the norm.

This Article argues that the Court could find a path through the impediments, including Congress’s inability to provide all the needed rules and the present reliance on delegation, to enforce the norm to a substantial, though incomplete, extent. The path should begin by distinguishing between the original norm and the impediments to its full judicial enforcement. The distinction between the norm and the impediments to its judicial enforcement would make clear that, regardless of the inability of the Court to fully enforce the norm, members of Congress, having sworn to uphold the Constitution,¹⁰ are honor bound to comply with the norm to the extent practical.

The Court would then be left with a constitutional duty to follow a path that enables it to enforce the norm to the extent permitted by the impediments to judicial enforcement. One

8. The earliest use of the term “nondelegation doctrine” or “non-delegation doctrine” in a Supreme Court opinion is in a passage citing with approval Professor Kenneth Culp Davis’s call to explicitly abandon the doctrine. *McGautha v. California*, 402 U.S. 183, 274 n.27 (1971) (Brennan, J., dissenting) (citing 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.01–2.05 (1958)).

9. For the points summarized in this paragraph, see *infra* Parts II–III.

10. U.S. CONST. art. VI, cl. 3.

step on this path would be to hold that the Court will strike down significant new regulations whose promulgation the legislative process has not approved. The idea that Congress should vote on significant new regulations has a bipartisan pedigree, yet both parties in Congress—each in its own way—assiduously avoid putting the idea into practice.¹¹ As Part IV.B will show, the Court can construct a test of the significance of regulations that is judicially manageable. The Court should forewarn Congress of its intention to take this step so that Congress could organize itself to vote on the promulgation of these significant new regulations. A subsequent step might be to force Congress to gradually take responsibility for the most important preexisting regulations.

Implicit in this approach is that impediments to judicial enforcement often require the Court to adopt tests that are less stringent than the norms themselves. Such underenforcement of constitutional norms may seem strange because the Court does not exactly advertise it, but it happens nonetheless. An example discussed in Part III.A is the equal protection norm, which forbids states from treating people unequally without fair reason. Impeded by concern for usurping the policymaking prerogatives of states in run-of-the-mill cases, the Court uses a deferential test allowing some violations of the norm. Part IV.A shows that the Court changes the tests it applies when it perceives better ways to skirt impediments to the judicial enforcement of constitutional norms. Thus, by “constitutional norm,” I mean a requirement of the Constitution and by “test” I mean a standard that courts use to avoid impediments to full enforcement of a constitutional norm.

This Article’s proposed approach to judicial enforcement would provide less complete compliance with the consent-of-the-governed norm than the approach advocated in my earlier scholarship.¹² Since my earlier publications, I have had the benefit of private communications with sitting Justices from the left, right, and center—none still on the Court. These discussions gave me the impression that they would have liked to do more to enforce the norm, but given the impediments, they

11. For the points summarized in this paragraph, see *infra* Parts III–IV.B.

12. This Article suggests a method of enforcement quite different than strict enforcement of the norm after a period of transition. See SCHOENBROD, *POWER WITHOUT RESPONSIBILITY*, *supra* note 5, at 170–91.

were unsure of how to do so. This Article responds to such concerns.

The Court's recent disposition of *Gundy v. United States*¹³ suggests five Justices might be willing to revive judicial enforcement of the consent-of-the-governed norm.¹⁴ All Justices should join in reviving the norm, especially now that the Presidency of Donald Trump has made starkly evident what was true before: legislators have long shirked their constitutional duty to take responsibility for the exercise of legislative powers and the result is often harm to their constituents. The Court's failure to enforce the norm has resulted in Congress and Presidents under both parties devising and imposing new ways of delegating power that allow incumbents to take credit for popular promises yet shift blame for unpopular consequences.¹⁵ By so doing, the incumbents avoid the hard choices needed to deliver more effective regulatory protection and reduce pointless regulatory burdens.¹⁶ Examples with deadly consequences for the governed are discussed in Part III.D. Such disgraceful legislative behavior, made possible by the Court's failure to enforce the norm, has contributed to loss of trust in government.¹⁷ Trust in the federal government to do "the right thing" most of time fell from

13. 139 S. Ct. 2116 (2019).

14. The dissent by Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, calls for reinvigorating the norm. *Id.* at 2135 (Gorsuch, J., dissenting). Justice Alito stated in his concurring opinion that, "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support the effort." *Id.* at 2131 (Alito, J., concurring in the judgment). Justice Kavanaugh did not participate in the decision. Later, Justice Kavanaugh wrote an opinion in which he stated that Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases." *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in denial of certiorari). For discussions of the likelihood that *Gundy* would lead to the enforcement of the norm, see Nicholas Bagley, Opinion, 'Most of Government is Unconstitutional', N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html> [<https://nyti.ms/2Y7UsXg>]; David B. Rivkin, Jr. & Lee A. Casey, Opinion, *Alito Teases a Judicial Revolution*, WALL ST. J. (June 23, 2019, 3:10 PM), <https://www.wsj.com/articles/alito-teases-a-judicial-revolution-11561317002> [<https://perma.cc/K8HZ-EPP7>].

15. DAVID SCHOENBROD, DC CONFIDENTIAL: INSIDE THE FIVE TRICKS OF WASHINGTON 39–53, 70–74 (2017).

16. *Id.*

17. See Howard Dean & David Schoenbrod, *Populism is powerful because Washington deserves a kick in the pants*, USA TODAY (Oct. 23, 2017, 6:00 AM), <https://usat.ly/2zwIRnL> [<https://perma.cc/N2X6-RZC7>].

three-quarters of voters in 1964 to one-third in 1980 and only one-fifth in 2015, and one-sixth in 2019.¹⁸

Part I of this Article explains the original concept of the consent-of-the-governed norm. Part II discusses the evolving impediments to judicial enforcement of the norm. Part III shows that members of Congress should comply with the norm to a substantial extent, and their failure to do so causes grievous harm to their constituents. Part IV shows how the Court could and should substantially achieve the purpose of the norm. Part V argues that the many rationales for ignoring the norm are flimsy.

I. THE CONSENT-OF-THE-GOVERNED NORM

A. *The Norm's Provenance*

To require the consent of the governed, the Constitution empowered voters to sack the key policy makers. Article I vests “All legislative Powers herein granted,” including making regulatory law, in a Congress, including a House of Representatives directly elected at two year intervals, legislating in tandem with a President.¹⁹ To make members of Congress personally responsible, Article I requires how they vote—“the Yeas and Nays”—be published when requested by one-fifth of the legislators present.²⁰ So, these directly or indirectly elected officials would be accountable for the hard legislative choices.²¹ Such accountability would enable the governed to withhold their consent in response to the decisions of elected officials.²² That was the deal that the Framers offered the people.

Members of Congress would bear personal responsibility even though voters may pay little attention until a vote for or

18. *Public Trust in Government: 1958–2019*, PEW RES. CTR. (Apr. 11, 2019), <https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/> [<https://perma.cc/2BV8-NDPM>].

19. U.S. CONST. art. I, §§ 1, 2, 7–8.

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

21. The Constitution does not, of course, call for the President to be popularly elected, U.S. CONST. art. II, § 1, cl. 2–3, and did not do so for senators until the ratification of the Seventeenth Amendment. U.S. CONST. art. I, § 3, cl. 1. Nonetheless, even without direct elections, popular sentiment could result in either Presidents or senators failing to get reelected.

22. THE FEDERALIST NO. 50, *supra* note 4, at 314–17 (James Madison).

against a rule directly affects them. As Justice Kagan, quoting James Madison, wrote in a powerful dissent from the Court's refusal to take on political gerrymandering:

To retain an "intimate sympathy with the people," [members of Congress] must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.²³

Debate at the Constitutional Convention proceeded on the premise that Congress had to make the law itself rather than delegate that job to others.²⁴ John Locke, who influenced many of the Framers, thought a people's grant of legislative power was "only to make *laws*, and not to make legislators" because "when the people have said, [w]e will submit to rules, and be governed by *laws* made by such men, and in such forms, no body else can say other men shall make *laws* for them."²⁵

Making the regulatory law meant not just passing statutes but passing statutes that state the rules of private conduct.²⁶ In *Federalist No. 75*, Alexander Hamilton wrote "The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society . . ."²⁷ In *Fletcher v. Peck*,²⁸ decided in 1810, the Supreme Court wrote, "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."²⁹

23. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2512 (2019) (Kagan, J., dissenting) (citation omitted) (second alteration in original) (quoting THE FEDERALIST NOS. 52, 57, at 124, 155 (James Madison) (J. & A. McLean eds., 1788)).

24. JOHN L. FITZGERALD, CONGRESS AND THE SEPARATION OF POWERS 35–39 (1986); see generally JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT (2017).

25. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 87 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690).

26. For an argument to the contrary, see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1733 (2002). Part V.A addresses their argument.

27. THE FEDERALIST NO. 75, *supra* note 4, at 449 (Alexander Hamilton).

28. 10 U.S. (6 Cranch) 87 (1810).

29. *Id.* at 136; see also, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2138 (2019) (Gorsuch, J., dissenting).

And in *Gibbons v. Ogden*,³⁰ decided in 1824, the Court wrote that the power to regulate commerce, which Article I includes in the legislative power, is “to prescribe the rule by which commerce is to be governed.”³¹ It is no wonder then that school civics courses once taught that it is Congress’s job to make the laws and that its members are called “lawmakers.”

In *Cargo of the Brig Aurora v. United States*,³² decided in 1813, the Court recognized in dicta that Congress may not delegate the power to make the rules of private conduct.³³ The statute in question conditioned a rule imposing a maritime embargo on the President’s findings on whether other nations respected American neutrality.³⁴ Based upon the President’s findings, the embargo took effect.³⁵ The attorney for the party charged with violating the embargo argued, “Congress could not transfer the legislative power to the President. To make the revival of a law depend upon the President’s proclamation, is to give to that proclamation the force of a law.”³⁶ The Court responded that the President was not making a rule but rather applying a legislated rule by determining “the occurrence of any subsequent combination of events.”³⁷ This was not rulemaking but rather, as *Fletcher* put it, “the application of [legislated] rules.”³⁸ The Court thus suggested that Congress could not delegate the power to make rules of private conduct to the executive branch.

30. 22 U.S. (9 Wheat.) 1 (1824).

31. *Id.* at 196.

32. 11 U.S. (7 Cranch) 382 (1813).

33. *Id.* at 388.

34. *Id.* at 382–83.

35. *Id.* at 382.

36. *Id.* at 386.

37. *Id.* at 388. The passage in full is:

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

Id.

38. 10 U.S. (6 Cranch) 87, 136 (1810).

B. *What the Original Norm Would Require of Congress*

To discharge its responsibility to make the rules of private conduct as the norm originally required, Congress must itself state the rules binding society in understandable terms, such as a rule limiting pollution from designated factories. The rules must be understandable so that voters can hold their representatives responsible in future elections. Understandability is thus essential to serve the bedrock purpose of Article I.

In contrast, a statute like the modern Clean Air Act that tells an agency to make rules to achieve some goal like “protect the public health” with “an adequate margin of safety” states a goal rather than a rule.³⁹ Stating goals is insufficient because Congress can state goals yet avoid responsibility to the governed for how the agency resolves major political controversies in drafting the rule. As such, allowing Congress to do no more than state goals conflicts with the original consent-of-the-governed norm. For example, “protect the public health” is a pleasing goal yet, when this language was inserted in the statute in 1970,⁴⁰ the statute’s chief author, Senator Edmund Muskie, knew that the agency could not fully achieve the goal. As he later admitted after the air pollution problem was safely in the lap of the Environmental Protection Agency (EPA):

Our public health scientists and doctors have told us that there is no threshold, that any air pollution is harmful. The Clean Air Act is based on the assumption, although we knew at the time it was inaccurate, that there is a threshold. When we set the standards [the responsibility for whose setting Congress in fact left to the EPA], we understood that below the standards that we set there would still be health effects.⁴¹

Yet, Congress took credit for unconditionally protecting health.⁴² Nor did Congress decide, in the overwhelming majority of cases, how to allocate the cleanup burden among the sources

39. See 42 U.S.C. § 7409(b)(1) (2012).

40. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 109(b)(1), 84 Stat. 1676, 1680.

41. *Clean Air Act Amendments of 1977: Hearing Before the S. Subcomm. on Envtl. Pollution of the Comm. on Env't & Pub. Works*, pt. 3, 95th Cong. 8 (1977) (statement of Sen. Edmund Muskie).

42. See, e.g., DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE* 70–72 (2005).

that contribute to unhealthy pollution.⁴³ So, the legislators had plausible deniability for almost any unpopular consequences of the rules announced on agency letterhead.

A statute that takes the form of a rule but in fact fails to state a rule of conduct in understandable terms, such as one that bars large factories from emitting “unreasonable” pollution, violates the original consent-of-the-governed norm. What was unreasonable was understandable when early courts instructed juries in tort actions that the standard of reasonable care was how people in their community customarily behaved, but it would not be understandable when applied to a modern factory.⁴⁴ Custom is no guide to the meaning of “unreasonable” when we confront newly understood threats and learn of newly invented means to deal with them. Such a statute fails to achieve the objective of Article I: to make the elected lawmakers responsible for the politically salient choices.

Of course, even a forthright rule will require interpretation in some cases.⁴⁵ Yet, interpreting the law is distinct from policy-making.⁴⁶ Interpretation calls for an inquiry into how the enacting legislature would have clarified the law’s ambiguities; policymaking calls for an inquiry into what makes sense to the policymaker. In deciding how the Congress that passed the statute would have resolved an ambiguity, a judge can get information from many sources. One such source is that, by dictating clear outcomes in most cases, the rule usually reveals the relative weight the legislature gave to conflicting policy

43. *Id.* at 26. The singular exception is that the 1970 statute did require auto manufacturers to reduce emissions from new cars by 90 percent. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690. The 1970 statute called for the EPA and the states to regulate other sources, but in sufficiently general terms that members of Congress could deny responsibility for the specific emission limits imposed. *See, e.g.*, 42 U.S.C. § 7411 (2012) (requiring the EPA Administrator to regulate new stationary sources).

44. *See, e.g.*, Aldred’s Case (1610) 77 Eng. Rep. 816, 820–21; 9 Co. Rep. 57 b, 58 b; OLIVER WENDELL HOLMES, *THE COMMON LAW* 87–88 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881).

45. *See* Ronald M. Dworkin, *Is Law a System of Rules?*, in *ESSAYS IN LEGAL PHILOSOPHY* 25, 52 (Robert S. Summers ed., 1968); *see also* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 156 (tent. ed. 1958).

46. *See, e.g.*, Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058–60 (1975).

goals, such as enhancing regulatory protection versus avoiding regulatory burdens.⁴⁷

The original consent-of-the-governed norm is thus based upon legal principles that courts routinely apply. The harder question is how courts should deal with modern impediments to the original norm's full enforcement.

II. THE IMPEDIMENTS TO JUDICIAL ENFORCEMENT OF THE ORIGINAL NORM

A. *The Impediments' Evolution*

*Wayman v. Southard*⁴⁸ decided by the Supreme Court in 1825 exemplifies the difficulty Congress encountered in legislating all the rules of private conduct.⁴⁹ The statute at issue instructed the various federal district courts to adopt rules of procedure that track state court procedural rules, but authorized the federal courts to make "alterations and additions."⁵⁰ It would have been arduous for Congress to go through the procedural rules of each state court system and adapt them to the needs of the federal court. The Supreme Court saw no difficulty in allowing the federal courts to adopt the rules regulating the courts rather than private persons:

It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . . [Either the courts or Congress,] for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description.⁵¹

47. Congress could call upon an agency to interpret a rule stated in a statute. For example, a statute might require that, starting five years hence, no fossil-fueled power plant may emit sulfur at more than half the current average emission rate for such plants and direct the agency to issue a binding regulation stating the future limit in numerical terms. The agency would need to interpret and apply the statute, but Congress would have faced the salient policy choices. A court could then review the agency's interpretation. 5 U.S.C. § 706(2)(C) (2018). The agency would be applying a rule rather than making it.

48. 23 U.S. (10 Wheat.) 1 (1825).

49. *Id.*

50. *Id.* at 31.

51. *Id.* at 42–43.

The complaint in the case, however, objected to rules that governed private persons—in particular, a rule on the enforcement of judgments.⁵² The Court went on to state:

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.⁵³

So, the opinion continued, other officials could “vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution.”⁵⁴ “Fill up the details” in this context could be understood to be a test to accommodate the inability of Congress to state every last rule—“minor” as well as major—as required by the state-the-rule definition of the norm articulated in *Fletcher v. Peck*, *Brig Aurora*, and *Gibbons v. Ogden*.⁵⁵

Congress’s difficulty in complying with the original norm compounded as the need for new federal rules grew with the growth in the nation’s land area, population, technological prowess, and interstate activity. Take, for example, a problem that came from railroad lines stretching across many states. State-by-state ratemaking and litigation were no way to regulate an interstate railroad. Yet, Congress itself could not set the rates for all the railroads. So, a wide range of interests including the railroads themselves urged Congress to establish an agency to deal with rates.⁵⁶ The result was the Interstate Commerce Act of 1887⁵⁷ establishing the Interstate Commerce Commission.⁵⁸

52. *Id.* at 11.

53. *Id.* at 43.

54. *Id.* at 45.

55. “Fill up the details” might also be a somewhat different statement of the norm. Rather than pausing to analyze which version is better or trying to reconcile them, this Article will use the state-the-rule version. The reason is that Congress now comes nowhere close to complying with either version, as the earlier discussion of the Clean Air Act illustrates, and the point of this Article is to show how the Court could begin to bring Congress much closer to the consent-of-the-governed norm rather than to define it exactly.

56. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920*, at 126–31 (1982).

57. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C. (2012)).

58. *Id.* at 383.

This statute was an early example of a new way of thinking about regulation. The new way was brought on by the Progressive Movement, quite different from what “progressive” means today. As Professor Robert Wiebe’s excellent history of the rise and decline of self-rule in the United States explains, the end of the nineteenth century brought exciting new technologies, as well as firms doing business on a national scale, such as the railroads.⁵⁹ In addition to their national outlook, the firms’ executives prided themselves on the quasi-scientific systems they developed to operate on a national scale.⁶⁰ They hired junior executives from universities that instilled such pride in their students.⁶¹ Professor Wiebe calls the group with this outlook the “national class” as distinguished from the “local middle class,” which comprised the leading lights of the older, more parochial order.⁶² The Ivy League rather than Podunk College was the path to success among the national class.⁶³ According to Professor Wiebe, the national class sought to shift power from the state and local level to the national and from legislatures beholden to voters to commissions and courts insulated from political pressure and staffed by experts—in other words, to people more like themselves.⁶⁴

In empowering federal agencies, the Progressives began to push the republic down a slippery slope towards Congress systematically evading responsibility, but evasion was not the common objective. To the contrary, many of the Progressives believed in separation of powers, including a Congress that makes the law, and thought they were honoring these beliefs.⁶⁵ For example, they conceived of the Interstate Commerce Act as authorizing experts to apply a legislated rule on railroad rates rather than to make rules. Whether the standards in various statutes left so much wiggle room as to constitute delegations of legislative power was not apparent to many of the Progressives because they saw their statutes as empowering experts in agen-

59. ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 141 (1995).

60. *See id.* at 143.

61. *See id.* at 142–43.

62. *Id.* at 145.

63. *See id.* at 142–43.

64. *Id.* at 141–46.

65. *See, e.g.*, SAMUEL FREEMAN MILLER, *LECTURES ON THE CONSTITUTION OF THE UNITED STATES* 25, 86, 89, 449 (New York & Albany, Banks & Bros. 1891).

cies insulated from politics to use scientific methods to find correct ways to apply statutes.⁶⁶ The Court rebuffed assertions that the Progressives' statutes empowering agencies violated the consent-of-the-governed norm.⁶⁷

Whether the Supreme Court failed to notice violations of the norm in cases concerning delegations to expert agencies or decided that they should not enforce it in such cases, the Court did enforce it in other sorts of cases. In *United States v. L. Cohen Grocery Co.*,⁶⁸ decided in 1921, the Court struck down a federal statute on the grounds that it delegated lawmaking power to the courts.⁶⁹ The statute made it a crime to charge "unjust or unreasonable" prices for "any necessities."⁷⁰ With a delegation to the courts rather than experts, there could be no pretense science had made the indefinite definite. The Supreme Court held, "Congress alone has power to define crimes against the United States."⁷¹

Similarly, in two other cases—*Knickerbocker Ice Co. v. Stewart*,⁷² decided in 1920, and *Washington v. W.C. Dawson & Co.*,⁷³ decided in 1924—the Court struck down statutes that instructed federal courts to apply state workman's compensation statutes in admiralty cases.⁷⁴ The Justices reasoned that Congress could not delegate to state legislatures the power to enact the federal law.

The Court first used the "intelligible principle" language in *J.W. Hampton, Jr., & Co. v. United States*⁷⁵ decided in 1928, stating, "If Congress shall lay down by legislative act an intelli-

66. See WIEBE, *supra* note 59, at 175–76.

67. See, e.g., *Field v. Clark*, 143 U.S. 649, 681–94 (1892).

68. 255 U.S. 81 (1921).

69. *Id.* at 91–93.

70. *Id.* at 86.

71. *Id.* at 87–88 (quoting *United States v. L. Cohen Grocer Co.* 264 F. 218, 220 (E.D. Mo. 1920)) (internal quotation marks omitted). Delegation of the power to make rules of private conduct may be particularly concerning when they are backed by criminal sanctions, but many statutes that authorize agencies to make rules of private conduct give these agencies the option of enforcing them criminally. See JOHN G. MALCOLM, CRIMINAL LAW AND THE ADMINISTRATIVE STATE: THE PROBLEM WITH CRIMINAL REGULATIONS 1–2 (Heritage Found., Legal Memorandum No. 130, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/LM130.pdf [<https://perma.cc/H5NR-L7XK>].

72. 253 U.S. 149 (1920).

73. 264 U.S. 219 (1924).

74. *Id.* at 227–28; *Knickerbocker*, 253 U.S. at 166.

75. 276 U.S. 394 (1928).

ble principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”⁷⁶ Justice Gorsuch’s dissent in *Gundy v. United States*, argues that:

No one at the time thought the phrase [“intelligible principle”] meant to effect some revolution in this Court’s understanding of the Constitution. While the exact line between policy and details, lawmaking and factfinding, and legislative and nonlegislative functions had sometimes invited reasonable debate, everyone agreed these were the relevant inquiries. And when Chief Justice Taft wrote of an “intelligible principle,” it seems plain enough that he sought only to explain the operation of these traditional tests; he gave no hint of a wish to overrule or revise them There’s a good argument, as well, that the statute in *J. W. Hampton* passed muster under the traditional tests.⁷⁷

Whether *J.W. Hampton* applied an “intelligible principle” test, it did state, “In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.”⁷⁸ Such fixing sounds like a policy decision better left to the political branches. An editorial in *The Constitutional Review* said that the statute upheld was “the most dangerous advance in bureaucratic government ever attempted in America.”⁷⁹

Nonetheless, Justice Gorsuch’s contention that the “intelligible principle” language was not meant to weaken the test of delegation is buttressed by the Court’s response to the National Industrial Recovery Act⁸⁰ passed only five years later. The statute granted the President sweeping powers to regulate industry in response to the Great Depression but did little to control how he used those powers.⁸¹ The Italian dictator, Benito Mussolini stated admiringly of President Franklin Roosevelt’s sway under the statute, “Ecco un dittatore!”—that is, “Behold a dicta-

76. *Id.* at 409 (internal quotations omitted).

77. *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

78. *J.W. Hampton*, 276 U.S. at 406.

79. J.S. Cotton, *The General Welfare Clause*, 13 CONST. REV. 98, 101 (1929).

80. Pub. L. No. 73-66, 48 Stat. 195 (1933).

81. *Id.*

tor!"⁸² In 1935, in *Panama Refining Co. v. Ryan*,⁸³ a divided Court struck one delegation in the statute.⁸⁴ Later that year, in *A.L.A. Schechter Poultry Corp. v. United States*,⁸⁵ a unanimous Court, including Justices Brandeis, Cardozo, and Stone, struck another of its delegations.⁸⁶ Then, in 1936, in *Carter v. Carter Coal Co.*,⁸⁷ citing *Schechter*, the Court struck down a delegation of rule-making power to an association of coal mining companies.⁸⁸ Thus, the Court struck down three delegations for violating the consent-of-the-governed norm in the seven years after *J.W. Hampton*.

After winning reelection in 1936, President Roosevelt famously struck back at the Court, which had defied him on delegation and other issues, by proposing a statute authorizing him to appoint additional Justices.⁸⁹ Congress did not pass this court-packing plan,⁹⁰ but the President nonetheless prevailed. One of the Court's changes of position was derisively labeled the "switch in time that saved nine," suggesting that change was to protect the Court.⁹¹ Yet, the evidence shows that the change came before the President announced his plan and was made public only afterwards.⁹² Nonetheless, the Justices did seek to insulate the Court from political turmoil.⁹³ The judicial

82. James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747, 766 (1991) (internal quotation marks omitted) ("dittatore" misspelled in original).

83. 293 U.S. 388 (1935).

84. *Id.* at 419–33.

85. 295 U.S. 495 (1935).

86. *Id.* at 529–42.

87. 298 U.S. 238 (1936).

88. *Id.* at 310–12 (citing *Schechter*, 295 U.S. at 537).

89. See JAMES F. SIMON, *FDR AND CHIEF JUSTICE HUGHES* 312–15 (2012).

90. *Id.* at 333–34.

91. *Id.* at 327.

92. See *id.* The "switch" refers to the Justice Owen Roberts voting to strike a state minimum wage statute in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), but then taking a contrary position in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

93. Chief Justice Hughes worked to frame decisions to minimize the likelihood of the Court's independence being crimped. See SIMON, *supra* note 89, at 299–300, 302–06, 323–29, 332, 335–37, 392. For another example, Justice Frankfurter wrote in a concurrence in a decision not to take on malapportionment of legislative districts, "It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law." *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946) (plurality opinion). For a discussion of im-

unmanageability of the intelligible principle test, of course, let the Court sidestep the potentially troublesome issue of delegation.

With retiring Justices replaced by President Roosevelt appointees and the nation facing the emergencies of the Great Depression and World War II, the Court rejected every constitutional challenge to regulatory statutes on consent-of-the-governed grounds.⁹⁴ Whatever the Court originally meant by “intelligible principle,” it came to mean next to nothing. As Justice Kagan stated in her opinion for the Court in *Gundy v. United States*, “we have over and over upheld even very broad delegations” including “to regulate in the ‘public interest.’”⁹⁵

Professor Bruce Ackerman argues the confrontation between President Roosevelt and the Court, President Roosevelt’s subsequent reelections by overwhelming margins, and the Court’s subsequent rulings constituted a “constitutional moment” that amended the Constitution to, among other things, allow delegation of legislative power.⁹⁶ I dispute this argument in Part V.D. Nonetheless, as Part IV.A shows, sufficiently strong public opinion can, as long as it persists, keep the Court from fully enforcing constitutional norms despite the hope that the Constitution is a counter-majoritarian imperative.

Whatever strong public opinion in favor of delegation there was no longer persists. According to Professor David Mayhew, in polls conducted in 1958, 1977, and 2004 to 2005, by a margin of three to one, voters prefer Congress rather than the President to “make policies.”⁹⁷ A poll taken in January 2019 found that “[e]ighty-two percent (82%) of voters believe Congress should review and approve regulations rather than allowing agencies to set them up on their own.”⁹⁸ In this poll, the support for

pediments to full enforcement of constitutional norms, including “politics,” see LAWRENCE LESSIG, *FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION* 163–68 (2019).

94. *Whitman v. American Trucking*, 531 U.S. 457, 474 (2001) (citing cases).

95. *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (citing *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932)).

96. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 306–11 (1991); Bruce A. Ackerman, *The Storrs Lectures: Discovering The Constitution*, 93 *YALE L.J.* 1013, 1053–57, 1070–71 (1984).

97. DAVID R. MAYHEW, *THE IMPRINT OF CONGRESS* 8 (2017).

98. Scott Rasmussen, *82% Say Congress Should Review & Approve Federal Regulations*, SCOTTRASMUSSEN.COM (Jan. 24, 2019), <https://scottrasmussen.com/82-say-congress-should-review-approve-federal-regulations/> [<https://perma.cc/W7GD-EVXU>]; see also

Congress to shoulder responsibility was much the same regardless of party affiliation, race, or political ideology.⁹⁹

One manifestation of public opinion against congressional buck passing came along with the first Earth Day in 1970. A book documenting a study funded by Ralph Nader had charged that people died from air pollution because Congress, starting with Senator Muskie, had written ineffective air pollution legislation that gave an agency broad discretion to regulate pollution and thereby avoided the hard choices.¹⁰⁰ In response, Senator Muskie authored the 1970 Clean Air Act, which he asserted “faces the air pollution crisis with urgency and in candor. It makes hard choices”¹⁰¹ As a result, he vowed, “all Americans in all parts of the country shall have clean air to breathe within the 1970’s.”¹⁰² Instead of openly granting an agency broad discretion on how to regulate, the new statute supposedly ordered the EPA to make rules fully sufficient to protect health by deadlines and granted citizens the right to enforce this order in federal court.¹⁰³ The statute did not deliver what Senator Muskie maintained it did. It left almost all the hard choices to the agency, as Part III.D will show. Congress’s need to pretend otherwise evidences public opinion against Congress passing the buck.

When the dust settled from the emergencies of the Great Depression, World War II, and the Korean War, Justices expressed concern for the consent-of-the-governed norm. In *Kent v. Dulles*¹⁰⁴ decided in 1958, five Justices invoked it as a reason to narrowly construe a statute that otherwise threatened protected freedoms, and in so doing, the Court limited the authority

Mark Chenoweth, *Florida Voters Join Chevron Revolt And Strike A Blow Against Judicial Bias*, FORBES (Nov. 8, 2018, 8:44 AM), <https://www.forbes.com/sites/markchenoweth/2018/11/08/florida-voters-join-chevron-revolt-and-strike-a-blow-against-judicial-bias/#2cfd60f44fe6> [<https://perma.cc/F7CY-TJNU>] (Florida passes referendum abolishing *Chevron*-like statutory interpretation in state courts).

99. PJ Rasmussen, *Crosstabs Jan. 15–16*, SCOTTRASMUSSEN.COM (Jan. 16, 2019), <https://scottrasmussen.com/crosstabs-jan-15-16-3> [<https://perma.cc/CL8A-QNDJ>].

100. See Ralph Nader, *Foreword* to JOHN C. ESPOSITO & LARRY J. SILVERMAN, *VANISHING AIR: THE RALPH NADER STUDY GROUP REPORT ON AIR POLLUTION*, at vii–ix, 287 (1970).

101. 116 CONG. REC. 42,381 (1970).

102. *Id.*

103. See Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 108(a), 109(a)(1), 110(f)(2)(b), 84 Stat. 1676, 1678–79, 1683.

104. 357 U.S. 116 (1958).

the statute conferred to the executive branch.¹⁰⁵ Then, in *National Cable Television Ass'n v. United States*,¹⁰⁶ decided in 1974, the Court invoked the norm to reject an interpretation of a statute that gave an agency the power to tax those it regulated to cover the cost of regulation.¹⁰⁷ This was the first time the consent-of-the-governed norm had been applied in a case regarding regulatory control of business in four decades. The Justices citing the norm in these cases and others were from both sides of the political spectrum.

The norm also played a role in the Supreme Court's handling of a challenge to the Occupational Safety and Health Act.¹⁰⁸ It, like the Clean Air Act, was passed in 1970 and made high-sounding promises. It directed the agency to ensure "safe . . . places of employment" and reduce occupational exposure to toxic materials "to the extent feasible," without making clear what these requirements meant.¹⁰⁹ In its decision in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (often called the *Benzene* case),¹¹⁰ the Court held invalid a regulation that the agency promulgated to limit benzene levels in workplaces.¹¹¹ Arguing that the statute might otherwise be an unconstitutionally broad delegation, three Justices construed the statute to require the agency to base the limit on harms the agency determined are significant.¹¹² The agency had failed to require that the harm be significant. A fifth Justice, then-Justice Rehnquist, voted to declare the Act unconstitutional for dele-

105. *Id.* at 129 ("Where activities . . . often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them."). In *Arizona v. California*, 373 U.S. 546 (1963), three Justices dissented on the grounds that the Court should have invoked the norm to construe a statute narrowly. *Id.* at 625–27 (Harlan, J., dissenting in part).

106. 415 U.S. 336 (1974).

107. *Id.* at 342–43.

108. Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678 (2012)).

109. *Id.* §§ 3(8), 6(b)(5) (codified as amended at 29 U.S.C. §§ 652(8), 655(b)(5) (2012)).

110. 448 U.S. 607 (1980).

111. *Id.* at 661–62 (plurality opinion).

112. *Id.*

gating legislative power,¹¹³ a position with which Chief Justice Burger agreed in a later case.¹¹⁴

In 1996, in *Loving v. United States*,¹¹⁵ the Court praised the consent-of-the-governed norm in dicta.¹¹⁶ A soldier sentenced to death invoked the norm to challenge the constitutionality of a statute that empowered the President to establish the criteria for such sentences in military tribunals.¹¹⁷ He lost, in part because of the special authority that the President has in military matters, but the Court stated:

Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking. Ill suited to that task are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control. The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.¹¹⁸

Yet, the "clear assignment of power" does not result in the Court enforcing the norm in most cases and, where the Court does enforce the norm, it asserts that it is not invoking the consent-of-the-governed norm. Take the case cited, *INS v. Chadha*.¹¹⁹ It struck the legislative veto which, depending upon the statute in which it appears, allowed one or two houses of Congress to veto designated administrative actions.¹²⁰ The stated rationale was that the legislative veto cuts the President out of legislative actions in contravention of the Article I legislative process, which involves the House, the Senate, and the President.¹²¹ Yet, as Justice Byron White argued in dissent, the legislative veto was being struck because it delegates legislative power to

113. *Id.* at 671–88 (Rehnquist, J., concurring).

114. *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543–44 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J.).

115. 517 U.S. 748 (1996).

116. *Id.* at 757–58.

117. *Id.* at 751–52.

118. *Id.* at 757–58 (citing *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

119. 462 U.S. 919.

120. *Id.* at 959–60.

121. *See id.* at 946–48.

a process other than that of Article I,¹²² but that reasoning would also invalidate delegation of lawmaking authority to agencies.¹²³ The *Loving* dicta did, however, hint that *Chadha* could be viewed as, in part, a delegation case.

Similarly, in *Clinton v. City of New York*¹²⁴ decided in 1998, Justices from the left and right joined in striking down the line-item veto, which allowed the President to reject line items in appropriations statutes.¹²⁵ The Court reasoned that this procedure contravened Article I's legislative process, which limits the President to accepting or not the entire bill passed by the House and the Senate.¹²⁶ Yet, the line-item veto could also be conceived as delegating some of Congress's power over appropriations to the President acting alone. Concerns of practicality were no barrier in striking a delegation of the appropriations power because Congress likes to hand out the money itself. Spending, after all, usually brings credit to its members. In contrast, Congress often delegates the power to impose rules of private conduct because they bring blame as well as credit.

Thus, the Court faced a case fraught with more political and practical difficulty in *Whitman v. American Trucking Ass'ns*¹²⁷ decided in 2001, in which trade associations had argued that a popular regulatory statute, the Clean Air Act, unconstitutionally delegated legislative power.¹²⁸ Specifically, they argued the "protect the public health" provision delegated legislative power because it gave no guidance as to the extent to which the agency must protect health.¹²⁹ A D.C. Circuit Court of Appeals panel had held that the Clean Air Act as construed by the agency did delegate power unconstitutionally.¹³⁰

122. *Id.* at 984–89 (White, J., dissenting).

123. *See id.* at 985–87.

124. 524 U.S. 417 (1998).

125. *Id.* at 417–20.

126. *Id.* at 436–41.

127. 531 U.S. 457 (2001).

128. *Id.* at 458–59.

129. *See id.* at 463.

130. *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034 (per curiam), *aff'd in part, rev'd in part, and remanded sub nom. Whitman*, 531 U.S. 457. The Wall Street Journal reported that this aspect of the original court of appeals decision was influenced by SCHOENBROD, POWER WITHOUT RESPONSIBILITY, *supra* note 5. John J. Fialka, *Professor Seeks to Limit Congress Ability to Delegate Tasks to Federal Agencies*, WALL ST. J. (May 20, 1999, 12:01 AM), <https://www.wsj.com/articles/SB927150035434840424> [<https://perma.cc/2XLS-FN9Y>]. The panel held, however, the statute might be

In an opinion by Justice Scalia, the Court stated that the text of the Constitution “permits no delegation of [legislative] powers.”¹³¹ Yet, having seemingly vowed that the Court would stop Congress from abdicating its legislative power, the Court trivialized that vow by stating, “we repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’”¹³² Indeed, the opinion, like Justice Kagan’s opinion for the Court in *Gundy* quoted earlier, noted that even goals as mushy as “the public interest” had counted as an “intelligible principle.”¹³³ The opinion concluded by stating that “we have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”¹³⁴ The quotation is from an earlier opinion in which Justice Scalia argued that “intelligible principle” was not a judicially manageable test.¹³⁵ In effect, *Whitman* allows members of Congress to judge whether they have made themselves sufficiently responsible to their constituents, despite their self-interest in avoiding responsibility.¹³⁶ In sum, when it comes to the rules of private conduct, the consent-of-the-governed norm has become a farce.

saved through a narrowing interpretation, but rather than narrowing the interpretation itself, the court called upon the agency to consider a narrowing construction. See *Am. Trucking*, 175 F.3d at 1034–38. The decision seemed to be *Benzene* adapted to the age of *Chevron*. *Chevron U.S.A. Inc. v. Nat. Res. Defense Council*, 467 U.S. 837 (1984). The Court rejected having the agency provide a narrowing interpretation: “The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.” *Whitman*, 531 U.S. at 473.

131. *Whitman*, 531 U.S. at 472.

132. *Id.* (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

133. *Id.* at 474.

134. *Id.* at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)) (citing *Mistretta*, 488 U.S. at 373 (majority opinion)).

135. *Id.* (quoting *Mistretta*, 488 U.S. at 416 (1989) (Scalia, J., dissenting)). This passage was cited with approval in the Court’s opinion in *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).

136. American Trucking could have won a minor victory for the constitutional norm along the lines of *Benzene* by adopting the argument that Professor Marci Hamilton and I advanced in an amicus brief. Brief of the Manufacturers Alliance/MAPI Inc. et

B. *The Impediments Today*

Believing that Congress cannot fully comply with the consent-of-the-governed norm, the Court has concluded that it cannot enforce the norm as originally understood.¹³⁷ Many, if not most, of the regulatory statutes in the United States Code would fail to comply with the norm as originally understood.¹³⁸

The Court, of course, purports to limit delegation through the “intelligible principle” test, but it is judicially unmanageable and so no limit on delegation in practice. Justice Gorsuch’s dissent in *Gundy* suggests important strides in the direction of the Court overcoming this impediment to enforcing the norm. His dissent calls for discarding the “intelligible principle” test, which he calls a “misadventure,”¹³⁹ and replacing it with a judicially manageable test. The dissent also recognizes that Chief Justice Marshall’s 1825 opinion in *Wayman v. Southard* could provide precedential support for such a test.¹⁴⁰ Justice Gorsuch writes that Chief Justice Marshall’s opinion “distinguished between those ‘important subjects, which must be entirely regulated by the legislature itself,’ and ‘those of less interest, in which a general provision may be made, and power given to

al. as Amici Curiae in Support of Respondents, *Whitman*, 531 U.S. 457 (No. 99-1257). We argued that to reduce the scope of the delegation, the statute should be construed to require the agency to set the standard to protect against harms to health that it found to be significant and in the rulemaking it had expressly refused to make such a finding. *Id.* at 15–20. There was strong support for this reading of the statute in its legislative history. *Id.* Seemingly driven by profits more than constitutional principle, American Trucking preferred to argue that the statute be construed to minimize costs to its members. See David Schoenbrod, *Politics and the Principle That Elected Legislators Should Make the Laws*, 26 HARV. J.L. & PUB. POL’Y 239, 270–75 (2003). Professor Hamilton and I filed amicus briefs on the delegation issue in *Clinton*, *Loving*, and other cases.

137. As stated in *Mistretta v. United States*, “[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” 488 U.S. at 372.

138. See Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 327 (1987). Even if such a ruling were made prospective, Congress and agencies would have to struggle to meet the need for ongoing changes in statutes and regulations.

139. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

140. See *id.* at 2135–36 (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). Justice Gorsuch omitted Chief Justice Marshall’s reference to “minor regulations.” *Id.*; *Wayman*, 23 U.S. (10 Wheat.) at 45.

those who are to act . . . to fill up the details.”¹⁴¹ The dissent goes on to make a convincing case that the statutory provision at issue in *Gundy* left far more than details to the delegate.¹⁴²

Nonetheless, additional strides are needed before the test discussed in the dissent would be a workable test for a majority. If Justice Gorsuch had been writing for the Court, his use of the statutory-invalidation guillotine would threaten huge swathes of the United States Code and the Code of Federal Regulations. His test would be a threat because it would be hard to know in advance how the Court would draw the line between “important subjects, which must be entirely regulated by the legislature itself,” and “those of less interest, in which a general provision may be made, and power given to those who are to act . . . to fill up the details.”¹⁴³ This formulation leaves many questions open. Does the test mean that Congress must state the more important rules, the more important goals, or some combination thereof? Whichever it is, it would also be unclear how to define the level of importance. Indeed, it would be much more difficult to construct a judicially manageable test along these lines in 2020 than it would have been in the simpler world of 1825.

Even if the Court could construct a judicially manageable test along the lines that Justice Gorsuch’s dissent suggests, doing so would take many years of case-by-case adjudication. Meanwhile, federal regulators as well as businesses, state and local governments, nonprofits, and others subject to federal regulation have come to rely upon regulation as we now have it. More agencies with more power have produced a Code of Federal Regulations with twelve times more words than it had when first codified in 1938.¹⁴⁴ The reliance is massive.

During the years of uncertainty that Justice Gorsuch’s test would produce, stakeholders would have to predict which regulations would be found valid and which would not. The uncertainty would plague both large organizations and smaller organizations and individuals without ready access to legal

141. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (omission in original) (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43).

142. *See id.* at 2143–48.

143. *Wayman*, 23 U.S. (10 Wheat.) at 43.

144. Email from Ethan Clarkson, Research Assistant, N.Y. Law Sch., to author (Oct. 10, 2019) (on file with author).

advice. After all, individuals who farm, practice dentistry on their own, or operate gas stations, to name just some examples, are subject to many federal regulations. The approval process for many projects, big and small, could take much longer than it does now. On top of the uncertain status of old regulations would come uncertainty in issuing new ones.¹⁴⁵ All this uncertainty would harm the economy generally. Meanwhile, advocates for various regulatory causes would upset voters by saying that the Court had stripped them of essential regulatory protection.¹⁴⁶

To avert such a catastrophe, the Court would need to explain to the governed and elected officials how to transition to what most of the people want—regulatory protection that is both workable and subject to the consent of the governed. I will suggest how the Court could do so but first will discuss what Congress should do on its own.

III. CONGRESS FLOUTS THE NORM

A. *Congress's Duty to Comply with the Norm to the Extent Practical*

Even if impediments prevent even partial judicial enforcement of the consent-of-the-governed norm, members of Congress are honor bound to do their best to comply with it. As Dean Lawrence Sager argues in an article on underenforced constitutional norms, “[C]onstitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delin-

145. However, Justice Gorsuch suggests, “Congress can also commission agencies or other experts to study and recommend legislative language.” *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting). Yes, it might, but his optimism takes no account of the gridlock in Congress.

146. All the uncertainty and upset would arouse political antagonism against the Court and so add to the current speculation about court packing. James Freeman, Opinion, *Justice Ginsburg Kicks Buttigieg*, WALL ST. J. (July 25, 2019, 4:03 PM), <https://www.wsj.com/articles/justice-ginsburg-kicks-buttigieg-11564084993> [<https://perma.cc/8NMJ-N7JM>]. Indeed, four aspirants to the Democratic Party’s nomination for President—Mayor Pete Buttigieg and Senators Kirsten Gillibrand, Kamala Harris, and Elizabeth Warren—say they are open to court packing. *Id.*

eating only the boundaries of the federal courts' role in enforcing the norm"¹⁴⁷

Dean Sager also calls for courts to distinguish norms from the impediments to their full enforcement.¹⁴⁸ He illustrates the distinction with the "equal protection" norm,¹⁴⁹ which he defines this way: "A state may treat people differently only when it is fair to do so."¹⁵⁰ The impediment to its full enforcement is that federal courts should not second guess policy decisions the Constitution assigns to states.¹⁵¹ To accommodate this impediment, federal courts developed a test for judicial enforcement that differs from the equal protection norm: an inequality is permitted if it bears a "rational relationship" to the government's justification for it, unless the inequality involves a dubious classification such as race.¹⁵² This test ends up crediting some pretextual justifications, thus permitting some unfair inequalities. Dean Sager shows that by recognizing that the rational relationship test allows some violations of the equal protection norm, federal courts can allow state courts and Congress, which do not face the same impediment as do the federal courts, to augment the federal courts' incomplete enforcement.¹⁵³ Thus, the norm and the test for its judicial enforcement differ. As Professor Thomas Nachbar writes, "There is no textual basis in the Constitution to justify reviewing legislation for its rationality."¹⁵⁴

147. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978). Dean Sager also states the following:

This obligation to obey constitutional norms at their unenforced margins requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions. Public officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins.

Id. at 1227.

148. *Id.* at 1212.

149. U.S. CONST. amend. XIV, § 1.

150. Sager, *supra* note 147, at 1215, 1263–64 (internal quotation marks omitted).

151. *See id.* at 1216.

152. *See id.* at 1216–17.

153. *See id.* at 1212.

154. Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1630 (2016).

Dean Sager's article does not discuss the underenforced consent-of-the-governed norm.¹⁵⁵ He did write, however, that a norm's status as underenforced is "particularly apparent when the absence of 'judicially manageable standards' is cited as a reason for the invocation of the political question doctrine."¹⁵⁶ This is a reason that the Court gives for underenforcing the consent-of-the-governed norm.¹⁵⁷

Because, as Dean Sager argues, underenforced norms are valid to their full conceptual limits and the consent-of-the-governed norm bars delegation of the power to make rules of private conduct, Congress should do its best to take direct responsibility for such rules. Congress would aim too low if it sought to provide no more than an insipid "intelligible principle."

B. *Congress Could Comply with the
Norm to a Substantial Extent*

Congress could do much more than it now does to comply with the consent-of-the-governed norm. One way that Congress could shoulder more of its constitutional responsibility while still making use of agency expertise was suggested by James Landis, once the New Deal's leading expert on administrative law and later dean of Harvard Law School. He suggested that Congress could require new "administrative action . . . of large significance" not take effect until Congress explicitly approves it.¹⁵⁸ He wrote that for administrative officials, "it was an act of

155. Whether the ultimate reason for underenforcement of a norm is an institutional constraint on the courts or on Congress, the consent of the governed should be viewed as an underenforced constitutional norm. See Sager, *supra* note 147, at 1227. A search of law reviews found seven publications that both cited Dean Sager's article and mentioned the "delegation doctrine" or "nondelegation." Email from William Mills, Professor & Assoc. Librarian, N.Y. Law Sch., to author (Nov. 30, 2018) (on file with author). None of these publications discussed the possibility of using Dean Sager's recommendations to improve enforcement of the consent-of-the-governed norm. *Id.*

156. Sager, *supra* note 147, at 1226.

157. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001). The reliance on the lack of a judicially manageable standard is clearer in the opinion that the Court quotes there, *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

158. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 77, 79 (1938). Landis alternatively suggested the legislative veto, which was struck down in *Chadha*. *Id.* at 77.

political wisdom to put back upon the shoulders of Congress” responsibility for such actions.¹⁵⁹

In 1984, Stephen Breyer, then a court of appeals judge, showed how Congress could structure a statute to efficiently implement Dean Landis’s idea.¹⁶⁰ The statute would force Congress to vote on bills to approve agency actions.¹⁶¹ If approved by both houses, the bill would be presented to the President for signature, thus avoiding the objection that doomed the legislative veto in *Chadha*.¹⁶² The statute would set deadlines by which the House and Senate must vote, limit debate, and bar filibusters on such votes.¹⁶³ Instead of using gridlock or statutes mouthing platitudinous goals to avoid responsibility for hard choices, the legislators would have to vote on specific regulations.

Then-Judge Breyer framed his proposal as a way for Congress to reclaim the power that it lost when *Chadha* struck down the legislative veto and so confined it to actions previously subject to a legislative veto.¹⁶⁴ To serve the purpose of the consent-of-the-governed norm, it would be better to aim the proposal at significant regulations. The proposal could target regulations defined as “significant regulatory action” for the purpose of review by the Office of Information and Regulatory Affairs in the Office of Management and Budget.¹⁶⁵ There would be about as many such regulations as current votes on symbolic public laws such as those naming post offices.¹⁶⁶ President William Clinton issued the executive order containing the current definition, and it has remained largely unchanged under Presidents George W. Bush, Barack Obama, and Donald Trump.¹⁶⁷ Voting

159. *Id.* at 76.

160. Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 793–96 (1984).

161. *Id.* at 794.

162. *Id.* at 793.

163. *Id.*

164. *Id.* at 793.

165. Exec. Order No. 12,866, § 3(f), 3 C.F.R. 638, 641–42 (1994), *reprinted as amended in* 5 U.S.C. § 601 note (2012). President Clinton’s executive order was in turn a variation on one issued by President Reagan. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638.

166. SCHOENBROD, *supra* note 15, at 153.

167. *See* Exec. Order No. 13,789, § 2(a)(iii), 82 Fed. Reg. 19,317, 19,317 (Apr. 21, 2017) (same); Exec. Order No. 13,609, § 4(f), 3 C.F.R. 255, 257 (2013) (referencing the definition in President Clinton’s executive order); Exec. Order No. 13,422, 3 C.F.R. 191 (2008) (implicitly using the same definition by not altering the original

on significant regulations would require legislators to shoulder more responsibility than voting on the names of post offices, but the Constitution includes voting on regulatory rules in Congress's job description, not naming post offices.

Members of Congress could find the time for such work. Starting with House Speaker Newt Gingrich in the late 1990s, congressional leaders began to push their members to spend most of their time back home in their districts to, in effect, campaign for reelection, reserving only two to three days per week in Washington and only in weeks when Congress is in session. Moreover, even when in Washington, party leaders push their members to spend far more time raising campaign contributions (much of which are donated to the party leaders' war chests) and campaigning for reelection rather than working on legislation.¹⁶⁸ The upshot is that most "lawmakers" spend much less time lawmaking than many weekend golfers spend golfing.¹⁶⁹ Were members of Congress responsible for regulations, however, even party leaders would want them to spend more time considering the regulations on which they would cast votes. In voting on regulations, members of Congress and their staffs would have the benefit of the agency's rule-making record.

There will, of course, sometimes be major fights over regulations in Congress, but that is where the fighting is supposed to be. Congress passing the buck does not stop the fights but rather displaces them to other venues, such as hearings over the confirmation of judicial nominees.¹⁷⁰

The statute implementing the Landis-Breyer proposal should make clear that a bill on a regulation would approve the agency's promulgation of it rather than enact it.¹⁷¹ That way, the regulation once approved would still be subject to judicial review,

definition), *revoked by* Exec. Order No. 13,497, 3 C.F.R. 218 (2010), *reprinted in* 5 U.S.C. § 601 note (2012).

168. SCHOENBROD, *supra* note 15, at 89–90.

169. *Id.*

170. *See, e.g.*, Press Release, Senator Ben Sasse, Sasse on Kavanaugh Hearing: "We Can And We Should Do Better Than This" (Sept. 4, 2018), <https://www.sasse.senate.gov/public/index.cfm/2018/9/sasse-on-kavanaugh-hearing-we-can-and-we-should-do-better-than-this> [<https://perma.cc/C9Z9-56SN>].

171. *See* David Schoenbrod, *Responsibility for Regulation Act*, DC-CONFIDENTIAL.ORG (2019), <https://www.dc-confidential.org/responsibility-regulation-act/> [<https://perma.cc/D9WB-WSFN>] (outlining such a bill).

especially on whether the agency acted within its statutory authority.¹⁷² Moreover, the agency could amend the regulation on its own if the amendment is not so important as to constitute “significant regulatory action.”

It may seem strange that a regulation reviewed by both houses of Congress and the President could be reviewed again by a court or amended by an agency. Recall, however, that the legislative process has approved the agency’s promulgation of the regulation rather than enacted the regulation. Surely, Congress can approve the promulgation of a single, known regulation when it now has on the books statutes that approve in advance and wholesale the promulgation of future, and thus unknown, regulations. The former, by making Congress accountable, complies with the consent-of-the-governed norm. Moreover, Congress is within its power to approve an action for one purpose but leave it to the courts to decide its legality for other purposes. For example, in *Tennessee Valley Authority v. Hill*,¹⁷³ the Supreme Court rejected the Tennessee Valley Authority’s argument that Congress’s appropriation of money to build the Tellico Dam insulated the project from objection under the Endangered Species Act.¹⁷⁴

Judicial review is desirable because otherwise an agency could increase its own statutory authority by gaining congressional approval of a regulation exceeding its previous authority under the enabling statute. Such increase of authority would shift the initiative in increasing agency authority from Congress to agencies. Moreover, growing the agencies’ authority implicitly by Congress approving a regulation would create uncertainty as to the scope of agencies’ authority in issuing later regulations.¹⁷⁵

For a final wrinkle, the statute might approve the promulgation of all earlier regulations. Such wholesale approval would

172. See 5 U.S.C. § 706(2)(C) (2018).

173. 437 U.S. 153 (1978).

174. See *id.* at 172–73, 189–90. In this case, the Court used tools of statutory construction to find that Congress did not intend to insulate the dam from scrutiny under the Endangered Species Act. See *id.* at 188. The statute implementing the Landis-Breyer proposal could make the courts’ work easier by stating explicitly that judicial review would be preserved. No Justice in *TVA v. Hill* opined that Congress could not decide one issue (appropriation) and leave another issue unresolved (whether building the dam violated the Endangered Species Act).

175. For more on the desirability of preserving judicial review, see Schoenbrod, *supra* note 171.

not do much to make members of Congress accountable for any old regulation but would acknowledge Congress's failure to do its duty for many decades and so be an initial step toward atonement. The wholesale approval would also shield the old regulations from challenge on consent-of-the-governed grounds and thereby greatly reduce the uncertainty and upset that would arise if the Court began to enforce this norm as to significant regulations.

C. *How Flouting the Norm Benefits Legislators Politically*

Let us call the resulting statute the Responsibility for Regulation Act. Congress has failed to adopt a statute forcing it to comply substantially with the consent-of-the-governed norm because the legislators do not want the responsibility. Consider what happened after some members asked me in 1995 to help design a bill that would increase Congress's responsibility for regulations. I suggested the Landis-Breyer proposal. The result was a bill that members of both parties introduced called the Congressional Responsibility Act.¹⁷⁶

When the bill began to get support, the growing possibility of its passage worried party leaders because legislators would end up with responsibility for hard choices. To avoid responsibility while assuaging popular opinion calling for it, Congress passed in 1996 a sound-alike bill, the Congressional Review Act, and President Clinton signed it.¹⁷⁷ It gives Congress the option of voting on regulations, but not surprisingly the legislators hardly ever opt to take that responsibility. All but one of the exceptions came after the Obama Administration postponed controversial regulations until after the 2016 election to avoid angering voters before they went to the polls and, assumedly, elected Hillary Clinton.¹⁷⁸ As a result, the Obama Administration failed to give Congress notice of many regulations in time to safeguard them from annulment by the Republican President

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

177. Congressional Review Act, 5 U.S.C. §§ 801–808 (2018).

178. See Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 190–91, 243–44 (2018); Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2162 (2009) (describing the Bush Administration's use of the Congressional Review Act to overturn the Clinton Administration's ergonomics rule).

and Congress that took over in 2017.¹⁷⁹ Yet, the leaders of the Republican majorities in Congress allowed votes on only that small portion of these vulnerable regulations that would not require their members to make hard choices.¹⁸⁰

Long before 2017, however, it became apparent that the Congressional Review Act failed to make elected lawmakers responsible to voters. To ward off blame for failing to take responsibility for regulations, Republicans in the House have repeatedly passed a bill based in part upon the original Congressional Responsibility Act.¹⁸¹ Unfortunately, the new bill is another sham, starting with its new title, Regulations from the Executive in Need of Scrutiny (REINS). The title suggests that the regulations stem from overzealous agencies despite the many statutes requiring agencies to promulgate regulations. Worse still, the bill is full of poison pills that ensure it will never get significant Democratic support, thus making its enactment improbable.¹⁸² Indeed, of the thirty-nine cosponsors of the bill in the Senate in the 115th Congress, none was a Democrat.¹⁸³ The upshot is that

179. See Juliet Eilperin & Darla Cameron, *How Trump is rolling back Obama's legacy*, WASH. POST (Jan. 20, 2018), https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.c0ae88396f22 [https://perma.cc/R6V5-FYE6].

180. See, e.g., Sheryl Gay Stolberg, *McConnell Promised to End Senate Gridlock. Instead, Republicans Are Stuck in Neutral.*, N.Y. TIMES (Aug. 3, 2019), <https://www.nytimes.com/2019/08/03/us/politics/senate-votes-mcconnell.html> [https://nyti.ms/2OTv5cz] (noting the Republican-led Senate had the fewest legislative debates in recent memory, including on urgent issues).

181. See Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017, H.R. 26, 115th Cong. (as passed by House, Jan. 5, 2017).

182. One poison pill: all existing regulations would expire in ten years unless expressly approved by Congress. *Id.* § 809(b). Moreover, the bill lacks realistic procedures to consider the immense pile of regulations in that time frame. In the meantime, people, businesses, and governments of the United States will have little idea which of their existing regulatory protections and obligations will drop dead in a decade. Well before then, the uncertainty would crimp the economy.

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

183. See *S.21—Regulations from the Executive in Need of Scrutiny Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/21/cosponsors> [https://perma.cc/MYN6-ZGSH] (last visited Oct. 13, 2019).

REINS's sponsors can contend that they want to be responsible without ever having to take responsibility.

One poison pill requires agencies to cut the cost of existing regulations to offset the cost of new regulations.¹⁸⁴ So, even if REINS were enacted, Republican legislators could take credit with their party's base for wanting to control regulatory costs while shifting blame to agencies for any reduction in regulatory protection. Meanwhile, so long as some version of the Landis-Breyer approach is not enacted, the Democrats who support existing regulatory statutes can take credit with their party's base for wanting regulatory protection while shifting blame to agencies for the regulatory burdens. This stalemate is a perfect recipe for polarization.

If either the Democratic or Republican leaders in Congress really wanted to submit to "the consent of the governed," they could introduce a bill that strips the REINS Act of its poison pills, make clear that it applies to regulations reducing or increasing regulatory protection, and give it a new title. One example would be the Responsibility for Regulation Act described in Part III.B.

Such a statute would make Congress a more functional, less polarized legislature. In voting on specific regulations, members would have to take responsibility for both the level of regulatory protection and the level of regulatory burdens. So, they would have to face hard choices about trade-offs instead of simply spouting slogans about polarizing positions. Now, in contrast, majority leaders of both parties try to keep hard choices off the floor in Congress. For example, former Republican House Majority Leader Dennis Hastert adopted the so-called Hastert Rule that prevented a bill from reaching the floor unless it was supported by a majority of the majority party.¹⁸⁵ The Democrats, for their part, are adept at structuring bills and designing procedures to hide the hard choices.¹⁸⁶

184. H.R. 26 § 808.

185. See MICKEY EDWARDS, *THE PARTIES VERSUS THE PEOPLE: HOW TO TURN REPUBLICANS AND DEMOCRATS INTO AMERICANS* 104 (2012).

186. For example, the Democratic bill to cut emissions of climate change gases was assiduously structured to hide the hard choices to the detriment of controlling climate change. See David Schoenbrod & Richard B. Stewart, Opinion, *The Cap-and-Trade Bait and Switch*, WALL ST. J. (Aug. 24, 2009, 12:42 PM), <https://www.wsj.com/articles/SB10001424052970203609204574314312524495276> [https://perma.cc/2DQV-RTP9]. Democratic Speaker of the House Nancy Pelosi famously

The extra time members of Congress would need to spend on lawmaking in Washington to grapple with the hard choices would be of benefit because, working in Washington only a couple of days a week, members hardly get to know members of the other party.¹⁸⁷ In contrast, before the 1990s, Congress worked longer in Washington, and members and their families lived in Washington and got to know each other, socially as well as at work.¹⁸⁸ Respected observers of Congress argue that its members and their families spending more time in Washington would reduce the nastiness and gridlock that makes Congress so dysfunctional.¹⁸⁹

In sum, by taking responsibility for regulation, members of Congress would have to make hard choices but would gain personally to the extent they ran for office to have the satisfaction of serving their community. Given our understandably jaundiced view of politicians, it is difficult to bear in mind what psychology shows: that evolution has led most people to want to do the right thing (as well as benefit themselves personally) and this is so across the political spectrum, although our views of what is right differ.¹⁹⁰ Yet, members of Congress cannot be knights questing to serve the public because the current regime forces them to be pawns in the campaign of their party's leaders to become and stay the leaders of the majority.¹⁹¹ As columnist Peggy Noonan recently wrote, "Congress knows how hapless it looks, how riven by partisanship and skins-vs.-shirts dumbness. For many of them it takes the tang out of things. They know it lowers their standing in America. They grieve it.

said that "we have to pass the [health care] bill so that you can find out what's in it," but later asserted that she was misunderstood. See Jonathan Capehart, *Opinion, Pelosi defends her infamous health care remark*, WASH. POST (June 20, 2012), https://www.washingtonpost.com/blogs/post-partisan/post/pelosi-defends-her-infamous-health-care-remark/2012/06/20/gJQAqch6qV_blog.html?utm_term=.d119562e2f20 [<https://perma.cc/X8MH-EKL6>] (alteration in original).

187. SCHOENBROD, *supra* note 15, at 89, 94.

188. *Id.* at 93–94.

189. *Id.*

190. See generally JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

191. See generally MORRIS P. FIORINA, *UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING, AND POLITICAL STALEMATE* (2017).

It embarrasses them. They'd like to be part of something that works, something respected."¹⁹²

*D. How Flouting the Norm Harms
the Legislators' Constituents*

Many people believe the public is better served when agencies rather than Congress run regulation.¹⁹³ This belief is understandable because Congress is less knowledgeable than the agencies and given to posturing or worse. However, the choice is not between the agencies or Congress running regulation but rather whether Congress will bear responsibility for the important role it now plays in regulation.

Most current regulatory statutes order agencies to deliver popular promises, such as health protection, but nonetheless sidestep the hard choices.¹⁹⁴ That way, the members of Congress get much of the credit for the popular promises, and the agency gets much of the blame for the burdens needed to deliver on the promises and the failures to deliver.¹⁹⁵

Take, for example, the pollution that came from refiners adding lead additives to gasoline. The statute enacted in 1970 promised that health would be protected from lead completely by 1976.¹⁹⁶ As an attorney for the Natural Resources Defense Council in the 1970s, I won cases that aimed to push the EPA to do its duty of achieving this goal. Nonetheless, because of pressure on the agency from politicians on both the left and right, the EPA, during both Democratic and Republican administrations, failed to act vigorously to abate the health effects of lead in gasoline until the mid-1980s and then only after the big oil refiners found that they could save money if lead additives to gasoline were banned.¹⁹⁷

192. Peggy Noonan, Opinion, *Elijah Cummings and the Little Sisters*, WALL ST. J. (Oct. 24, 2019, 6:27 PM), <https://www.wsj.com/articles/elijah-cummings-and-the-little-sisters-11571956039> [<https://perma.cc/HE4N-U44F>].

193. See, e.g., Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1183 (2018) (arguing that the traditional nondelegation doctrine may not "promote social welfare" based in part upon the superior knowledge of the agencies).

194. See, e.g., SCHOENBROD, *supra* note 15, at 43.

195. See *id.* at 88–94.

196. *Id.* at 44.

197. On the lead litigation and its consequences, see generally SCHOENBROD, *supra* note 42, at 29–38.

To put the consequences in perspective, consider that in 2016, President Obama declared a state of emergency because nearly one-twentieth of the children aged five and under of Flint, Michigan, had blood lead levels of at least five micrograms.¹⁹⁸ In the 1970s, the *average* blood lead level in children across the United States was three times that level.¹⁹⁹ Back in the 1970s, medical experts told me that, although lead in paint caused fatally high lead levels in some children, the population-wide contamination came primarily from lead in gasoline. Congress's unqualified promise that the Clean Air Act would "protect health" was a pious fraud.

I began to wonder what would have happened if Congress had itself enacted the rule that would set the pace at which to cut lead in gasoline. Doing nothing on lead was not an option because in 1970 "Get the Lead Out," as some bumper stickers read, was a popular demand.²⁰⁰ Congress itself, in a singular exception to the statute's general flight from responsibility, decided that new cars had to emit 90 percent less of a list of pollutants by 1975 but left lead off the list.²⁰¹ The statute instead ordered the EPA to fully protect health from airborne lead by 1976.²⁰² If Congress could not have passed the buck on lead, it would have required, I estimated, at least a 50 percent cut in the amount of lead in gasoline by 1975.²⁰³ Using the EPA health data, I showed that this quicker start on lead would have averted about 50,000 deaths in the United States, about equal to American deaths in the Vietnam War.²⁰⁴

It is, of course, politically profitable for Congress to issue statutory orders to agencies that allow legislators to take credit but shift blame—so politically profitable that Congress radically increased the number of orders to the EPA in the 1990 version

198. Yanan Wang, *Untold cities across America have higher rates of lead poisoning than Flint*, WASH. POST (Feb. 4, 2016, 5:53 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2016/02/04/untold-cities-across-america-have-higher-rates-of-lead-poisoning-than-flint> [https://perma.cc/D59P-6VYF].

199. Kathryn R. Mahaffey et al., *National Estimates of Blood Lead Levels: United States, 1976–1980: Association with Selected Demographic and Socioeconomic Factors*, 307 NEW ENG. J. MED. 573, 575 (1982).

200. See SCHOENBROD, *supra* note 42, at 29–30.

201. *Id.* at 34.

202. *Id.* at 35.

203. *Id.* at 36.

204. See *id.* at 36–38.

of the Clean Air Act. The phrase “the administrator . . . shall” appears 940 times.²⁰⁵ Many of the orders must be performed repeatedly. The orders are lengthy, which helps explain why the statute’s text would fill a 450-page book. Long statutes full of complicated orders are not unusual.²⁰⁶

The legislators are sufficiently skilled to issue many lengthy orders, yet still avoid blame for the hard choices. For example, when President Obama’s EPA issued a new ozone standard under the statutory mandate to “protect health” from air pollutants in 2015, Democratic legislators could criticize the regulation as insufficiently tough on pollution and Republican legislators could criticize the regulation as too tough on the economy.²⁰⁷

One result of such narrow delegation is extraordinary complication. As said of the Clean Air Act by Gina McCarthy, whom President Obama appointed assistant administrator of EPA and then administrator, “[E]ach sector has 17 to 20 rules that govern each piece of equipment and you’ve got to be a neuroscientist to figure it out.”²⁰⁸ The complication requires big business to hire staffs of costly experts and suffer even more costly delays in getting permits. The consequences are worse for smaller businesses, farmers, state and local governments, and other entities subject to federal regulation but less able to afford the experts.

Another result is that the statutes’ orders grow obsolete quickly because they are based upon circumstances and understandings that change.²⁰⁹ Yet, because the statutes were de-

205. Email from Iain MacDonald, Research Assistant, N.Y. Univ. Sch. of Law, to author (July 19, 2009) (on file with author).

206. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code).

207. See Anthony Adragna, *Republicans Criticize Ozone Rule for Impacts; Democrats Lament Lack of Tougher Standard*, 46 ENV’T REP. 2901 (2015). Some members of Congress asserted the EPA went too far and that “it’ll be important for Congress to fight back,” *id.* at 2901 (quoting Senator Jeff Sessions) (internal quotation marks omitted), but others expressed disappointment with the EPA for the rule being “not as strong as [they] had hoped.” *Id.* (quoting Representative Frank Pallone) (internal quotation marks omitted).

208. Ross Sandler & David Schoenbrod, Opinion, *Holding Congress Accountable*, REG. REV. (Feb. 19, 2018), <https://www.theregreview.org/2018/02/19/sandler-schoenbrod-holding-congress-accountable/> [<https://perma.cc/48QH-UNBU>] (internal quotation marks omitted).

209. *Id.*

signed to shift blame to the agencies, members of Congress have no incentive to revise the statutes, even as they grow increasingly dysfunctional for their constituents.²¹⁰

Consider Congress's failure to update the environmental statutes, almost none of which have been amended for nearly three decades despite rapid changes in our understanding of environmental problems and how to deal with them.²¹¹ In a project organized by New York Law School and New York University School of Law in 2007, some fifty environmental law experts from across the ideological spectrum set out to show Congress how to update these obsolete statutes. The project's leaders—Professor Richard Stewart, former chair of the Environmental Defense Fund, his colleague on the New York University faculty, Professor Katrina Wyman, and I—summarized the results in a book, *Breaking the Logjam: Environmental Protection That Will Work*.²¹² The focus was on how to get more environmental protection at lower cost rather than how clean is clean enough. Our proposals included greater use of market-based alternatives instead of inefficient command-and-control regulation, leaving essentially local issues to state and local government, and imposing direct federal regulation of national issues such as interstate pollution.

Democrats and Republicans on Capitol Hill told us in private they wished our reforms were already in the statutes, but that Congress would not enact them because doing so would require legislators to take responsibility. So, for example, Congress did not adopt the *Breaking the Logjam* proposal to deal with the large stationary sources of interstate major pollutants by enacting a national cap-and-trade system.²¹³ That system would make it profitable to invent and use less expensive ways to cut pollution.²¹⁴ Instead, the current statute requires the EPA to tell

210. *Id.*

211. The exception is the Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601–2697 (2012 & Supp. V 2018)), which was amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016) (codified in scattered sections of 15 U.S.C. §§ 2601–2629).

212. SCHOENBROD ET AL., *LOGJAM*, *supra* note 5.

213. *See id.* at 87–94.

214. *See id.* at 88–89.

the upwind states to limit pollution sufficiently to reduce harm in downwind states.²¹⁵

This wackadoodle system serves members of Congress by interposing the EPA and state officials between them and their constituents, all while making pollution control more expensive. The current system results in more pollution that kills constituents. During the Obama Administration, the EPA calculated that the existing statute would halve ozone and particulate pollution, which are the major air pollution killers, thereby adding six months to the lifespan of the average American. A congressionally imposed national cap-and-trade system could easily halve the pollution again and, based upon the EPA's health analysis, add another three months to the average life.²¹⁶ So, the average young person will die a quarter year sooner under the current statute.

In sum, with Congress exerting power over agencies, the choice is no longer whether experts in agencies or legislators should run regulation. Rather, the choice is whether Congress shall bear responsibility for its role in regulation. By delegating the legislative power to make regulatory law, members of Congress evade responsibility for how they wield power and, as a result, wield it irresponsibly.²¹⁷

Consider how the incentives of members of Congress would change if they had to vote on regulations. They would then bear personal responsibility for the failure to deliver popular benefits and the imposition of unpopular burdens. A challenger in a future election could then blame the incumbent for inflicting bad consequences on voters. It is recorded votes on rules—not debate, sound bites, or votes for popular goals—that would make members of Congress responsible for regulations in future elections. The upshot: although the legislators themselves would spend much less time on each regulation than does the agency and voters would not read the regulations, the legisla-

215. *See id.* at 92.

216. Bill Pedersen & David Schoenbrod, *The Overwhelming Case for Clean Air Act Reform*, 43 ENV'T L. REP. 10,969, 10,969 (2013).

217. They can, however, influence regulation in other ways, such as through the power of the purse and the power to investigate, as Professor Josh Chafetz convincingly shows. *See generally* JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* (2017). Such influence can be wielded in ways that allow the legislators to escape responsibility for the hard choices.

tors would still fear the blame that they might come to bear for the consequences of their votes in the next election, or the next, or the next.

As Dean Landis wrote, his suggestion would “have the administrative as the technical agent in the initiation of rules of conduct, yet at the same time to have the legislative share in the responsibility for their adoption.”²¹⁸ Responsibility for significant regulation would better align the interests of legislators and their constituents. With legislators bearing responsibility for the consequences of regulation for constituents, more of the skill that the legislators now employ to make themselves look good would be put in service of producing regulations that better please their constituents. Agency experts would become Congress’s allies in showing how to update statutes to allow agencies to promulgate regulations that produce better consequences for constituents. In sum, the interests of the legislators and their constituents would be better aligned.

Congress will not, of course, construct a monument in memory of the 50,000 victims of its failure on lead in gasoline even though it funded a monument in memory of the like number of American service members who died in the Vietnam War. Nor will it build monuments for the millions of other victims of its shirking. The Court should start to do its job and thereby stop endorsing Congress’s pious frauds.

IV. WHAT THE COURT SHOULD DO

A. *The Court’s Job*

A book published in May 2019 by Professor Lawrence Lessig, *Fidelity & Constraint: How the Supreme Court Has Read the American Constitution*,²¹⁹ helps show how the Court could, and why it should, substantially enforce the consent-of-the-governed norm. In its almost 600 pages, the book provides a model of “the practice of the Supreme Court as it has interpreted our Constitution” that explains the work of Justices from across the ideological spectrum from the early years to modern times.²²⁰

218. LANDIS, *supra* note 158, at 76.

219. LESSIG, *supra* note 93.

220. *Id.* at 2. Professor Lessig asserts that the model describes the behavior of Justices on the Left and Right. *Id.* at 17.

The model has two parts: “fidelity to meaning,” referring to the meaning of the Constitution’s provisions, and “fidelity to role,” referring to the constraints on the enforcement of that meaning imposed by the Court’s role in a republic.²²¹ Professor Lessig writes that decisions prompted by constraints “are instances of *infidelity* (to meaning) in order to preserve or enable the capacity of the judicial institution more generally.”²²²

Professor Lessig does not himself apply this model to the consent-of-the-governed norm. Nonetheless, his analysis of fidelity to role is applicable to the impediments to that norm’s enforcement.²²³

The first impediment to full enforcement of the norm discussed in Part II is the inability of Congress to make all the federal rules of private conduct and thereby to fully conform to the original meaning of the norm. The Court requiring the impossible of Congress would jeopardize the authority of the Court.²²⁴ Originalists could avoid this impossibility by recognizing such impracticality as an impediment to judicial enforcement.²²⁵

The second impediment to enforcement discussed in Part II is the lack of a judicially manageable test. Professor Lessig states the Court bows out when it lacks a judicially manageable

221. *See id.* at 5. Fidelity to meaning asks, according to Professor Lessig, “How does a judge preserve the meaning of the Constitution’s text within the current interpretative context?” *Id.* at 16. Professor Lessig describes the process as one of “translation.” *Id.* at 49–67. He argues that both the Left and Right do it. *See id.* at 257.

222. *Id.* at 451 (emphasis added).

223. Professor Lessig does mention *Schechter* and *Panama Refining*, but does not use his model to analyze them. *See id.* at 88–89, 92–93.

224. As Justices sometimes state, “the Constitution . . . is not a suicide pact.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

225. Jurists who are not originalist could, according to Professor Lessig’s model, translate original meanings to achieve their purposes in the modern context. An example of such a translation is the power to “regulate Commerce . . . among the several States.” U.S. CONST. art. I, § 8, cl. 3. That clause was meant to limit Congress’s power, but as the amount of interstate commerce grew, the original meaning of the clause put no substantial limit on Congress’s power. The Justices, Professor Lessig concludes, came to see this “effectively unlimited power of the federal government as inconsistent with the Framers’ design. They adopted an interpretive strategy to correct for that inconsistency—translation.” LESSIG, *supra* note 93, at 92. Similarly, a jurist who embraced Professor Lessig’s concept of translation might read the consent-of-the-governed norm to have made Congress responsible in a way thought feasible in early times. In our more complicated times, such a jurist could then translate the norm to mean that Congress must make itself responsible to a practical extent.

test because otherwise it would seem to be acting politically, thereby jeopardizing its credibility as a judicial institution.²²⁶ The state-the-rule definition of the norm is judicially manageable because it rides on a difference of kind (lawmaking versus law interpretation and application), but the “intelligible principle” test is not.²²⁷ The question is whether the Justices can come up with a judicially manageable way to deal with the first impediment. The answer will be discussed in Part IV.B.

The third impediment discussed in Part II is strong public opinion in favor of delegation. As was shown, there is no such strong opinion now. When overwhelming political opposition does exist, however, it is another constraint, according to Professor Lessig.²²⁸ That the Court would back down in the face of political opposition may seem strange given that the Constitution is supposedly counter-majoritarian. That is why Professor Lessig notes, “It is in [the nature of this constraint] that its nature cannot be announced.”²²⁹

Professor Lessig goes on to state that because political opposition sufficient to make the Court suppress the meaning of the Constitution “was a kind of *force majeure*, then it follows that when the force is removed, the obligation to return to the Constitution’s . . . meaning returns as well.”²³⁰

The fourth impediment to enforcement of the consent-of-the-governed norm discussed in Part II is reliance on Congress’s ability to delegate. The four impediments are related. The judicially unmanageable “intelligible principle” test was adopted as a way of avoiding giving Congress an impossible task, and in turn, it built reliance on the current regulatory system. The Court’s attempt to enforce the norm without showing how to cope with that reliance could then result in overwhelming political opposition.

226. See LESSIG, *supra* note 93, at 42. Thus, the Court cannot seem to be acting politically rather than judicially. *Id.* at 154–57.

227. David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224 (1985).

228. See LESSIG, *supra* note 93, at 450.

229. *Id.* at 452.

230. *Id.* at 431. Professor Lessig cites other examples. See *id.* at 85–90, 357–63.

Professor Lessig shows that the Court has repeatedly adopted new ways to better enforce constitutional norms.²³¹ As he argues, “[W]hat a court needs when it recognizes failure is the freedom to try again: ‘Our aim is to preserve X. We have tried techniques A and B; they’ve proven too costly. We’ll now try C.’”²³² To enforce the consent-of-the-governed norm, the Court needs a judicially manageable test with which Congress could comply and a way to take account of reliance on the current regulatory system.

Searching for such a test is the Court’s job. The search can succeed.

B. *How the Court Could Do Its Job*

The design of such a test, and the choice of how Congress would comply with it, will have policy implications. To avoid intruding into policy more than necessary to enforce constitutional norms, courts often try to get political branches to tackle such policy choices in a way that is consistent with the norms before themselves taking more intrusive action.²³³ So, in cases where legislative districting violates the one-person, one-vote norm, courts give the state legislature an opportunity to reapportion the districts—a decision with profound effects on who gets elected—in a way that complies with the Constitution. As the Court stated in *Reynolds v. Sims*,²³⁴ “[J]udicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.”²³⁵

231. See, e.g., *id.* at 172 (“If [Justice] Jackson’s view was that the Court couldn’t enforce the limits of the Constitution because he couldn’t craft a judicially administrable rule, that left open the possibility that other, more creative, justices could do so later.”); *id.* at 192–94 (discussing the opinion by Chief Justice Roberts concluding that the Affordable Care Act exceeded Congress’s commerce power but upholding it under the taxing power); *id.* at 196–204 (discussing the doctrine of state and federal immunity and the process of translation in the Court’s analysis despite political pressures).

232. *Id.* at 269.

233. See generally ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003). We showed that courts can prompt a political branch to tackle a question of policy in a way that respects consent of the governed. See *id.* at 193–222.

234. 377 U.S. 533 (1964).

235. *Id.* at 586.

The upshot from giving elected officials a chance can be, if all goes well, a division of labor in which the elected officials make most of the policy choices and the judges stick largely to enforcing rights. This approach might help the Court get Congress to take substantial responsibility for regulation even though the legislature in this matter sits high on Capitol Hill and prefers to avoid responsibility. One reason is that, as shown in Part II.A, the Court would have an ally that is even more powerful than Congress: public opinion.

Calling upon elected officials to help decide how, but not whether, to remedy the most significant violations of the consent-of-the-governed norm is better than starting by rolling out the guillotine to kill some statute found to violate the norm. The call should make the following points:

- (1) Members of Congress, having sworn to uphold the Constitution, are duty bound to bring themselves into compliance with the consent-of-the-governed norm to the extent practical;
- (2) It would be practical for them at the very least to vote on the regulations deemed significant under the longstanding executive order;
- (3) The process through which Congress organizes itself to cast such votes is up to Congress, but one option is the Landis-Breyer proposal;
- (4) That process must, however, comply with Article I, including its requirement that “the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal;”²³⁶ and

236. U.S. CONST. art. I, § 5, cl. 3. Compliance with the Journal Clause is vital to make members of Congress personally responsible for the exercise of legislative powers. See *Field v. Clark*, 143 U.S. 649, 670–71 (1892). Such responsibility is in turn vital to achieve the key purposes of Article I, including consent of the governed. *Field v. Clark* goes on to state in dicta that the Court has a duty “to give full effect to the provisions of the Constitution relating to the enactment of laws.” *Id.* at 670. The Court fulfilled that duty in *INS v. Chadha*, 462 U.S. 919 (1983), and *Clinton v. City of New York*, 524 U.S. 417 (1998). In those two cases, the Court insisted that Congress must comply with the Article I legislative process in exercising legislative powers. *Clinton*, 524 U.S. at 438–39; *Chadha*, 462 U.S. at 945. There is no denying that a vote to comply with the consent-of-the-governed norm is the exercise of a legislative power or that the Journal Clause is part of the Article I legislative process. Although *Chadha* and *Clinton* dealt with departures from Article I, Section 7 and the Journal Clause invoked here is in Section 5, that is a distinction without a

- (5) If the Court finds that Congress has failed to do its duty by a date certain, the courts, also duty bound to enforce the Constitution, will act. Such action would be to strike any new rule of private conduct brought before the Court whose promulgation by an agency has not been approved through the Article I legislative process, unless the government shows that the rule is not significant.

Optimally, but not necessarily, the Court would issue the call to Congress in a case that does not directly threaten the reliance interest in delegations to expert agencies. *Chadha* or *Clinton* suggest the kind of case I have in mind. Both involved statutes that, as I have argued, could be described as delegating legislative power but not to an expert agency.²³⁷ Other such cases could come along, as suggested by President Trump's supposed order to American companies to stop doing business in China.²³⁸

If Congress does not respond to the call by the date certain, the Court would replace the judicially unmanageable "intelligible principle" test with one geared to whether the regulation is significant. A test based upon the significance of each rule has a strong foundation in precedent. As already noted, the Court in its 1825 decision in *Wayman v. Southard* stated that Congress may delegate power to issue "minor regulations."²³⁹ This language in *Wayman* does not appear in Justice Gorsuch's dissent in *Gundy*.²⁴⁰

difference. Section 7 also contains a separate Journal Clause applicable to votes to override a presidential veto. U.S. CONST. art. I, § 7, cl. 2. Both Journal Clauses require recording "the yeas and nays" in matters arousing important disagreement. *Id.*; U.S. CONST. art. I, § 5, cl. 3.

The House of Representatives now uses an electronic method to record "the yeas and nays" without the time-consuming process of calling each legislator by name. If, however, there is some practical impediment to comply with the yeas and nays requirement of Article I, Section 5 in every context, Congress can clearly comply with it in implementing a process like the Landis-Breyer proposal because Congress can limit its application to significant regulations and bar amendments. Thus, the requirement is a constitutional norm the courts can enforce in the context of enforcing substantial compliance with the consent-of-the-governed norm.

237. See *supra* Part.II.A.

238. See Keith Bradsher & Alan Rappeport, *Trump Ordered U.S. Companies to Leave China. Is That Possible?*, N.Y. TIMES (Aug. 24, 2019), <https://www.nytimes.com/2019/08/24/business/trump-china-trade.html> [<https://nyti.ms/2zjvTvA>].

239. 23 U.S. (10 Wheat.) 1, 45 (1825).

240. See *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting).

To define significant regulations in modern circumstances, the Court could rely upon the definition of “significant regulatory action” in the executive order that has been in force for more than a quarter century under two Democratic and two Republican Presidents.²⁴¹ In particular, the Court could rely upon the first part of the executive order’s definition that defines significant regulations as having an “annual effect on the economy of \$100 million or more.”²⁴² So, a regulation would be deemed significant if it increased *or* decreased costs by such amount. The \$100 million test does not, of course, appear in the Constitution, but the Court regularly adopts bright-line tests to make judicially manageable enforcement of norms that the Constitution states in amorphous terms.²⁴³ The Court, however, would not need to adopt such a test if Congress itself adopts a definition that is at least as inclusive. And, even if Congress fails to so do and the Court adopts the \$100 million definition,

241. Exec. Order No. 12,866, § 3(f), 3 C.F.R. 638, 641–42 (1994), *reprinted as amended in* 5 U.S.C. § 601 note (2012).

242. *Id.* § 3(f)(1).

243. Here are some examples. Faced with enforcing the constitutional provision that requires the President to get the consent of the Senate for important appointments except “during the Recess of the Senate” but does not define “recess,” U.S. CONST. art. II, § 2, cl. 3, the Court decided that Senate confirmation is presumptively needed if it is out of session for less than ten days. *NLRB v. Canning*, 573 U.S. 513, 538 (2014). Faced with enforcing the Equal Protection Clause’s requirement that both houses of the state legislature must be apportioned based on population, U.S. CONST. amend. XIV, § 1, but acknowledging that some deviations from population equality may be necessary, the Court decided that population deviations of 10 percent or less were insufficient to make a *prima facie* case of invidious discrimination. *Brown v. Thomson*, 462 U.S. 835, 842 (1983). Faced with enforcing the Sixth Amendment’s right to a jury trial without defining the size of that jury, U.S. CONST. amend. VI, the Court decided that a jury with less than six members would impair the purpose and function of the jury. *Ballew v. Georgia*, 435 U.S. 223, 239 (1978). Faced with enforcing the constitutional provision requiring probable cause for searches and seizures without defining a timeline for providing probable cause, U.S. CONST. amend. IV, the Court decided that determination of probable cause within 48 hours of arrest will as a general matter comply with the promptness requirement of the Fourth Amendment. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). The Court also deals with amorphous constitutional norms by adopting bright-line tests that are not numerical. *See, e.g., Michigan v. Jackson*, 475 U.S. 625, 636 (1986) (holding that police cannot initiate an interrogation after a defendant has requested counsel), *rev’d by* *Montejo v. Louisiana*, 556 U.S. 778 (2009); *Michigan v. Summers*, 452 U.S. 692, 699–701, 704–05 (1981) (finding an exception to the Fourth Amendment’s probable cause requirement for temporary detentions when there is a warrant to search a house for drugs).

Congress could supplant it later by adopting a definition that is at least as inclusive.

The executive order's definition goes on to include additional grounds for finding a regulation significant.²⁴⁴ These additional grounds are, however, amorphous and so would raise problems of judicial manageability. The Court should leave these additional grounds out of its own test of significance. Congress could, however, include them in any statute it passes in response to the Court's call for action or later.

Professors Steven Calabresi and Gary Lawson have also suggested a test based upon the \$100 million figure in the executive order.²⁴⁵ They helpfully point out that although this "line is concededly arbitrary . . . it is not obvious to us why an under-inclusive arbitrary line is worse than no line at all."²⁴⁶

Unlike the "intelligible principle" test, the \$100 million test would be judicially manageable. "Intelligible principle" is unmanageable because it looks to how much the statute says about the goals that the agency must pursue. With statutes calling for agencies to pursue a wide variety of goals—such as protecting health, stopping unfair trade practices, or preventing discrimination—rank ordering how much the statutes say about goals would be like comparing the proverbial apples and oranges. Nor is there any objective scale on which to set a cut-off as to how much intelligibility is enough.²⁴⁷

In contrast, the \$100 million test does provide an objective scale. Of course, determining the economic impact of a regulation does involve estimating, but the courts could put the burden on the agency to show that its regulation has an impact

244. The definition goes on to include regulatory actions that "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." Exec. Order No. 12,866, § 3(f)(1), 3 C.F.R. at 641. It would be consistent with the consent-of-the-governed norm if the President amended the definition to, say, define as significant regulations with annual benefits of \$100 million or more or adjusted the \$100 million cut-off to take account of inflation.

245. Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 856–57 (2018).

246. *Id.* at 857.

247. See Schoenbrod, *supra* note 227, at 1231, *cited with approval* in *Gundy v. United States*, 139 S. Ct. 2116, 2140 n.62 (2019) (Gorsuch, J., dissenting); *see also* *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 79 (2015) (Thomas, J., concurring in the judgment); *Printz v. United States*, 521 U.S. 898, 927 (1997).

that is below the benchmark. Reviewing such a showing is standard judicial work. Alternatively, Congress could assign the estimation job to the Congressional Budget Office.²⁴⁸

The new test would be judicially manageable even under the strict concept of manageability the majority in *Rucho v. Common Cause*²⁴⁹ used to find that the courts could not judge claims of unfair partisan gerrymandering.²⁵⁰ The majority found that claims of political gerrymandering “have proved far more difficult to adjudicate” than those claiming violations of the one-person, one-vote rule.²⁵¹ “The basic reason is that, although it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, ‘a jurisdiction may engage in [some] constitutional political gerrymandering.’”²⁵² In contrast, the original meaning of the consent-of-the-governed norm is every bit as absolute as that of the one-person, one-vote norm.

There are, however, impediments to complete judicial enforcement of both the one-person, one-vote norm and the consent-of-the-governed norm as originally defined. With one-person, one-vote, the impediment is that the state has a legitimate interest in matters other than complete equality in the populations of legislative districts. One such interest is making legislative boundaries correspond to municipal boundaries. So, courts presumptively uphold the districting if the deviations among the populations of districts do not exceed ten percent.²⁵³ With

248. Calabresi & Lawson, *supra* note 245, at 856 n.163.

249. 139 S. Ct. 2484 (2019).

250. *See id.* at 2500–02.

251. *Id.* at 2497.

252. *Id.* (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)).

253. *See Brown v. Thomson*, 462 U.S. 835, 842–43 (1983); *see also Reynolds v. Sims*, 377 U.S. 533, 566 (1964); SANDRA M. STEVENSON & WENDY VAN WIE, 6 ANTI-ETEAU ON LOCAL GOVERNMENT LAW § 86.04(2) (2d ed. 2019); John P. Ludington, Annotation, *Constitutionality of Legislative Apportionment: Supreme Court Cases*, 77 L. ED. 2d 1496 (2012).

The *Rucho* majority goes on to argue that:

Even if we were to accept the dissent’s proposed baseline, it would return us to “the original unanswerable question (How much political motivation and effect is too much?).” Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? . . . The dissent argues that there are other instances in law where matters of degree are left to the courts. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion.

the original meaning of the consent-of-the-governed norm, one impediment is Congress cannot enact all the rules, as discussed in Part II.

With the one-person, one-vote norm, the impediment to complete judicial enforcement—other legitimate state interests—guides how much deviation from equality to allow. With the consent-of-the-governed norm, the impediment to judicial enforcement—legislative practicality—could guide the choice of a cutoff on the significance of regulations.

Although deciding how best to circumvent the impediments to enforcement of the consent-of-the-norm would require the exercise of some discretion, requiring Congress to vote on significant regulations would circumvent the biggest embarrassment that would result from instructing the lower courts to distinguish between “important subjects which must be entirely regulated by the legislature itself,” and “those of less interest, in which a general provision may be made, and power given to those who are to act . . . to fill up the details.”²⁵⁴ The courts would not be seen to be picking and choosing among regulatory statutes or agency actions. Rather, the norm would apply to all new regulations with an annual effect on the economy of \$100 million or more under all statutes, whether they increase or decrease regulatory protection.

That Congress should vote on all significant regulations already has a certain bipartisan pedigree. As already noted, it came from a leading New Dealer (Dean Landis) and was elaborated by a Supreme Court Justice who is an expert in regulation and was appointed by a Democratic President (Justice Breyer). Subsequently, Republican legislators in the House have repeatedly passed the REINS bill, which incorporates a version of the Landis-Breyer proposal. Yet, as shown in Part III.C, both parties in Congress have worked to avoid subjecting their members to the responsibility the Landis-Breyer approach would impose.

Rolling out the guillotine would be easier after having called upon Congress to address the problem and when single regulations, rather than entire statutes, are to be struck. Previously

Rucho, 139 S. Ct. at 2505 (citations omitted). In contrast, the Court found that there would be conflicting concepts of what constitutes reasonable fairness in legislative districting. *See id.* at 2504–07.

254. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

having discussed the norm and Congress's failure to adhere to it to the extent practical, the Court's constitutional intervention would not come as surprise. Moreover, the Court will have made clear it prefers Congress to make the policy judgments needed to comply with the norm. Indeed, even if Congress initially fails to decide how it will bear responsibility and the Court holds that it will strike significant regulations Congress has not approved, Congress could come up with an alternative way of taking responsibility. Professor Lessig argues that the Court can allow such leeway.²⁵⁵

Congress might respond constructively to a call from the Court to honor the consent-of-the-governed norm despite the credit-claiming, blame-shifting advantage its members now reap from delegation. The call would highlight the clash between their current behavior and, as discussed in Part II.A, the public's overwhelming desire for a government based upon a consent of the governed and, in particular, for a Congress that takes responsibility for policy. As such, failure of the lawmakers in Congress to take responsibility for the laws would bring blame. Still more blame would come from failing to adopt reforms that would remove the cloud of uncertainty as to the validity of existing regulations. If Congress fails to remove that cloud, the Court would have strong justification for itself deciding not to apply the new test to old regulations.²⁵⁶

255. Professor Lessig argues that courts should accede to a legislature's way of complying with the meaning of the Constitution "where the legislature has done the important work of translation itself." LESSIG, *supra* note 93, at 272.

256. The Court could avoid applying the new test to old regulations despite the statement in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), that:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . . [W]e now prohibit the erection of selective temporal barriers to the application of federal law in non-criminal cases.

Id. at 97. Yet, as previously described in Part III.C, applying a new and stronger test of the consent-of-the-governed norm to old regulations would cause great pain given the ensuing uncertainty about the validity of the huge volume of old regulations. Fortunately, however, *Harper* should not control here because the reasons the Court gave in that case either do not apply here or do so very weakly, especially given that *Harper* itself announced its own, new judicially created retroactivity rule. What the Court did there in one direction, it can do again in another direction on another quite distinct issue. One reason offered in Justice Thomas's opinion for the Court in *Harper* is that the judicial function "strips us of the quin-

Moreover, both businesses and advocates of strong regulation would rankle at agencies being unable to change regulations. Incumbents could take credit now for enacting the reform, and responsibility for the hard choices on regulation could be postponed until after the next election. That responsibility would apply to both parties whereas now either party in Congress that unilaterally gives up the credit-claiming, blame-shifting advantages of delegation would put itself at an electoral disadvantage. Finally, a Congress whose approval ratings have dipped as low as the single digits in recent years lacks the credibility with the public to put up much of a fight.²⁵⁷ Moreover, a failure by Congress to respond constructively would legitimate more intrusive judicial action.

Eventual success in getting Congress to take responsibility for significant new rules would tend to reduce the impediments to the Court enforcing the norm and enable it to require Congress to begin gradually to take responsibility for the most important old rules. Moreover, as Christopher DeMuth has

tessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit." *Id.* at 95 (alteration in original) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)). This point is too broad because, as Justice Scalia recognized, "[A] certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action . . ." *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting). Another reason offered in Justice Thomas's opinion is that "selective application of new rules violates the principle of treating similarly situated [parties] the same." *Harper*, 509 U.S. at 95 (alteration in original) (quoting *Griffith*, 479 U.S. at 323) (internal quotation marks omitted). Yet applying the consent-of-the-governed norm retroactively would, given the ensuing uncertainty and upset, harm just about everyone. Moreover, the parties subject to the old regulations did not rely upon the Court applying the new test of the norm to old regulations and so have no reliance interest in the courts' doing so. Finally, Justice Scalia's concurring opinion in *Harper* offers an additional reason for retrospectivity: "Prospective decisionmaking is the handmaid of judicial activism . . ." *Id.* at 105 (Scalia, J., concurring). The Court's earlier carving of a giant exception to the consent-of-the-governed norm constitutes massive judicial activism. In sum, if need be, a strong case can be made that the rule in *Harper* should not apply in the consent-of-the-governed norm's application to old regulations.

257. *Americans' Approval of Congress Drops to Single Digits*, N.Y. TIMES (Oct. 25, 2011), https://archive.nytimes.com/www.nytimes.com/interactive/2011/10/25/us/politics/approval-of-congress-drops-to-single-digits.html?_r=0 [<https://perma.cc/5TL8-8BP8>]. Recent Gallup polls found that voters approved of how the Supreme Court does its job by a margin of 54 to 42 percent but disapprove of how Congress does its job by margin of 68 to 27 percent. Gallup Poll, *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/VQ5H-TLX6>] (last visited Jan. 3, 2020); *Congress and the Public*, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/KH5T-ND69>] (last visited Jan. 3, 2020).

suggested, a President who wants Congress to take responsibility for regulation has diverse means to force Congress to do so.²⁵⁸

V. FAR-FETCHED RATIONALES FOR IGNORING THE NORM

A. *The Constitution Permits Congress to Leave Lawmaking to Agencies*

Professors Eric Posner and Adrian Vermeule contend that “a statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power” and that no authority to the contrary appears until the late 1800s.²⁵⁹ For example, they argue that Locke’s statement that a legislature may not delegate its legislative powers “is fully consistent” with their position that Congress may pass statutes that authorize the executive branch to make law but may not authorize it to pass statutes.²⁶⁰

Professors Posner and Vermeule’s article reveals the weakness of their argument by failing to even mention, let alone trying to distinguish, *Federalist No. 75*, *Fletcher v. Peck*, or *Gibbons v. Ogden*.²⁶¹ The article also reveals its weakness by contending

258. Christopher DeMuth, Presidential Reform of the Regulatory State 18 (Feb. 2019) (unpublished manuscript), <https://ccdemuth.com/wp-content/uploads/2019/05/Presidential-Reform-of-the-Regulatory-State.pdf> [<https://perma.cc/P34Z-Q3TG>].

259. Posner & Vermeule, *supra* note 26, at 1721–22.

260. *Id.* at 1727. Similarly, Professor Cynthia Farina argues that, because the President can delegate, so can Congress. Cynthia R. Farina, *Deconstructing Non-delegation*, 33 HARV. J.L. & PUB. POL’Y 87, 90–93 (2010). For a rousing rebuttal, see Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL’Y 147, 178–81 (2017).

261. Professors Posner and Vermeule do discuss *Brig Aurora* but, in quoting it, omit the language that indicates the Court upheld the statute on the basis that it gave the President the power to apply a rule by finding “the occurrence of any subsequent combination of events” rather than to proclaim a rule. Posner & Vermeule, *supra* note 26, at 1737–38. In particular, they omit the sentence that suggests that the President’s job was to find facts rather than make law: “The 19th section of that act declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation, without limitation upon the occurrence of any subsequent combination of events.” *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813). They may have missed the importance of this language because they looked for evidence of the “intelligible principle” in *Wayman v. Southard* and unsurprisingly not finding it, conclude the Court displayed no definitive signs of a concern with delegation until late 1892. Posner & Vermeule, *supra* note 26, at 1722, 1738–39.

Professor Jerry Mashaw objects to characterizing the President’s role as one of rule application. “The Court’s description of the President’s role, which involved

that its argument is consistent with “[t]he Framers’ principal concern [of] legislative aggrandizement—the legislative seizure of powers belonging to other institutions.”²⁶² That leaves out a concern that is at least as fundamental to the Framers—consent of the governed. As Justice Kagan recently wrote, “If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign.”²⁶³ Yet, Professors Posner and Vermeule do not even mention *Federalist No. 51* and its position that, to repeat, “[a] dependence on the people is, no doubt, the primary control on the government.”²⁶⁴

B. *Even Early Congresses Ignored the Norm*

Professor Jerry Mashaw contends that, whatever the people were told about consent of the governed in the late 1700s, early elected officials never felt obliged to comply with any such norm.²⁶⁵ He writes, “From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking.”²⁶⁶

He goes on to state that “any claim that early Congresses declined to delegate broad authority to others must . . . conjure with the First Bank of the United States. The Bank’s function, in effect if not in form, was essentially that now served by the

delicate diplomatic negotiations, complex bilateral understandings, and uncertain compliance, was surely a model of understatement concerning the presidential discretion effectively conferred on him to find a fact.” JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 99 (2012). Yes, the President got to set the strategy to get other nations to respect American neutrality, but the President’s job with respect to the rule enforced in *Brig Aurora* was far simpler: to find whether other nations were respecting American neutrality.

262. Posner & Vermeule, *supra* note 26, at 1733.

263. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2511 (2019) (Kagan, J., dissenting).

264. THE FEDERALIST NO. 51, *supra* note 4, at 319 (James Madison).

265. MASHAW, *supra* note 261, at 25. Though disagreeing with this argument, I nonetheless admire his book for showing that the early federal government had a larger administrative apparatus than previously understood and that the separations among the legislative, executive, and judicial branches were far from neat.

266. *Id.* at 5. Professors Posner and Vermeule make a similar argument, but I will focus on Professor Mashaw’s version because it is more detailed and was written more recently. See Posner & Vermeule, *supra* note 26, at 1732–41.

Federal Reserve Board in regulating the money supply.”²⁶⁷ Professor Mashaw’s example makes it seem that Congress granted the First Bank legislative power because the Federal Reserve does now impose rules regulating how much banks can lend in order, in part, to control the money supply.²⁶⁸ Yet, the law establishing the First Bank did not give it the power to regulate other banks.²⁶⁹ It did affect the money supply, but by deciding how much money *it* would lend. Congress could have taken that decision away from the First Bank but leaving it with First Bank was not a delegation of legislative power.

In this example and many others, Professor Mashaw fails to demonstrate that the early Congresses systematically delegated their power to make the rules of private conduct because he conflates (1) Congress ceding legislative powers which it alone was supposed to exercise (such as making the rules of private conduct) with (2) Congress letting others make decisions that Congress itself need not make but could and sometimes did (such as allowing a bank to decide how much money it would lend). The two are distinct, as Dean Ronald Cass shows.²⁷⁰ Yet, Professor Mashaw applies the word “delegate” to both. That is semantically correct but is nonetheless confusing because only the first violates the norm that Article I establishes.²⁷¹

In his extended analysis of Professor Mashaw’s book, Professor Joseph Postell shows that early Congresses “largely refrained” from delegating legislative powers to administrators and did so because of their commitment to the constitutional principle of nondelegation.²⁷² There were some temporary deviations in which Congress granted lawmaking powers to administrators, most notably the infamous Embargo of 1807 to 1809.²⁷³ Professor Mashaw writes that the embargo statutes “featured stunning

267. MASHAW, *supra* note 261, at 47.

268. 12 U.S.C. § 84 (2012).

269. An Act to incorporate the subscribers to the Bank of the United States, ch. 10, 1 Stat. 191 (1791).

270. Cass, *supra* note 260, at 155–58. The distinction appears in *Wayman v. Southard*. 23 U.S. (10 Wheat.) 1, 42–43 (1825).

271. Many of Professor Mashaw’s examples of Congress delegating are of its letting others do what Congress itself did not have to do. *See, e.g.,* MASHAW, *supra* note 261, at 46 (granting the President the power to decide how to distribute congressional appropriated funds to veterans).

272. POSTELL, *supra* note 24, at 78.

273. MASHAW, *supra* note 261, at 91–118.

delegations of discretionary authority both to the President and lower-level officials,” and therefore it “has much to teach us about early understandings of the nondelegation doctrine.”²⁷⁴

This embargo that began in 1807—the one in *Brig Aurora*²⁷⁵ arose under later legislation—was, as Professor Mashaw helpfully explains, borne out of desperation.²⁷⁶ In the course of a war with each other, Britain and France seized American merchant ships and kidnapped their crews.²⁷⁷ These were acts of war against the United States, which was neutral in the conflict, but American officials were afraid of responding militarily against great powers.²⁷⁸ As an alternative, President Thomas Jefferson recommended keeping American ships at home and depriving Britain and France of American exports.²⁷⁹ He asked Congress to authorize such action and it did so.²⁸⁰

It is, however, wrong to conclude that the Embargo of 1807 to 1809 signifies acceptance of delegation.²⁸¹ The statute generated protest in Congress that led ultimately to cutting back the President’s power.²⁸² As Professor Postell sums up, “[T]he embargo was a temporary deviation from the typical policy decisions of the early republic, one that that was nearly universally acknowledged as a colossal failure, and thus is of very limited value as an indication of what early American politicians regarded as legitimate.”²⁸³ It certainly was not an example of the congressional buck passing that drives so much delegation today. Indeed, the embargo brought blame.

Another example that Professor Mashaw highlights is how Congress responded to the dangers of a new technology, steamboats.²⁸⁴ The boilers of early steamboats tended to explode

274. *Id.* at 90.

275. *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813).

276. MASHAW, *supra* note 261, at 91–92.

277. *Id.* at 91.

278. *Id.* at 91–92.

279. *Id.* at 92.

280. *Id.* at 92–93.

281. Professor Philip Hamburger argues the legislation might be seen as giving the President the power to determine facts that would trigger the applicability of law rather than to make law. PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 107–10 (2014).

282. MASHAW, *supra* note 261, at 96.

283. POSTELL, *supra* note 24, at 78.

284. MASHAW, *supra* note 261, at 187–208.

with fatal consequences.²⁸⁵ Congress passed the Steamboat Act of 1852, which Professor Mashaw cites as an instance of early Congresses freely delegating the power to make rules of private conduct.²⁸⁶ It was not such an early Congress, coming as it did six decades after the ratification of the Constitution, and not much of an example at that. The statute, as he describes it, used “administrative rulemaking as a principal technique for articulating regulatory standards.”²⁸⁷ Yet, Professor Postell finds only two sections of the statute where “[t]he supervising inspectors were given rulemaking power.”²⁸⁸ One called for the inspectors, as the statute put it, to make rules “for their own conduct” and that of the inspectors working under them.²⁸⁹ This power, Professor Postell aptly argues, was not to make rules governing private conduct, but rather to govern official conduct and so did not violate the consent-of-the-governed norm.²⁹⁰

The other provision called for the inspectors to make rules for ships passing each other.²⁹¹ The genesis of this provision suggests no comfort with Congress empowering others to make rules of private conduct. As Professor Postell recounts, the bill, as originally introduced, contained a section with detailed rules on this subject based upon traditional practices.²⁹² Legislators objected because they did not understand the section and particularly how these practices, which varied with whether a ship was going upstream or downstream, applied when tides reverse the direction of the water’s flow, as can happen far inland in some rivers.²⁹³ At the end of the legislative process in the House, the House passed a bill which included 150 amendments, one of which gave the inspectors broad rule-making authority over ships passing each other.²⁹⁴ The Senate

285. *Id.* at 188.

286. *Id.* at 192.

287. *Id.* at 152.

288. POSTELL, *supra* note 24, at 98.

289. Act of August 30, 1852, ch. 106, § 18, 10 Stat. 61, 70.

290. POSTELL, *supra* note 24, at 98–99.

291. Ch. 106, § 29, 10 Stat. 61 at 72.

292. POSTELL, *supra* note 24, at 99.

293. *Id.* at 100.

294. *Id.*

acceded because it was left with the choice of the House bill or no bill at all dealing with the deaths from steamboat explosions.²⁹⁵

The original language suggests members of Congress expected to state the rules themselves. The great bulk of the bill showed them doing so. It is often highly specific, containing detailed rules on a wide range of issues bearing on steamboat safety, from availability of lifeboats and firefighting equipment to the pressure in boilers, and much more.²⁹⁶ Here is one example:

That every vessel so propelled by steam, and carrying passengers, shall have not less than three double-acting forcing pumps, with chamber at least four inches in diameter, two to be worked by hand and one by steam, if steam can be employed, otherwise by hand; one whereof shall be placed near the stern, one near the stem, and one amidship; each having a suitable, well-fitted hose, of at least two thirds the length of the vessel, kept at all times in perfect order and ready for immediate use; each of which pumps shall also be supplied with water by a pipe connected therewith, and passing through the side of the vessel, so low as to be at all times in the water when she is afloat: *Provided*, That, in steamers not exceeding two hundred tons measurement, two of said pumps may be dispensed with; and in steamers of over two hundred tons, and not exceeding five hundred tons measurement, one of said pumps may be dispensed with.²⁹⁷

Such detailed provisions are more like a regulation that a modern agency would put in the Code of Federal Regulations than an enabling statute that a modern Congress would put in the United States Code. Yet, Professor Mashaw compares the 1852 statute with modern statutes creating “the Occupational Safety and Health Administration, the National Highway Traffic Safety Administration, the Consumer Product Safety Commission, and the Environmental Protection Agency in the 1960s and early 1970s.”²⁹⁸

Professor Mashaw dismisses the specifics in the statute by stating that the steamboat inspectors had “considerable discretion.”²⁹⁹ The statute did leave some room for judgment calls, as

295. *Id.*

296. *Id.* at 101.

297. Ch. 106, § 3, 10 Stat. 61 at 62.

298. MASHAW, *supra* note 261, at 21.

299. *Id.* at 192.

in the phrase “a suitable, well-fitted hose” in the section quoted at length above. Yet, the inspectors, who were expected to come from the steamboat business, could base their determinations on their knowledge of practices in their line of work,³⁰⁰ much as common law juries in that era would base their judgments about reasonable care on practices in their own communities. Thus, the judgments left to the inspectors could be of rule application rather than rulemaking. Alternatively, these judgments would be considered as rulemaking of the “fill up the details” variety. Either way, the legislators had taken responsibility for the politically salient choices. It was nothing like modern statutes in which members of Congress grant legislative powers to avoid personal responsibility for the laws.³⁰¹

In sum, for many decades after the ratification of the Constitution, members of Congress tried to make the rules of private conduct themselves, but sometimes fell short. As Professor Daniel Walker Howe chronicles, legislators in the early decades took positions on the hard choices.³⁰² In contrast, as Part III.D shows, modern Congresses issue detailed instructions but still manage to skirt the hard choices.

C. *The Court Enforced the Norm in Only One Year of Hundreds*

Referring to *Panama Refining* and *Schechter Poultry* striking down provisions of the National Industrial Recovery Act in 1935, Professor Cass Sunstein quipped that the constitutional bar on Congress delegating legislative power has “had one good year and 211 bad ones (and counting).”³⁰³ Yet, as Professor Mark Tushnet recently blogged, “It’s not true,” citing *Carter* in 1936.³⁰⁴ I have cited other examples: *Knickerbocker Ice* in 1920, *L. Cohen Grocery Store* in 1921, and *Washington* in 1924.³⁰⁵ One could also arguably cite *Clinton* in 1998 and *Chadha* in 1983, es-

300. *Id.* at 195.

301. SCHOENBROD, *supra* note 15, at 70–74.

302. DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 125–63, 272–73 (2007); *cf.* WIEBE, *supra* note 59, at 21.

303. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

304. Mark Tushnet, *The Nondelegation Doctrine—Correcting a Common Error*, BALKINIZATION (Dec. 22, 2018, 11:22 PM), <https://balkin.blogspot.com/2018/12/the-nondelegation-doctrine-correcting.html> [<https://perma.cc/8SME-883T>] (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)).

305. *See supra* Part II.A.

pecially in light of the gloss put on it by *Loving*.³⁰⁶ Indeed, Justice Gorsuch's dissent in *Gundy* cites these cases along with the void for vagueness cases and other cases to show the Court has taken the norm seriously.³⁰⁷ More importantly, Congress substantially honored the norm well into the 1800s.³⁰⁸ *Brig Aurora* and *Wayman* upheld challenged statutes on reasonable grounds. That the cases were brought suggests litigants were willing to raise delegation arguments. That more cases were not brought suggests there was not much worth challenging.

D. *The Constitution Was Amended to Eliminate the Norm*

Professor Ackerman argues that the decisive reelections of President Roosevelt after his confrontation with the Court was a "constitutional moment" that amended the Constitution to allow Congress to delegate its legislative powers.³⁰⁹ In contrast, Professor William Leuchtenburg concludes that whatever else the voters might have been doing in 1936, they were not consciously amending the Constitution.³¹⁰ The public did not think of itself as amending the Constitution at the time, and the Court has not so regarded it since.³¹¹

More fundamentally, the Constitution is not just an agreement on how government should work in response to the will of the

306. *See id.*

307. *Gundy v. United States*, 139 S. Ct. 2116, 2141–43 (2019) (Gorsuch, J., dissenting). Indeed, these cases tend to undercut the Court's rationale that Congress does not delegate legislative power when it states an intelligible principle. Similarly, as Professor David Strauss argues, cases before *Brown v. Board of Education*, 347 U.S. 483 (1954), tended to undercut the "separate but equal" logic of *Plessy v. Ferguson*, 163 U.S. 537 (1896). DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 90–92 (Geoffrey R. Stone ed., 2010). Professor Strauss states, "[T]he Court in *Brown* was taking one further step in a well-established progression." *Id.* at 92.

308. *See supra* Part II.A.

309. 1 ACKERMAN, *supra* note 96, at 306–11; Ackerman, *supra* note 96, at 1053–57, 1070–71; *see also* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 432 n.40, 447–48 (1987) (arguing that the New Deal amended the Constitution to allow delegation). *But see*, Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893, 924–33 (1990) (rejecting Professor Ackerman's theory).

310. William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2077, 2111 (1999).

311. *Id.*; *see also* LESSIG, *supra* note 93, at 440 (stating in reference to Professor Ackerman's theory, that "it is not obvious that it was a will to amend"). Also, as Professor Lessig argues, "The problem for Ackerman's account . . . is that the Court has repeatedly tried to reset the balance that was itself reset in 1937–1942." *Id.* at 430.

governed, but it is also an agreement on how the Constitution can be amended in response to the will of the governed. The Constitution, of course, includes an explicit, formal process for its amendment.³¹² Although there is something to be said for substance over form, form does have its uses. A formal amendment would have had to make clear whether the electorate opposed a procedural requirement that Congress take responsibility, or rather that it cared more about President Roosevelt's policy objectives, whether any such change was meant to be permanent or only for the duration of the emergencies of the Great Depression and World War II, and whether the amendment permitted only the broad ("here's a problem, fix it") delegations that typified the New Deal or also the narrow ("we get the credit, the agency gets the blame") delegations of the Clean Air Act and its aftermath discussed in Part III of this Article. Finally, if Professor Ackerman is correct that the Constitution was amended by a shift in public opinion, why is it not equally so that the Constitution was reamended when public opinion later began to call for Congress to take responsibility, and Congress feigned doing so, as discussed in Parts II.A and III.C?

E. Delegation Is Consistent with Consent of the Governed

Professors Posner and Vermeule argue that Congress is accountable for agency-made rules. They do so in several paragraphs of suppositions about how legislators and voters behave.³¹³ But these suppositions are not supported by reference to the work of political scientists—the social scientists who systematically describe such behavior.³¹⁴ To the contrary, political scientists conclude that, in many circumstances, delegation al-

312. U.S. CONST. art. V.

313. Posner & Vermeule, *supra* note 26, at 1749–50.

314. Professors Posner and Vermeule do cite political scientists David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 *CARDOZO L. REV.* 947, 961–62 (1999), but they cite these political scientists for the proposition that enforcing the nondelegation doctrine would drive Congress to delegate to legislative committees rather than administrative agencies and thereby undercut accountability another way. See Posner & Vermeule, *supra* note 26, at 1749. This is not the proposition I dispute. The proposition for which Epstein and Professor O'Halloran are cited, if true, may be relevant to the issue of the extent to which courts should underenforce the norm, but not to whether it should, as Professors Posner and Vermeule recommend, be killed off altogether.

lows legislators to take credit for popular consequences and shift blame for unpopular ones.³¹⁵

315. See, e.g., R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 101 (1990) (“Sometimes legislators know precisely what the executive will decide, but the process of delegation insulates them from political retribution.”); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 132 (2d. prt. 1975) (“[I]n a large class of legislative undertakings the electoral payment is for positions rather than for effects.”); Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 175 (Roger G. Noll ed., 1985) (offering a mathematical assessment of when it pays legislators to delegate); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *PUB. CHOICE* 33, 45–47 (1982) (stating that legislators may pick the regulatory form that makes them look best to their constituents rather than the one that does the most good for their constituents); Justin Fox & Stuart V. Jordan, *Delegation and Accountability*, 73 *J. POL.* 831, 843–44 (2011) (identifying conditions under which delegation to agencies can provide politicians with an element of plausible deniability); Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 *POL. & SOC’Y* 152, 173 (2010) (stating that well-organized business interests pushing for favors from legislators at the expense of the average voter “will seek to substitute symbolic actions for real ones, for example, or manipulate complex policy designs to produce more favorable yet opaque distributional outcomes”); R. Kent Weaver, *The Politics of Blame Avoidance*, 6 *J. PUB. POL’Y* 371, 375, 386–87 (1986) (stating that politicians pass the buck as a means to avoid blame for unpopular actions).

In addition, researchers have used experimental subjects to test whether delegation of authority enables legislators to shift significant amounts of blame to agencies and found that it can. See, e.g., Adam Hill, *Does Delegation Undermine Accountability? Experimental Evidence on the Relationship Between Blame Shifting and Control*, 12 *J. EMPIRICAL LEGAL STUD.* 311 (2015) (answering the question affirmatively on the basis of experiments by multiple researchers). Of his own experiments, Hill wrote, “Even in these cases, where the agent is effectively powerless to change the outcome, participants blame principals significantly less than in cases where the principal brings about the outcome directly.” *Id.* at 312.

Professors Posner and Vermeule also float the idea that delegation must be acceptable because delegation is used pervasively in public and private life. See Posner & Vermeule, *supra* note 26, at 1744–45. Here, they attack an argument that no one makes: delegation is invariably bad. The beef is only with delegation that deflects blame from where it should lie rather than to achieve economies of specialization or scale. Delegation to deflect blame is a ploy used in in business as well as government. See Andy Kessler, *Opinion, Where in the World Is Larry Page?*, *WALL ST. J.* (Dec. 31, 2018, 10:59 AM), <https://www.wsj.com/articles/where-in-the-world-is-larry-page-11546199677> [<https://perma.cc/C5FL-NTZC>] (identifying some of the corporate leaders who work through surrogates to deflect blame).

In addition, Professors Posner and Vermeule argue that legislators will engage in “happy talk” regardless of whether they delegate. Posner & Vermeule, *supra* note 26, at 1748. Perhaps, but spin is less effective than spin plus arranging to have the bad news come on the letterhead of an agency rather than from a vote in Congress.

Professors Posner and Vermeule also argue that the accountability of the President as executive preserves the consent of the governed.³¹⁶ Yet, a President serving a second term escapes accountability at the polls altogether because the Constitution bars a third term.³¹⁷ And even a first term President largely escapes blame for the burdens imposed by agencies. Some agencies are independent of presidential control. And although most are subject to it, Presidents usually will personally announce only those rules that the White House political advisors think will be popular.³¹⁸ Otherwise, the President leaves the announcement to the agency head. The agency head can usually shift some of the blame to the statute or the court decisions that structured the agency's decision making. Everyone is responsible, so no one is.

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

One might argue that voters should do the homework necessary to see through such trickery, but they will not and they should not have to. As Professor Jeremy Waldron writes, "[T]he agent-accountability that is involved in democracy puts the onus of generating that transparency and the conveying of the information that accountability requires *on the persons being held accountable*. . . . [T]he agents owe the principal an account."³¹⁹

316. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 112–53 (2010); *see also* Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 *YALE L.J.* 1395, 1409–14 (1975).

317. U.S. CONST. amend. XXII.

318. *See, e.g.*, Lisa Heinzerling, *Ozone madness*, *GRIST* (Sept. 4, 2011), <http://grist.org/article/2011-09-03-ozone-madness/> [<https://perma.cc/4XGA-D8ZF>]. Professor Heinzerling was a key member of President Obama's team at the EPA. Lisa Heinzerling, GEO. L., <https://www.law.georgetown.edu/faculty/lisa-heinzerling/> [<https://perma.cc/WD9F-686M>] (last visited Jan. 9, 2020).

319. Jeremy Waldron, *Accountability: Fundamental to Democracy* 32 (N.Y. Univ. Sch. of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 14-13, 2014).

F. *Canons of Statutory Construction
Serve the Purpose of the Norm*

Professor Sunstein argues that the Supreme Court has replaced the constitutional bar on delegation with various “non-delegation canons” of statutory construction, which he calls collectively “The American Nondelegation Doctrine.”³²⁰ It, he argues, serves the purposes of the traditional doctrine.³²¹ In his words, it stops “legislative shirking . . . by requiring Congress to make the relevant judgments. . . . [E]xecutive officials cannot seize on vague or general language to produce specified kinds of outcomes. The legislature must authorize those outcomes in advance, and with a high level of particularity.”³²² The kinds of outcomes for which agencies need clear legislative statements of authorization include, to list some of Professor Sunstein’s examples, those arising from the agency asserting the power to act retroactively, extraterritorially, or in ways that create serious constitutional problems, or would bring about an enormous and transformative expansion in its regulatory authority.³²³

320. Sunstein, *supra* note 193, at 1181. Professor Sunstein sees consent of the governed as an underenforced norm but applauds far more underenforcement than I think necessary.

321. Professor Sunstein also gives arguments against the traditional doctrine. First, he states that it is not judicially manageable because it requires courts to answer a question of degree: “*how much discretion is too much discretion?*” *Id.* at 1182. This is true of the intelligible principle test, yet Professor Sunstein’s own canons require judgments of degree. The “elephants-in-mouseholes doctrine,” invoked when agencies find big powers in obscure grants of authority, requires courts to make two judgments of degree: how big is an elephant and how obscure is a mousehole. Generally, his canons are changeable, *id.* at 1184 (“[T]hey change over time.”), and unclear in application, *id.* at 1200 (“The passage is not without ambiguity . . .”). Meanwhile, *Chevron* is of doubtful manageability because there are several conflicting versions of the doctrine. See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 783, 817–29 (2010).

Second, Professor Sunstein’s argues that the traditional doctrine is of “uncertain constitutional pedigree” because, citing Professor Mashaw, it clashes with “actual practice during the early period of the American republic.” Sunstein, *supra* note 193, at 1183 (citing MASHAW, *supra* note 261, at 5). Yet, as I argued in Part V.B, Professor Mashaw is wrong. Professor Sunstein also relies upon Professors Posner and Vermeule for the related proposition that the norm lacks “clear roots . . . in the text and in founding-era debates.” *Id.* (citing Posner & Vermeule, *supra* note 26, at 1723). But the roots were clear enough to persuade the early Supreme Court in cases such as *Fletcher v. Peck*, *Brig Aurora*, and *Gibbons v. Ogden*. See *supra* Part II.A.

322. Sunstein, *supra* note 193, at 1191.

323. *Id.* at 1181, 1185.

Clear statement requirements are often, but not always, sensible tools in statutory interpretation.³²⁴ However, clear statement requirements do little to stop shirking by Congress. An example is the 1970 Clean Air Act, which, as discussed in Part III.D, plainly authorized the agency to protect health, but allowed politicians to take credit for healthy air while shifting blame to the EPA and the states for failing to deliver and the economic burdens concomitant with pollution reduction.³²⁵ That is why legislators of both parties voted for it almost unanimously in 1970.³²⁶

So, yes, members of Congress are elected and must authorize agencies to make law. But with great skill they shift blame to the agencies for the unpopular consequences such as regulatory protection not delivered or regulatory burdens imposed. That is not consent of the governed.³²⁷

In sum, Professor Sunstein asserts that Congress can delegate sweeping power to agencies if it does so bluntly. That is bizarre because he would treat purposeful violations of the consent-of-the-governed norm more leniently than inadvertent violations even though the harm to the government is apt to be particularly great where Congress is most insistent that it wants to evade responsibility.

* * * * *

That so many highly intelligent scholars can do no better than make such far-fetched arguments for ignoring the consent-of-the-governed norm bolsters the argument for recognizing it.

324. To the extent that clear statement requirements are used to curb delegation rather than to divine the intent of Congress, they may lead the courts away from the intent of Congress. See John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1557–59 (2008).

325. David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 789–98 (1983).

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

327. Justice Gorsuch's dissent in *Gundy* cites these delegation-related statutory construction canons to show ongoing judicial concern with the constitutional norm rather than to argue that the canons are an adequate substitute for the norm. See *Gundy v. United States*, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting).

CONCLUSION

We like the administrative state. After all, most people want the regulatory protection we were promised agencies would provide. That is why Congress passed the regulatory statutes.

Nonetheless, we also dislike the administrative state. After all, most people want members of Congress to take personal responsibility for regulations and thus to be accountable for both the burdens imposed and the shortfalls in regulatory protection. By failing to take such responsibility, Congress pits us against ourselves.

Many influential people benefit from Congress's failure to take responsibility: the agency officials who get the power, lawyers whose income and sense of importance come from their role in the abstruse processes that now have the last word on regulation, and most importantly the members of Congress who prefer to avoid responsibility for hard choices so long as members of the opposing political party do.

The job of securing the consent of the governed the Declaration of Independence promised, and the Constitution requires, thus falls to the Supreme Court. It has no duty more supreme than judging compliance with the Constitution. None of the Constitution's norms is more supreme than the consent of the governed. As Justice Kagan recently wrote, "[T]he need for judicial review is at its most urgent in cases" where "politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms."³²⁸

Yet, in response to assertions that Congress violates the consent-of-the-governed norm by outsourcing responsibility, the Court currently outsources its own responsibility for judgment to Congress. That is poetic injustice. It should stop. Once the Court does its duty, Congress can do its duty.

328. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2523 (2019) (Kagan, J., dissenting) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring)) (internal quotation marks omitted).