ARTICLES

JUDGING CONGRESSIONAL OVERSIGHT

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INTRODUCTION

That Congress may play no role in law administration is an axiom of the Supreme Court's separation-of-powers jurisprudence.[1] A combination of constitutional clauses and administrative law doctrines ensure that Congress's involvement in the interpretation and implementation of federal law is kept to an absolute minimum. Some of these limitations—such as the Incompatibility Clause's categorical prohibition against sitting Senators and Representatives simultaneously serving in either the Executive or Judicial Branches[2]—are unambiguously imposed by the text of the Constitution. But courts have gone further, reading into other constitutional provisions similarly tight restrictions on Congress's postlegislative activities. Thus, in *INS v. Chadha*, the Court ruled that the Bicameralism and Presentment Clauses forbid Congress from nullifying agency decisions through the unicameral veto.[3] Courts have likewise narrowly construed Congress's ability to influence administrative decisionmaking outside of the legislative process.[4] They regard, with

1. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 726 (1986).

2. U.S. CONST. art. I, § 6, cl. 2; *see also* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1047 (1994).

3. INS v. Chadha, 462 U.S. 919, 949–59 (1983).

4. This Article deals with three related, though distinct, concepts in analyzing how courts regard Congress's involvement in law administration: oversight, influence, and control. As used here, "oversight" refers broadly to the formal and informal tools—such as hearings, investigations, ex parte contacts including letters or phone calls, etc.—used by federal legislators and their staffs to gather information from or to influence decisions made by agency officials. *See also* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 71–139 (2006) (describing in detail the forms of oversight employed by members of Congress); *cf.* JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 217 (1990) (defining oversight as "review after the fact, . . . [including] inquiries about policies that are or have been in effect, investigations of past administrative actions, and the calling of executive officers to account for their financial transactions" (alteration in original) (quoting JOSEPH P. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 9 (1964))). The term "influence" refers to oversight behavior by legislators and their staffs, individually or collectively, that results, or is calculated to result, in an impact on agency decisionmaking. *Cf.* MORRIS S. OGUL, CONGRESS OVERSEES THE BUREAUCRACY: STUDIES IN LEGISLATIVE SUPERVISION 11 (1976). The term "control" refers to postenactment activities—particularly the use of oversight tools—to directly or indirectly assume the final policymaking authority that has been statutorily delegated to an administrative agency. The locus of decisional authority distinguishes influence from

substantial suspicion, congressional ex parte contacts with agency officials during the administrative decisionmaking process and are often inclined to invalidate the resulting decisions.

The theme that emerges from these cases is a highly restrictive vision of Congress's proper involvement in administrative affairs, one that can best be described as "complete delegation." Once Congress delegates policymaking authority[5] to an agency, courts feel that they must aggressively restrict any continuing role played by federal legislators in law administration, apart from what the Constitution explicitly permits.[6] Accordingly, courts have decided that federal legislators cannot control or heavily influence how agency officials exercise the powers delegated to them. The rationale is that failing to prevent such control or influence invites the congressional parliamentarianism the Founders feared and drafted the Constitution to prevent.[7]

Given the realities of the modern administrative state, it is difficult to justify this fear of expanding congressional power or complete delegation's rigidity. Rather than living in an era of legislative dominance of executive

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control. Where federal legislators assume only persuasive power over agencies, they wield influence. Where they assume the power to make, veto, or supplant decisions made by agencies, they wield control.

5. As used in this Article, "policymaking" refers to those decisions, made within the legal limits of an official's discretion, that are governed by what the official believes will be beneficial moral, social, or economic consequences. *Cf.* Roy L. Brooks, *The Use of Policy in Judicial Reasoning: A Reconceptualization Before and After* Bush v. Gore, 13 STAN. L & POL'Y REV. 33, 40–41 (2002) (comparing different theories of judicial policymaking, all of which involve some measure of political or moral discretion).

6. In reducing congressional power in this way, complete delegation complements the nondelegation doctrine. As currently understood and applied, the nondelegation doctrine allows Congress to give agencies a substantial amount of its policymaking power, provided that Congress clears the minimal hurdle of articulating an "intelligible principle" to guide how the agencies use that power. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("[W]e 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.'" (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928))). Complete delegation tells Congress what portion of that delegated policymaking power it is permitted to retain after it passes a statute—essentially none. When complete delegation and nondelegation are taken together, they allow Congress to divest itself of policymaking authority while severely restricting the methods available to Congress for calibrating that divestment.

7. The Framers warned against legislative encroachments, to be sure. *See, e.g.*, THE FEDERALIST NO. 48, at 147–48 (James Madison) (Roy P. Fairfield ed., 1981) (observing, "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex" and warning that the legislature's "constitutional powers being at once more extensive and less susceptible of precise limits" can "mask . . . the encroachments which it makes on the coordinate departments").

functions,[8] we, instead, live in an era of what then-Professor Elena Kagan aptly termed "presidential administration."[9] Broad delegations of substantial governmental power from Congress to the Executive Branch—whether of legislative, executive, or adjudicative power—have become the norm rather than the exception.[10] At least since the Reagan Administration, the White House has grown more assertive in its efforts to control administrative decisionmaking. Courts have also given the President a freer hand in influencing bureaucratic decisionmaking and have justified doing so on both constitutional and pragmatic grounds. The President's power to develop and implement public policy without any Congressional input has never been greater.[11] From mundane tasks such as exempting federal employees from mandatory retirement requirements to unilaterally creating new administrative agencies that wield tremendous policymaking power, the President has numerous tools for bypassing Congress almost entirely free of the fear of judicial rebuke.[12] Given the current state of play, it is highly unlikely that Congress is positioned to

8. The Framers assumed that the executive department would necessarily be weaker than the legislative department in a representative democracy. James Madison freely admitted as much:

> [I]n a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

Id. at 147.

9. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

10. The judiciary has actively enabled this transfer of policymaking authority by adopting an essentially toothless version of the nondelegation doctrine. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994) ("The rationale for [the] virtually complete abandonment of the nondelegation principle is simple: the Court believes—possibly correctly—that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions.").

11. *See* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 15 (2003) ("[P]residents simply set public policy and dare others to counter. For as long as Congress lacks the votes (usually two-thirds of both chambers) to overturn him, the president can be confident that his policy will stand.").

12. *See id*. at 6–8.

usurp the President's control of the administrative state. Nevertheless, judicial adoption of complete delegation has substantially limited Congress's ability to influence agencies. The result is a judicially reinforced chasm between the President's and Congress's abilities to influence administrative action.

A more pressing concern than whether Congress will dominate the President is whether, between the President and Congress, agencies are subject to sufficient political oversight.[13] The task of political oversight has been made more challenging by broad legislative delegations to agencies and the sheer size of the administrative state. These and other factors increase the potential for agency slack, defined as the divergence of presidential and congressional policy preferences on the one hand, and administrative policy preferences on the other. Although the White House has become more effective at reducing agency slack, and thus at making agency officials more politically accountable, comprehensive oversight by the President is simply impossible. To some extent, Congress already fills the inevitable gaps left by presidential oversight and thereby increases the overall political accountability of agency officials. Congress as a whole, however, is already plagued by collective action problems, information deficits, and only episodic interest in bureaucratic affairs. Complete delegation, as currently conceived and applied by the courts, makes legislators' task of managing agency slack that much more difficult.

This Article asserts that the complete delegation needs to be scaled back and refocused. Courts should focus less on the fear that Congress will assume control of administrative functions, the animating intuition behind complete delegation—an intuition that is unlikely to be borne out to any significant degree. Rather, they should view Congress's nonlegislative influence over how agencies wield delegated power as necessary to ensuring the political accountability of agency officials and as complementary to the political influence exercised by the President. By finding a way to accommodate legislator influence over administrative decisionmaking, courts could increase the overall political accountability of agencies and reduce the problem of agency slack caused by broad delegations of regulatory power.

The method of accommodation proposed by this Article is "partial

13. James Madison pointed to a related concern regarding the concentration of executive power, though he did not expect it to appertain to a representative republic. *See* THE FEDERALIST NO. 48, at 147 (James Madison) (Roy P. Fairfield ed., 1981) ("In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire.").

subdelegation." In the nonadjudicative context,[14] where agencies are granted a measure of policy discretion by statute or where they must interpret ambiguous statutory language, courts should allow agencies to explicitly account for the policy preferences of the federal legislators overseeing them. So long as the legislators' influence does not lead agencies to exceed their statutory authority or to otherwise act illegally—by ignoring decisional factors specified by statutes or by formulating policies unsupported by logic or the clear weight of available evidence—their ultimate decisions would not be subject to the judicial invalidation they can currently expect.

Moreover, relaxing complete delegation in this way need not disturb the President's primacy in influencing administrative affairs. To the extent that courts discern a presidential policy preference that conflicts with that of the congressional oversight committee, the President's preference would trump. This will leave congressional oversight committees in a supporting role, taking up the political accountability slack left by the White House. Additionally, establishing a judicially enforced hierarchy of oversight responsibility may encourage the political branches to more frequently coordinate their attempts at influence.[15]

The Article proceeds as follows. Part I describes how the judiciary addresses congressional and presidential attempts to control or influence bureaucratic decisionmaking. It begins by demonstrating how complete delegation narrowly restricts or completely forbids Congress's control or influence over bureaucratic decisionmaking. It then describes why courts give the President a comparatively freer hand in controlling and influencing agency officials. Part II explains how complete delegation, by limiting Congress's ability to influence agency decisionmaking, exacerbates the problem of agency slack and reduces agencies' overall political accountability. Part III proposes "partial subdelegation" as an alternative to complete delegation, and describes how it can reduce agency slack. Part IV identifies and addresses potential objections to this proposal. A brief conclusion follows.

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14. As described in Part I, *infra*, agency adjudications raise due process concerns that make political influence—whether from Congress or the President—problematic. Accordingly, the recommendations made in this Article apply only to nonadjudicative agency decisionmaking.

15. Such a recommendation is not as novel as it may at first seem. The Supreme Court has already shown its willingness to set an institutional interpretive hierarchy between courts and agencies when it comes to statutory interpretation. *See generally* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984).

I. JUDICIAL CONSTRAINTS ON POLITICAL CONTROL AND INFLUENCE OF AGENCIES

A. Congress and Complete Delegation

Congressional oversight is an implied constitutional power; no constitutional provision expressly empowers Congress to exercise general oversight authority over the administrative state.[16] Despite the Constitution's silence as to the nature and scope of Congress's powers of oversight,[17] the notion that it is a legitimate legislative function has never been seriously questioned. To the contrary, it has been an abiding assumption of democratic governance since before the Founding Era that legislatures have an obligation to oversee the government officials that interpret and implement the law. The idea seems to have been well understood by the British Parliament and by several colonial legislatures prior to the drafting and ratification of the Constitution.[18]

Nevertheless, courts have construed the permissible *effects and uses of* legislative oversight narrowly, and in doing so have embraced the view that congressional delegation of policymaking authority to administrative agencies must be complete delegation. While Congress can investigate the activities of federal administrators, it cannot retain direct or indirect control over their policy decisions outside of the legislative process unless the

16. To the extent that the Constitution's text explicitly contemplates a congressional oversight role, it does so in only two specific instances and it supports only Congress's information-gathering authority. Article I, Section Seven requires the President to include with his veto of legislation "objections" to be considered by both houses of Congress. U.S. CONST. art. I, § 7, cl. 2; *see also* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2181 (1990) ("The Constitution . . . requires that a veto be accompanied by a statement of objections, after which Congress is to reconsider the proposed legislation."). Article II, Section Three requires the President to "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. CONST. art. II, § 3.

17. A reason for this curious omission may be that the Framers considered Congress's possession of such authority so obvious that it did not need to be stated. As one commentator observed, the Framers did not think it necessary to grant Congress explicit oversight powers because they believed "[t]he power to make laws implied the power to see whether they were faithfully executed." Arthur M. Schlesinger Jr., *Introduction Essay* to CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792–1974, at xix (Arthur M. Schlesinger Jr. & Roger Bruns eds., 1975).

18. *See* FREDERICK M. KAISER ET AL., CONG. RESEARCH SERV., RL 30240, CONGRESSIONAL OVERSIGHT MANUAL 20 (2011), http://www.fas.org/sgp/crs/misc/RL30240.pdf; AKHIL REED AMAR, AMERICA'S CONSTITUTION 111 n.* (2005) (observing that "broad powers of investigation and oversight . . . had historically been exercised by parliaments and legislatures on both sides of the Atlantic").

Constitution specifically provides otherwise. Furthermore, legislators' ability to influence agency officials is heavily circumscribed. Though these limitations can be glimpsed in numerous areas of administrative law, this Part focuses on three categories of cases in which they are most evident. The first category involves legislation in which Congress attempts to preserve for its members or agents an official service role in administrative agencies. The second category involves legislation that gives congressional committees or subgroups veto power over administrative decisions. The third involves the amount of influence members and committees can exert on agency officials through ex parte contacts or other oversight tools.

Complete delegation is evident in each category; courts have tightly restricted or altogether forbidden postdelegation involvement of members of Congress and congressional subgroups in the bureaucratic decisionmaking process. The practical effect of complete delegation is to prevent Congress's members or subparts from assuming anything even approaching decisional control over decisions that have been delegated to agencies. Together, these cases reveal a restrictive impulse that creates substantial space for agencies to act independently of Congress.

1. Congressional Service in Administrative Agencies

The Incompatibility Clause may be the Constitution's clearest and most categorical expression of the complete delegation idea. It is an absolute ban against members of Congress simultaneously holding an appointed office in either the Executive or Judicial Branch.[19] It provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."[20] The original purpose of the Clause was primarily to prevent the Executive from exercising undue influence over legislators.[21] The Framers were well aware of British problems with "corruption," with the monarchy attempting to influence Parliament by offering its members handsomely compensated executive positions.[22] "Joint office holding soon became the mechanism by which

19. *See* Calabresi & Larsen, *supra* note 2, at 1047.

20. U.S. CONST. art. I, § 6, cl. 2.

21. *See* THE FEDERALIST NO. 76, at 406 (Alexander Hamilton) (J.R. Pole ed., 2005) (describing the Incompatibility Clause as an "important guard[ ] against the danger of executive influence upon the legislative body").

22. *See* Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 231 (2007). The Framers' sensitivity to simultaneous legislative–executive office holding seems to have two sources. The first was witnessing the King of England's ability to unduly influence Parliament by offering its members lucrative ministerial positions, pensions, titles of nobility, or other emoluments. *See* Calabresi & Larsen, *supra* note 2, at 1053–54. The second was dissatisfaction caused by the patronage hiring system, which Royal Governors used to secure

Parliament worked its will with the executive."[23] By including the Incompatibility Clause in the Constitution, the Framers intended to prevent the President from similarly dominating congressional decisionmaking through the substantial influence that patronage provides. In sum, the Clause was intended to reduce the expansion of presidential power.[24]

While the Incompatibility Clause may have prevented the President from dominating Congress through patronage hiring, it has almost certainly prevented Congress from dominating the President in ways that directly impact administrative decisionmaking. By forbidding the President from filling agency leadership positions with sitting members of Congress, powerful members have far fewer opportunities to demand appointment to high office in exchange for their compliance with the President's policy agenda.[25] This makes the President's prospects for political success—and hence for reelection—less dependent on congressional cooperation.[26] More importantly, the Incompatibility Clause prevents the formation of de facto legislative counsels that partner with (and perhaps dominate) the President in executing the laws.[27] Accordingly, one of its practical effects is to prevent legislators from simultaneously creating and enforcing federal law.[28] As Professor John Manning has observed, "This provision . . . precludes the development of a parliamentary-style government in which legislators serve as senior executive officers, as well as any system in which legislators play a judicial role, as in the British House of Lords."[29]

The principle embodied by the Incompatibility Clause, and the restrictive approach to Congress's involvement in law administration that

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the obedience of legislators and judges. *See id.* at 1056.

23. Bruff, *supra* note 22, at 232.

24. *See* Calabresi & Larsen, *supra* note 2, at 1086.

25. *See id.* at 1080 & n.168 (describing a study that reported the extremely limited frequency with which the President has appointed a member of Congress to an agency leadership position).

26. *Cf. id.* at 1089 (illustrating a scenario in which, without the Incompatibility Clause, the President would likely become dependent on currying Congress's favor through offering appointments in order to turn Administration policies into law).

27. For example, one could see how the President's ability to make independent policy judgments with respect to the use of military force would be substantially undermined if he, in capitulating to political pressure, were to appoint as Secretary of Defense the sitting Chair of the Senate or House Armed Services Committee. *Id.*

28. "Hence, the functions of generating and applying the laws would be placed in separate hands, reducing the potential for arbitrary treatment of citizens." Bruff, *supra* note 22, at 235.

29. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1984 (2011); *see also* Calabresi & Larsen, *supra* note 2, at 1062 ("[I]n twenty-one short words . . . an obscure constitutional provision foreclose[s] even the most attenuated forms of parliamentary government in America." (internal quotation marks omitted)).

animates it, has been extended to federal legislators who attempt to serve on administrative bodies as putatively private citizens. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,[30] the Supreme Court determined the constitutionality of the so-called Transfer Act. The Act transferred operating control of two Washington, D.C., airports—Reagan National Airport and Dulles International Airport—from the Department of Transportation to the Metropolitan Washington Airports Authority (MWAA).[31] The MWAA was created through a compact between the Commonwealth of Virginia and the District of Columbia and was controlled by them.[32] Members of Congress, concerned that the MWAA would reallocate a substantial amount of air traffic from Dulles to Reagan (their preferred airport), provided in the Transfer Act for the creation of a Board of Review to oversee the MWAA's activities.[33] The nine-member Board of Review would be composed entirely of members of Congress, though they would sit on the Board "in their individual capacities."[34]

Relying on "basic separation-of-powers principles"[35] rather than specific constitutional provisions, the Court invalidated the part of the Transfer Act providing for MWAA oversight by the Board of Review.[36] Acknowledging that the Board's review "might prove to be innocuous,"[37] the Court nevertheless concluded that "Congress could, if this Board of Review were valid, use similar expedients to enable its Members or its agents to retain control, outside the ordinary legislative process," of administration of the laws.[38] Quoting James Madison's admonition against congressional encroachment on the powers of the coordinate branches, the Court denominated the creation of the Board as such "an impermissible encroachment."[39]

Unsurprisingly, courts have also extended this prohibition against administrative service by members of Congress to agents under congressional control. The Supreme Court in *Bowsher v. Synar*[40] observed, "The Constitution does not contemplate an active role for Congress in the

30. 501 U.S. 252 (1991).
31. *Id.* at 255–56.
32. *Id.* at 257–58.
33. *Id.* at 258–59.
34. *Id.* at 259 & n.5 (citing 49 U.S.C. § 2456(f)(1) (1988)).
35. *Id.* at 277 n.23.
36. *Id.* at 277.
37. *Id.*
38. *Id.*
39. *Id.* (citing THE FEDERALIST NO. 48, at 253 (James Madison) (Ian Shapiro ed., 2009)).
40. 478 U.S. 714 (1986).

supervision of officers charged with the execution of the laws it enacts";[41] that a "direct congressional role in the removal of officers charged with the execution of the laws [apart from impeachment] is inconsistent with separation of powers";[42] and that "[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess."[43] Although framed in terms of presidential power over removals, *Bowsher* is as much a case about Congress's capacity to retain nonlegislative, postenactment involvement in the administration of federal law. It involved federal legislation, which retained for Congress a measure of decisional authority—specifically the power to remove a federal official charged with implementing federal law. Such legislation is problematic because, the Court concludes, permitting Congress to retain (even limited) removal power over such an official is tantamount to giving Congress control over the decisions made by that official.[44] Although *Bowsher* involved a form of indirect rather than direct administrative involvement by federal legislators, and thus was not governed by the Incompatibility Clause, the Court nevertheless resorted to the broad proscription against congressional law administration evidenced by the Clause.[45]

2. Congressional Vetoes of Administrative Decisions

Just as the Supreme Court has barred members of Congress from

41. *Id.* at 722.

42. *Id.* at 723.

43. *Id.* at 726.

44. The *Bowsher* Court clearly equated the power to remove with the power to control:

> To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. . . . Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey. The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.

Id. (citations omitted) (internal quotation marks omitted). Some scholars have challenged the notion that the Court equates removal and control in all circumstances. *See, e.g.*, Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 709 (2007) (distinguishing, in the context of the President's removal powers as discussed in *Myers v. United States*, 272 U.S. 52 (1926), between the power to supervise agency officials and the power to control them).

45. The *Bowsher* Court mentioned the Incompatibility Clause in passing, along with other constitutional provisions, when supporting the general proposition that Congress is forbidden from implementing the laws it adopts. *Bowsher*, 478 U.S. at 722–23 (referencing, among other provisions, the Appointments Clause, the Impeachment Clause, and the Incompatibility Clause).

simultaneously holding positions in the Executive Branch and agents of Congress from wielding executive power, it has forbidden subparts of Congress from vetoing agency decisions. In *INS v. Chadha*,[46] the Supreme Court invalidated § 244(c)(2) of the Immigration and Nationality Act (INA),[47] which provided either house of Congress with a legislative veto[48] over deportation suspension orders issued by the Attorney General.[49] Chadha, a British national who overstayed his nonimmigrant student visa, was ordered to show cause why he should not be deported.[50] He did not and instead conceded his deportability at his deportation hearing.[51]

As part of a complicated procedure established by the INA for suspending, reviewing, and invalidating deportation orders, the immigration judge before whom Chadha appeared adjourned Chadha's hearing to allow Chadha to apply for a suspension of deportation.[52] INA § 244(a)(1) granted the Attorney General the discretion, upon making specific factual findings enumerated in the statute, to suspend Chadha's deportation.[53] Acting on behalf of the Attorney General, an immigration judge ordered Chadha's deportation suspended.[54] Section 244(c)(1) required that the suspension order be sent to both the House of Representatives and the Senate, whereupon either chamber acting alone could veto it by majority vote.[55] Had neither chamber acted, Chadha's legal status would have been converted from deportable to legal permanent resident.[56] The House of Representatives, upon reviewing Chadha's case, voted to veto the immigration judge's suspension order, rendering Chadha deportable.[57]

The underlying purpose of the legislative veto was to accommodate two competing interests. The first was to invest the deportation process with a measure of humanity by allowing the Attorney General to grant a reprieve

46. 462 U.S. 919 (1983).

47. *Id.* at 959.

48. "The term 'legislative veto' describes a variety of mechanisms for requiring the approval of Congress, or some entity within Congress, before a proposed administrative action can become effective." RONALD A. CASS ET AL., ADMINISTRATIVE LAW CASES AND MATERIALS 34 (6th ed. 2011).

49. *Chadha*, 462 U.S. at 925.

50. *Id.* at 923.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 924.

55. *Id.* at 924–25.

56. *Id.* at 925–26.

57. *Id.* at 926–27.

to those the Immigration and Naturalization Service ordered deported.[58] The second was to assert control over administrative decisionmaking by reserving for Congress a low-cost method—a method that is less difficult to execute than the normal legislative process of bicameralism and presentment—for reviewing and invalidating specific suspension orders issued by the Attorney General (or his delegate).[59]

The Court framed the issue in the case as whether § 244's legislative veto allowed Congress to legislate in a manner barred by the Constitution.[60] The Court approached the question by asking whether the unicameral veto was essentially "legislation," in the sense that it "had the purpose and effect of altering the legal rights, duties, and relations of persons."[61] Determining that it was,[62] the Court invalidated the veto because it failed to follow the exclusive procedures by which the Constitution permits Congress to legislate under Article I—bicameralism and presentment.[63]

The Court could not have reached this conclusion had it not already determined that Congress delegated to the Attorney General the power to change Chadha's immigration status. Had Congress not delegated that authority to the Attorney General, the House's veto would have merely confirmed that which Chadha had already conceded—his deportability—in which case the veto would have done nothing to alter his immigration status.[64] In order for the House's veto to be unconstitutional, the Constitution must have required Congress to delegate status-altering authority to the Attorney General, retaining none for itself apart from full legislative override. The Court implicitly acknowledged this point in

58. *See* CASS ET AL., *supra* note 48, at 35.

59. *Id.*

60. *Chadha*, 462 U.S. at 929.

61. *Id.* at 952.

62. Chadha conceded his deportability in his initial deportation hearing and was ordered deported. *Id.* at 923. His subsequent application for a suspension of that order was granted. *Id.* at 924. The Court interpreted the suspension as changing Chadha's legal status from deportable to not deportable. Accordingly, Chadha's legal status was "not deportable" when his file was sent to Congress, and the House's legislative veto of the suspension order changed Chadha's status back to "deportable." *Id.* at 926–28.

63. *See id.* at 952–53.

64. The Court stated the point as follows:

> It is not disputed that this choice to delegate authority [to alter Chadha's immigration status] is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President.

Id. at 954–55.

explaining that bicameralism and presentment were the exclusive means by which Congress could have invalidated the Attorney General's suspension order: "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."[65] The Court also anticipated that this categorical admonition, if applied too broadly, could substantially undermine congressional–administrative relations. It was therefore quick to clarify that the "Constitution provides Congress with abundant means to oversee and control its administrative creatures."[66]

This implicit distinction between oversight and control warrants closer attention because it evidences the Court's adherence to complete delegation. The Court pointed to three types of legislation to which Congress may resort when supervising administrative agencies: "the legislation that creates [agencies]," "durational limits on authorizations," and "formal reporting requirements."[67] The first two categories allow Congress to control agency decisionmaking within the constitutional parameters set by *Chadha*'s reasoning, which is to say that Congress may only control agency decisionmaking through duly enacted legislation. Neither authorizing legislation nor durational limits (often included in authorizing legislation) involve Congress's invalidation of bureaucratic choices outside of the legislative process. While Congress is free to revisit the policy choices it makes in its authorizing legislation, and while durational limits on that legislation may provide periodic occasions for such review, neither involve a claim that Congress can alter bureaucratic decisions outside of the full legislative process. While "formal reporting requirements" secure a postenactment role for Congress in the administration of the laws, that role does not involve postdelegation decisional control. Rather, the role is limited to gathering information, which is to say that it is limited to monitoring. Reporting requirements do not violate complete delegation precisely because they do not legally bind an agency to new or different congressional policy choices.

This point is illustrated by the Federal Circuit's decision in *City of Alexandria v. United States*.[68] There the court considered the city's constitutional challenge to a "report and wait" provision, 40 U.S.C. § 484(e)(6), which required the General Services Administration (GSA) to report intended land sales to a congressional oversight committee and to wait for the committee's reaction to the transaction.[69] While the statute did

65. *Id.* at 955.
66. *Id.* at 955 n.19.
67. *Id.*
68. 737 F.2d 1022 (Fed. Cir. 1984).
69. *Id.* at 1023–25.

not provide oversight committees with any formal veto power, committees could vote their disapproval of disfavored transactions. The Federal Circuit found the provision constitutional, in no small part because heeding or ignoring a committee's disapproval was, legally speaking, within the GSA Administrator's discretion.[70] Politically speaking, the court believed that bureaucrats would often feel compelled to capitulate to committee disapprovals of similar transactions.[71] Put another way, the court assumed that committees may have de facto veto power over GSA land sales, even if the "report and wait" provision fell short of giving them de jure veto power. Some such instances of control, one could reasonably infer, may be beyond the court's ability to detect and correct.

Importantly, the court did intimate that such influence could cross the line of legality. For example, the court surmised that an oversight committee's de facto control of an agency may be problematic in the atypical case where it claimed more than the "great moral effect" that oversight often has on agency decisionmaking.[72] In other words, a committee would clearly be overreaching if it were to claim legal authority to veto land sales under 40 U.S.C. § 484(e)(6).[73] As discussed in the following subpart, courts have similarly rejected congressional influence when it has led policy-formulating agencies to consider factors other than those required by statute.[74]

3. Congressional Influence Through Ex Parte Contacts

Even though courts have rejected legislation that gives members of Congress or congressional subparts a direct postdelegation policymaking role, they do not expect legislators to limit their involvement in agency decisionmaking solely to the passage of new or amendatory legislation. To the contrary, courts understand that legislators routinely make contact with and attempt to influence agency officials outside of the formal legislative process.[75] Justice Scalia, for instance, freely acknowledged this in *FCC v.*

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70. *Id.* at 1026 ("[N]othing suggests that here a committee vote of disapproval in any way changes the law.").

71. *Id.*

72. *Id.* at 1027.

73. *Id.*

74. *See, e.g.*, D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971) (rejecting as ultra vires the Secretary of Transportation's consideration of a congressman's threat to withhold funds for an unrelated building project).

75. *See, e.g.*, Gravel v. United States, 408 U.S. 606, 625 (1972):

> That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with

Fox Television Stations, Inc. when he observed that members of Congress and committees routinely attempt to exert influence on agency officials through extralegislative contacts.[76] He even went so far as to admonish the dissenters—who criticized his explicit acknowledgement of such committee–agency exchanges—for their apparent political prudishness.[77]

Indeed, the reporters are filled with cases in which courts have been asked to assess the legal consequences of ex parte congressional–administrative exchanges. These cases differ factually from those already discussed in that they do not involve legislation retraining a postdelegation policymaking role for Congress. Instead the focus in these cases is on whether legislators have, through informal ex parte contacts, unduly pressured agency officials into considering extrastatutory political factors during their deliberations. Like the administrative-participation and legislative-veto cases already discussed, the opinions in these "congressional influence" cases evince fidelity to complete delegation; they exhibit an overriding concern that powerful legislators or oversight committees will usurp the delegated policymaking power of administrators absent close judicial monitoring. How courts apply complete delegation to congressional influence cases depends to some extent on the decisionmaking process utilized by the agency, with courts drawing a clear distinction between adjudications and nonadjudications. Legislator involvement in formal and informal adjudications elicits a categorically negative judicial response, whereas courts have developed a more nuanced, though still restrictive, approach to congressional involvement in other proceedings, such as rulemakings.

Courts have developed rules to aggressively prevent congressional involvement in adjudicative administrative proceedings; the mere *appearance* of direct congressional pressure on administrative decisionmakers is sufficient to warrant invalidation of an agency's judicial or quasi-judicial decisions.[78] This is the case even if the agency can provide a fully satisfying

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> administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.

See also SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 126 (3d Cir. 1981) (en banc) ("[W]e cannot simply avert our eyes from the realities of the political world: members of Congress are requested to, and do in fact, intrude, in varying degrees, in administrative proceedings."); United States v. Mardis, 670 F. Supp. 2d 696, 702 (W.D. Tenn. 2009) ("Legislators routinely express their opinions to executive branch officials about matters for which their departments or agencies are responsible.").

76. 556 U.S. 502, 525 (2009).

77. *Id.* at 523–29.

78. *See* Lichoulas v. FERC, 606 F.3d 769, 779–80 (D.C. Cir. 2010) (rejecting a claim of impermissible congressional pressure in absence of evidence that the congressman's

and independent justification to support its decisions.[79] Courts are particularly perturbed by congressional oversight that targets agency adjudicators directly or attempts to closely scrutinize the official's step-by-step decisionmaking process.[80]

Although courts are not as strict with respect to nonadjudicative processes, congressional ex parte contacts still elicit substantial judicial suspicion and close scrutiny.[81] Rather than invalidating agency decisions based on nothing more than legislators' ex parte contacts, courts focus on whether those contacts shaped officials' decisions.[82] Courts have shown their willingness to validate an agency's nonadjudicative decision so long as the substance of legislators' contacts relate to factors agency officials are statutorily permitted to consider.[83] At least one court has sought to clarify the applicable review standard by distinguishing between the substance of legislators' contacts and the simple fact of those contacts. In *DCP Farms v.*

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correspondence with the agency influenced its decisions); ATX, Inc. v. U.S. Dep't of Transp., 41 F.3d 1522, 1529 (D.C. Cir. 1994) (concluding that "congressional pressure 'sacrifices the appearance of impartiality' and violates due process when it provides 'powerful external influence' on the decisionmaking process of an official exercising a judicial function" (quoting Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966))).

79. *See ATX*, 41 F.3d at 1530.

80. *See, e.g.*, Koniag, Inc. v. Andrus, 580 F.2d 601, 610 (D.C. Cir. 1978) (finding that the Interior Secretary's appearance of impartiality was compromised by a letter he received from Congressman John Dingell days before deciding the eligibility of Alaskan tribes to take land and revenues under the Alaska Native Claims Settlement Act); *Pillsbury Co.*, 354 F.2d at 965 (invalidating a Federal Trade Commission order where a Senate subcommittee aggressively questioned two of four commissioners about a merits of divestiture case before the hearing examiner made an initial decision); Schaghticoke Tribal Nation v. Kempthorne, 587 F. Supp. 2d 389, 409 (D. Conn. 2008) (recognizing the general principle that "[c]ongressional interference in the administrative process is of particular concern in a quasi-judicial proceeding").

81. *Cf.* DCP Farms v. Yeutter, 957 F.2d 1183, 1185, 1187–88 (5th Cir. 1992) (declining to apply a stringent "mere appearance of bias" standard to agency decisions made well before adjudicative proceedings were initiated).

82. *See, e.g.*, Aera Energy LLC v. Salazar, 642 F.3d 212, 220 (D.C. Cir. 2011) ("[P]olitical pressure invalidates agency action only when it shapes, in whole or in part, the judgment of the ultimate agency decisionmaker."); *Yeutter*, 957 F.2d at 1188 ("Actual bias is ordinarily required to invalidate decisions by federal agencies." (citing Dirt, Inc. v. Mobile Cnty. Comm'n, 739 F.2d 1562 (11th Cir. 1984))); Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 714 F.2d 163, 169–70 (D.C. Cir. 1983) (stating that courts will invalidate an agency's nonadjudicative decisions if "'extraneous factors intruded into the *calculus of consideration*' of the individual decisionmaker" (quoting D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971))).

83. *Peter Kiewit Sons' Co.*, 714 F.2d at 170 (explaining that a court reviewing an agency's nonadjudicative decisions "must consider the decisionmaker's input, not the legislator's output," and that the "test is whether extraneous factors intruded into the *calculus of consideration* of the individual decisionmaker" (internal quotation marks omitted)).

Yeutter, the Fifth Circuit explained:

> Congressional "interference" and "political pressure" are loaded terms. We need not attempt a portrait of all their sinister possibilities, even if we were able to do so. We can make plain that the force of logic and ideas [conveyed in legislators' contacts with agency officials] is not our concern. They carry their own force and exert their own pressure.[84]

To the extent that legislator contacts may permissibly persuade agency officials to change course, that persuasion must be driven by the argumentative and apolitical force of legislators' arguments. Where the persuasive force of a legislator's contacts derives from factors extraneous to the statute the agency is tasked with implementing—such as the fact that a legislator has threatened unrelated programs administered by the agency[85]—the agency's decision invites judicial invalidation. Accordingly, courts adopting this framework have been less inclined to invalidate agency decisions that are independently justified, even where legislators have directly and specifically engaged officials on the substance of pending decisions.[86]

That courts would aggressively protect agency adjudications against political interference is unsurprising. Adjudications—whether undertaken by agencies or courts—raise due process concerns not mirrored in the nonadjudicative context. When individual rights are at stake, or where government action differentiates individuals from the general population, notions of impartiality, notice, and meaningful participation become the sine qua non of legitimate judgment.[87] Aggressive protection against the prejudgment that may result from political influence—whether it comes from the President, members of Congress, or even state officials—is entirely consistent with protecting adjudicative legitimacy. It should therefore come as no surprise that courts tasked with balancing Congress's interest in swaying agency officials through ex parte contacts against an individual's due process rights routinely privilege the latter over the former, even if

84. *Yeutter*, 957 F.2d at 1188.

85. *See D.C. Fed'n of Civic Ass'ns*, 459 F.2d at 1236, 1245–46.

86. *See, e.g.*, California *ex rel.* State Water Res. Control Bd. v. FERC, 966 F.2d 1541, 1552 (9th Cir. 1992) (finding that two letters from Representative John Dingell to Federal Energy Regulatory Commission commissioners urging a particular interpretation of the Federal Land Policy and Management Act had no apparent impact on the agency's ultimate interpretation).

87. *See* Londoner v. City & Cnty. of Denver, 210 U.S. 373, 385–86 (1908) (holding that due process requires individual taxpayer participation before the imposition of a tax levy that distinguishes certain taxpayers from the general public). *See generally* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("The fundamental requisite of due process of law is the opportunity to be heard." (internal quotation marks omitted)).

legislators could provide a useful perspective on fretted questions of interpretation or policy. This is presumably the case even where agencies use adjudication to promulgate broadly applicable prospective rules.

By contrast, the promulgation of prospective and broadly applicable rules—the work product of rulemaking—has not been thought to produce the kind of individualized due process concerns raised by adjudication and thus has not been thought to require the same degree of due process protection.[88] Courts have therefore struck the balance between congressional oversight and individual procedural fairness in a way that allows agencies to be more solicitous of legislators' views. Nevertheless, agencies are not typically permitted to justify their decisions based on congressional policy concerns—budget priorities, changing constituent preferences, uniformity in regulatory goals and methods of attainment, legislative backlogs, etc.—not contemplated by the statutes the agencies are implementing.

To be clear, courts do not understand complete delegation as barring legislators from *attempting* to influence agency officials in the nonadjudicative decisionmaking process. Such attempts are more accurately regarded as extrajudicial rather than illegal. When reviewing agency decisionmaking, courts have settled on the following unspoken rule: political influence through legislative ex parte contacts is not a violation of complete delegation per se, but judicial *support for* such influence *would be*. As the nonlegislative actions of congressional members or committees are not legally binding, agencies must give them no special weight when making policy or enforcing the law. Likewise, courts must ensure that agencies do not give member or committee policy preferences dispositive weight when they review the legal validity of agencies' decisions.

These cases also show that courts expect agency officials to resist this pressure to adopt legislator policy preferences not expressed in legislation. Because courts cannot impose consequences for impermissible influence directly on legislators, they do so indirectly by penalizing agencies that fail to resist legislative pressure. Presumably, members and committees will see little benefit in trying to dominate agency officials if courts will invalidate the administrative decisions produced by such domination. As importantly, invalidation provides a disincentive for agency officials to allow themselves to be dominated. Among other things, judicial invalidation thwarts

88. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (holding that due process does not require individual taxpayer participation in the decision to increase property taxes on all taxable property within the city); CASS ET AL., *supra* note 48, at 382 ("There is no doubt . . . that the procedures requisite for decisions addressing many members of an affected class on grounds generally applicable classwide are minimal in comparison to the procedures constitutionally required for individualized determinations.").

realization of the agency's regulatory agenda and may diminish agency credibility with important constituent groups—other courts, other members of Congress, the President, regulated industry, or the public, for example. As is true in the legislative-veto and the Incompatibility Clause cases, complete delegation in the ex parte contacts arena encourages agencies to operate independently of their congressional overseers.

B. Presidential Influence on Agencies

Presidents have increasingly assumed direct responsibility for, and direct control over, administrative decisionmaking. "Our most recent Presidents, if not their predecessors, seem to have been at pains to convey the impression that they are personally responsible for the conduct of domestic governance, to a degree that extends to the resolution or decision of particular administrative issues . . . ."[89] However, courts have not allowed the President's attempts at increased administrative influence and control to go completely unchallenged. As indicated above,[90] due process and statutory limits can cabin whether and to what extent the President can direct the actions of his administrative subordinates. Courts have carefully monitored White House interference in agency adjudications and have policed White House ex parte contacts with agencies when statutes require their disclosure.[91] More broadly, courts have made clear that "congressional policy announced in a statute necessarily prevails over inconsistent presidential orders."[92]

Nevertheless, courts tend to give the President a fairly wide berth in influencing or controlling administrative decisionmaking. For example, the President's right to dictate agency action through executive orders has gone largely unquestioned in the courts,[93] and challenges to the substantive

89. Strauss, *supra* note 44, at 702 (footnote omitted).

90. *See supra* note 87 and accompanying text.

91. *See, e.g.*, Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1541 (9th Cir. 1993) ("Because Committee decisions are adjudicatory in nature, are required to be on the record, and are made after an opportunity for an agency hearing, we conclude that the [Administrative Procedure Act's (APA's)] ex parte communication prohibition is applicable [to presidential contacts]."); *id.* at 1546 (concluding that "the President and his staff are covered by [the APA's] prohibition and are not free to attempt to influence the decision-making processes of the Committee through ex parte communications").

92. LOUIS FISHER, PRESIDENTIAL WAR POWER 19 (1995); *see also* Kendall v. United States, 37 U.S. 524, 540–41 (1838) (concluding that the President lacked the authority to direct an Executive Branch official to disregard ministerial duties specifically delegated to that official by statute).

93. *See* Strauss, *supra* note 44, at 708 ("Fortuitously, perhaps, the courts have had few if any occasions to confront directly the question of presidential decisional authority in conventional administrative law contexts.").

legality of executive orders are overwhelmingly unsuccessful.[94] Additionally, proponents of the "unitary" executive theory of presidential power assert that Presidents have the authority to directly control all powers delegated by statute to his or her subordinates.[95]

That the judiciary permits the White House greater leeway than Congress in influencing administrative affairs is also clear from the ex parte contacts cases analyzed above. Although both presidential and congressional influence can properly be denominated "political," courts have been much less forgiving when encountering the latter than the former. Courts have justified this more deferential treatment of presidential political pressure from both constitutional and practical perspectives.

In a notable example, the D.C. Circuit has insisted on the "basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy."[96] While Congress's authority to oversee executive decisionmaking is longstanding and unquestioned, the text of the Constitution vests the execution of federal law solely in the President, including the execution of those laws that administrative agencies were created to implement.[97] Additionally, the Framers specifically rejected a "plural executive" in favor of a single President, in some measure because of the perceived advantages of "[political] accountability fixed on a single source."[98] By contrast, Congress's fractured composition immunizes it from the laser-like political accountability brought to bear on the Presidency. Congress's composition also handicaps its capacity to effectively evaluate and coordinate regulatory efforts, impediments not shared by the President.[99] Courts have pointed to these and other differences between Congress and the President to justify the latter's assertions of direct control over agency decisionmaking.

II. COMPLETE DELEGATION AND AGENCY SLACK

In an era of broad delegations of economic and social policymaking authority to agencies,[100] complete delegation significantly restricts

94. *See* HOWELL, *supra* note 11, at 154–55 (reporting that federal courts affirmed the legality of 83% of executive orders issued between 1942 and 1998).

95. *See* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 266 (2006) ("[D]efenders of a strongly 'unitary' executive argue that the Constitution requires that all executive power be vested in the President, and therefore that any agency action should be subject to presidential revision.").

96. Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981).

97. *See id.*

98. *Id.*

99. *Id.*

100. That Congress delegates a wide range of powers to the Executive Branch is

congressional involvement in bureaucratic activity. It leaves Congress with two viable paths for addressing agency slack, defined as the difference between the policy preferences of agencies and their political overseers. The first option is legislative override, which is the primary means by which Congress can secure judicial support for undoing agency policymaking with which it disagrees. Congress can pass a new statute (subject to the President's veto), clarifying or supplanting an agency's interpretation. Courts will then enforce the new statute against the agency by invalidating interpretations that contradict it.[101]

The second option is attempting to influence agency interpretation through formal and informal oversight mechanisms (such as ex parte contacts). As already explained, courts put members of Congress and committees on a very short leash when it comes to postdelegation participation and influence. Participation is verboten, at least when it is provided for in legislation but not explicitly in the Constitution. Most attempts at influence are heavily discouraged. Where agencies capitulate to informal congressional pressure their decisions are candidates for judicial invalidation. Those contacts the courts do deem innocuous serve little purpose in increasing the political accountability of agencies. While courts will allow federal legislators to raise issues contemplated by statutes—issues that can be raised by those without Congress's unique institutional perspective or those that agencies perhaps should be expected to address anyway[102]—courts forbid agencies from accounting for other "political"

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commonly accepted in administrative law circles. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 444–45 (2012) ("The complexities of the modern economy and administrative state, along with the heightened role of the United States in foreign affairs, have necessitated broad delegations of authority to the executive branch."); Kagan, *supra* note 9, at 2253 (observing that "as the administrative state grew and then the New Deal emerged, Congress routinely resorted to broad delegations").

101. This notion assumes, of course, that courts will faithfully interpret the new statute so as to advance congressional policy choices. The likelihood that judicial interpretation will not present equal or greater agency problems than administrative interpretation depends on a host of factors. Some commentators have expressed skepticism as to whether courts can be counted on to act more faithfully than agencies when it comes to interpretation. *See, e.g.*, Beermann, *supra* note 4, at 144 ("Unless someone provides a convincing argument that judges pursue the public good, as embodied in congressional legislation, as opposed to their own private interests, including seeing their own political ideals enacted into law, there is good reason to doubt that judicial review presents the greatest promise for enforcing and enacting Congress's will."); *cf.* Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 168–70 (2011) (arguing that, absent clear instructions or a clear sense of how courts are likely to rule, Congress should be reluctant to delegate preemption authority to federal courts rather than agencies).

102. In this regard, the D.C. Circuit has indicated that issues raised by federal legislators

considerations raised by federal legislators, even when agencies are not expressly forbidden by statute to consider them.[103] Even when courts permit federal legislators to have their say, courts do nothing to ensure that agencies provide reasonable responses to them. This leaves Congress with fewer and less effective opportunities to persuade agencies to account for the bigger regulatory, political, economic, or moral picture, which facilitates an increase in agency slack.

Even if one assumes the President's primacy in overseeing and influencing administrative decisionmaking, it cannot credibly be claimed that the White House is capable of managing the agency slack problem on its own.[104] It is true that Presidents have become increasingly aggressive in their efforts to direct agency policymaking, and that they are most likely to suffer the political consequences for agency missteps. Nevertheless, the President's unique position in federal policy formation and implementation could just as easily be viewed as a hindrance to political accountability. Given the number of policy decisions that must be funneled through the White House, it is highly unlikely that voters will penalize the President for the scores of agency decisions with which they disagree. At best, the President is only somewhat more accountable for the majority of his decisions than his legislative counterparts in Congress, who likewise are unlikely to be penalized for most of the votes they take or legislation they introduce (or fail to introduce). Moreover, the resources that Presidents dedicate to agency oversight are likely insufficient to check most agency policymaking. These already finite resources can be stretched even thinner by the numerous ways in which administrative officials resist presidential influence. As Professor William Howell has explained:

> Administrative agencies may read their [presidentially imposed] mandates selectively; they may ignore especially objectionable provisions; they may report false or misleading information about initiatives' success or failures. . . . [T]he executive branch assuredly does not reduce to the

should have no more influence on agencies than issues raised by members of the public. *Cf., e.g.*, *Sierra Club*, 657 F.2d at 409–10 (observing that "administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources").

103. Of course, an enacting Congress is free to forbid agencies from considering particular factors when exercising delegated discretion. Such a situation arose in *Whitman v. American Trucking Ass'ns*, where both the Environmental Protection Agency (EPA) and the courts had acknowledged that the Clean Air Act prohibited the EPA from considering economic implementation costs when setting ambient air quality standards. 531 U.S. 457, 464–65 (2001).

104. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583 (1984) (observing that agencies "are *all* subject to presidential direction in significant aspects of their functioning, and [are each] able to resist presidential direction in others" (emphasis added)).

> president himself. Bureaucrats enjoy a fair measure of autonomy to do as they please.[105]

In sum, it is a mistake to view the President's or Congress's administrative oversight capacities in isolation or as singularly sufficient. Hamstringing Congress's opportunities to influence agencies reduces the overall political accountability of the administrative state. As discussed below, judicial hostility to Congress's influence-driven oversight exacerbates the principal–agent problems Congress already experiences in policing agency slack. If one accepts that overseeing sessions of Congress stand as principals to administrative agents (a supposition the courts have acknowledged to varying degrees), the complete delegation severely restricts the ability of oversight committees to discipline agencies.

This Part relies on a basic principal–agent framework adapted from the political science literature on political control of public bureaucracies.[106] This framework assumes that principals (here Congress and the President, discussed in greater detail below) delegate policymaking power—such as the power to resolve statutory ambiguities—to administrative agencies for a host of practical and political reasons.[107] By virtue of this delegation, agencies are necessarily granted some level of discretion in how they resolve those ambiguities.[108] "Agency slack," defined here as the gap between the policy preferences of agencies and the initial or evolving preferences of their political principal(s), invariably results from agencies exercising this delegated interpretive discretion. Principals attempt to reduce agency slack in advance through delegation-shaping and agency design; they determine the scope of agency discretion, the operating hierarchy of the agency, and

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105. HOWELL, *supra* note 11, at 21.

106. Professor Moe, in a classic political science article on political control of bureaucracies, describes the application of the principal–agent model to representative government as follows:

> Democratic politics is easily viewed in principal–agent terms. Citizens are principals, politicians are their agents. Politicians are principals, bureaucrats are their agents. Bureaucratic superiors are principals, bureaucratic subordinates are their agents. The whole of politics is therefore structured by a chain of principal–agent relationships, from citizen to politician to bureaucratic superior to bureaucratic subordinate and on down the hierarchy of government to the lowest-level bureaucrats who actually deliver services directly to citizens.

Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 765–66 (1984).

107. These reasons include a need to "resolve commitment problems," "overcome information asymmetries in technical areas of governance," "enhance the efficiency of rule making," and "avoid taking blame for unpopular policies." Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, *in* THE POLITICS OF DELEGATION 1, 4 (Mark Thatcher & Alec Stone Sweet eds., 2003).

108. *Cf. id.* (contending that giving agents some discretion is necessary for principals to benefit from delegation).

the decisional procedures to be employed by the agency. Afterwards, political principals monitor and nudge agencies according to the principal's policy preferences. Adopting the appropriate mix of restrictions and monitoring mechanisms is crucial because when the opportunity presents itself, agencies may deviate from the policy preferences of their principals in order to maximize their own interests—political protection, budget protection or expansion, and substantive policy advocacy.[109] Additionally, simple defects in the delegation—unclear directions, novel and unanticipated circumstances, or previously unidentified conflicts with other statutory mandates enforced by the agency or other agencies—can increase agency slack even when agencies are actually trying to please their principal(s).

The analysis here focuses on Congress's and the President's ex post control tools. This Part assumes that both Congress and the President, the latter most often through the Executive Office of the President, act as agencies' principals. Treating Congress and the President as dual administrative principals is well-supported by basic tenets of constitutional and administrative law. Congress is an administrative principal because the Article I Vesting Clause grants it the legislative authority to create, eliminate, or shape the powers of agencies.[110] Courts have frequently inferred from this general legislative power the additional supervisory power to investigate the activities of Executive Branch officials and to demand explanations from them.[111] The President acts as a principal because the Article II Vesting Clause invests him with the primary responsibility for faithfully executing laws enacted in conjunction with Congress.[112] As described in Part I, Congress and the President share the power to appoint and remove administrative officials, albeit in clearly distinct roles. For instance, agencies derive their powers of law creation, implementation, and interpretation from Congress and the President, both of which have the authority (and many would say the responsibility), to

109. *See* Moe, *supra* note 106, at 766.

110. *See* U.S. CONST. art. I, § 1.

111. In *Watkins v. United States*, the Court described Congress's general powers of investigation in sweeping terms:

> The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects . . . for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

354 U.S. 178, 187 (1957).

112. *See* U.S. CONST. art. II, §§ 1, 3.

ensure that agencies use those powers appropriately.[113]

Application of the principal–agent framework described above highlights two problems that complete delegation causes for congressional oversight. The first is an enforcement problem where the unavailability of judicial enforcement decreases congressional opportunities for reducing agency slack. The second is a "presidential primacy" in which important constituencies are led to underestimate the importance of congressional oversight because the President also oversees the federal bureaucracy.

The ultimate practical impact of both problems is reduced democratic accountability for agencies. The enforcement problem reduces the credibility of congressional attempts to rein in agency slack and diminishes agency incentives to be responsive to prevailing popular opinions as reflected by election results.[114] The presidential primacy problem leads courts, commentators, and voters to rely more heavily on one political agent instead of on two to bring agencies closer in line with popular political sentiment.[115] Legislative override, despite its high likelihood of failure, becomes the most viable political recourse where the President proves unresponsive or agencies prove recalcitrant in the face of presidential pressures.[116]

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113. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3153–54 (2010) (implying that the President has the constitutional power and responsibility to control decisions made by administrative agency officials); *cf.* AMAR, *supra* note 18, at 111 n.* (observing that "broad powers of investigation and oversight . . . had historically been exercised by parliaments and legislatures on both sides of the Atlantic").

114. *See* Beermann, *supra* note 4, at 142 (observing that congressional oversight can reflect prevailing public opinion, particularly after midterm elections which divide Congress and the Presidency between political parties).

115. *See id.*

116. Included with legislative override are other procedures, such as the budgetary process or the expedited joint resolution process provided by the Congressional Review Act of 1996 (CRA), which requires Congress to follow the normal bicameralism and presentment procedures in order to undo administrative actions. In most circumstances, the CRA is a redundant and ineffective tool for overturning agency actions with which Congress disagrees. *See* Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1717 (2012) (noting that the CRA "has been successfully invoked on exactly one occasion," and that "it has not proved especially effective"). *See generally* Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162 (2009) (arguing that the CRA is little used even in situations in which it could be most effective). It is true that budgetary oversight—such as budget riders—can be effective in preventing agencies from ignoring legislators' policy preferences. *See* Beermann, *supra* note 4, at 84–90 (describing how federal legislators use the appropriations process to manage agency decisionmaking). How effectively Congress uses its budget power to manage agency slack is far from clear. *Compare* Louis Fisher, *War and Spending Prerogatives: Stages of Congressional Abdication*, 19 ST. LOUIS U. PUB. L. Rev. 7 (2000) (arguing that Congress has abdicated much of its budgetary responsibilities to the President), *with* Neal Devins, *Abdication by Another Name:*

A. The Enforcement Problem

Complete delegation reduces congressional opportunities for holding wayward agencies accountable through judicial review. As already explained, courts heavily discourage Congress's influence-driven oversight. When agencies capitulate to it, they subject their decisions to judicial invalidation even when federal legislators push agency officials to make policy choices that fall squarely within the agency's statutory mandate.[117] From a principal–agent perspective, the absence of positive oversight from courts decreases the likelihood that agencies will exercise their discretion in a manner consistent with congressional preferences. As Professors David Epstein and Sharyn O'Halloran observed, "More aggressive monitoring of agencies by courts can reduce agencies' waywardness, by inducing them to follow the statutes they administer more faithfully than they otherwise might. The idea that judicial review can have this effect is commonplace in classic administrative law theory, as well as [principal–agent] scholarship."[118]

Moreover, complete delegation has the following and somewhat puzzling practical effect: it places greater emphasis on self-policing by agencies despite the fact that agency slack is an endemic problem of delegation. It shifts the focus of inquiry away from the judiciary's traditionally recognized responsibility to police the separation of powers and toward an extrajudicial space in which agencies are free to negotiate with Congress and the President for the best deal. Of course, courts frame this extrajudicial space not in terms of agency self-policing but in terms of political control.[119]

The D.C. Circuit, in *Sierra Club v. Costle*, assumed that political pressure from members of Congress or congressional oversight committees was among the "considerations that Congress could not have intended to make relevant" when delegating policymaking authority to an agency official.[120]

An Ode to Lou Fisher, 19 ST. LOUIS U. PUB. L. REV. 65 (2000) (countering that federal legislators are heavily engaged in the budgetary process).

117. Unless, of course, the agency is being pressured to do something contrary to its statutory requirements.

118. Jud Mathews, *Deference Lotteries*, 91 TEXAS L. REV. (forthcoming 2013) (citing LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965) and DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 24–25 (1999)). *But see* Charles R. Shipan, *The Legislative Design of Judicial Review: A Formal Analysis*, 12 J. THEORETICAL POL. 269, 274 (2000) (pointing out various ways in which Congress can preclude the courts from reviewing agency action).

119. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009); City of Alexandria v. United States, 737 F.2d 1022 (Fed. Cir. 1984).

120. United States *ex rel.* Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2d Cir. 1950); *see* Sierra Club v. Costle, 657 F.2d 298, 409–10 (D.C. Cir. 1981) ("Where Congressmen keep

Accordingly, the D.C. Circuit indicated that it would have invalidated any agency decision citing congressional pressure—or political considerations important to federal legislators—as a relevant decisional factor, thereby penalizing the agency for capitulating to pressures it presumably should have resisted. Although in a form different from *Costle*, the D.C. Circuit's decision in *District of Columbia Federation of Civic Ass'ns v. Volpe* also turned on the assumption that the enacting Congress would have preferred agencies implementing federal law ignore congressional postdelegation influence.[121] Similarly, a plurality of the Supreme Court in *Fox Television* acknowledged the reality of congressional oversight pressures on agency decisionmaking but scoffed at the notion that such pressures actually determined the Federal Communications Commission's ultimate regulatory position.[122]

Compare this with the President-regarding assumption adopted by the Federal Circuit in *City of Alexandria*. There, the court surmised that the GSA Administrator would all but certainly capitulate to congressional pressure. The reason it would do so, however, had little to do with the power congressional oversight committees wield over the GSA. As the court readily acknowledged, the Administrator was well within his statutory authority to ignore the oversight committee entirely.[123] Rather, the court presumed that the President would not empower the GSA Administrator, a relatively junior official in the Executive Branch hierarchy, to complicate executive–congressional relations by proceeding with land transactions that Congress disapproved.[124] Irrespective of any discretion enjoyed by the Administrator, the court assumed that he would exercise that discretion in a way that served the President's larger political interests even if that meant capitulating to Congress in individual cases.[125]

Regardless of the political control assumptions adopted by courts, complete delegation can leave Congress in a weakened oversight position.

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their comments focused on the substance of the proposed rule—and we have no substantial evidence to cause us to believe Senator [Robert] Byrd did not do so here—administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources." (footnote omitted)). *But see* Sharpe, *supra* note 101, at 169–73 (arguing that, all things being equal, Congress may delegate policymaking authority to agencies precisely because it will be able to exercise greater influence over them as compared to courts).

121. *See* D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1247–49 (D.C. Cir. 1971).

122. *Fox Television*, 556 U.S. at 524–25.

123. *City of Alexandria*, 737 F.2d at 1026.

124. *Id.*

125. *Id.* ("Presidents may at times be at loggerheads with Congress in highly publicized matters, of national significance usually. They do not employ [General Services Administration] Administrators to place themselves at loggerheads likewise, in smaller matters.").

It funnels congressional responses to agency waywardness into the options of legislative override, which is difficult to coordinate and frequently ineffective, or informal oversight pressures, which are judicially unenforceable and hence easier for agencies to ignore. The result is a greater agency slack problem than would otherwise result from a judicial approach that consciously accounts for principal–agent theory.

B. The Presidential Primacy Problem

As compared to Congress, which operates under the restrictions of complete delegation and several institutionally endogenous handicaps, the President has become increasingly effective at using extrastatutory tools to influence administrative behavior.[126] Generally, observers now accept that the President has gained the upper hand on Congress when it comes to reducing administrative agency slack across the federal bureaucracy.

In her exhaustive study of the Clinton Administration's supervision of administrative agencies, then-Professor Elena Kagan described how President Clinton significantly increased his influence over agency decisionmaking.[127] In doing so, he continued a trend of presidential control begun by President Reagan. President Clinton used three nonstatutory control mechanisms: (1) directives issued to agency heads that required them to take particular actions within set time periods, (2) modification of Office of Management and Budget review of agency rulemakings (including those of independent agencies), and (3) taking credit for agency actions through speeches and other public events.[128]

President Obama has gone even further than his predecessors, at least with regard to the first type of influence. Traditionally, the moniker "independent" has been given to those agencies whose organizational features are calculated to insulate them from presidential control. Though their specific structures may vary, these agencies derive their "independence" from one essential feature: "the President lacks authority to remove their heads from office except for cause. Thus, these agencies are independent in the sense that the President cannot fire their leaders for political reasons and, consequently, cannot use this ultimate sanction to back up particular policy recommendations."[129] They are, therefore,

126. *See generally* William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence Over Rulemaking*, 54 ADMIN. L. REV. 611 (2002) (footnote omitted) (discussing the influence the President exercises on administrative rulemaking through ex parte Office of Management and Budget contacts with agencies).

127. *See generally* Kagan, *supra* note 9.

128. *Id.* at 2284–3303.

129. Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63

distinguishable from "executive" agencies—such as the Department of Justice or the State Department—the heads of which serve in the President's cabinet and can presumably be fired for any reason or no reason at all.[130]

In Executive Order 13,579, President Obama indicated that independent agencies are expected, perhaps even obligated, to adopt and implement his regulatory goals. Framed in the subjunctive, the order stated, "Independent regulatory agencies, no less than executive agencies" should adopt policies that protect "public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."[131] The order also directed independent agencies to develop plans to periodically review and analyze their preexisting significant regulations "within 120 days of [the] order."[132] This language, though seemingly innocuous, is more assertive than that typically used by Presidents when addressing independent agencies.[133]

While she does not couch her analysis in such terms, Kagan's conclusions here are consistent with principal–agent analysis. "Congress's most potent tools of oversight require collective action (and presidential agreement) . . . ."[134] When Presidents have greater involvement in agency decisionmaking, they are more likely to block legislative efforts to overturn those decisions through legislative override.[135] Agencies, aware that Congress will encounter substantial difficulties in overriding their decisions because of a potential presidential veto, will have less incentive to appease congressional policy preferences.

Political scientists have come to similar conclusions regarding the efficacy of presidential bureaucratic control efforts as compared to those of Congress. The President has comparative advantages over Congress in addressing the primary causes of agency slack, in terms of information and transaction costs—both of which facilitate a principal's ability to understand and correct the actions of its agents. Most obviously, the President wields enormous power over the executive departments, the

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VAND. L. REV. 599, 610 (2010).

130. *See* Myers v. United States, 272 U.S. 52, 176 (1926).

131. Exec. Order No. 13,579, 3 C.F.R. 256 (2012).

132. *Id.*

133. *But see* Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2263 n.195 (2012) ("President Obama has indicated a desire for independent agencies to comply with his orders but has not required them to do so.").

134. Kagan, *supra* note 9, at 2347.

135. *Id.*

heads of which serve in his cabinet and at his pleasure.[136] Even with respect to independent agencies, over which the President enjoys comparatively weaker influence, he often has access to better information about the activities of administrative agencies than do members of Congress.[137] The President can also exert influence over the flow of information from agencies to Congress, instructing them to release data slowly, selectively, or not at all.[138] With regard to transaction costs, Congress is a collective body that often has to coordinate its efforts to effectively address agency waywardness. The President, on the other hand, does not generally suffer from such collective action problems and therefore incurs comparatively miniscule transaction costs when trying to influence administrators.[139] The President, in sum, is positioned to provide a unified perspective on fretted policy issues handled by agencies, whereas Congress will respond through committees that may not represent the will of Congress or even the preferences of the median legislator within Congress.[140]

While the President almost certainly enjoys advantages over federal legislators when it comes to administrative oversight, those advantages

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136. Professor David Lewis has made the following constitutionally based claim for presidential control of agencies:

> It is not clear in the Constitution what exactly the Founders meant by executive power. They granted presidents the ability to secure in writing the recommendations of their principal officers, the ability to nominate principal officers, and the responsibility to faithfully execute the law. The reasonable interpretation of this grouping of powers, and one generally adopted by presidents, is that presidents are obligated to direct the executive branch of the government. In order for presidents to successfully carry out their oath of office, it is their responsibility to make sure the policies of the U.S. government are implemented effectively. To do so, they need control of the administrative apparatus of government.

DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997 24 (2003). From this descriptive account of the President's relationship with the administrative state, Professor Lewis draws the following normative inference: "In short, [presidents] need the types of administrative structures that maximize presidential control, and the bureau model fits the bill." *Id.* This Article disagrees with Professor Lewis's conclusion that these constitutional arrangements indicate that presidents should be given *even more* power over administrative decisionmaking. To the contrary, this Article operates from the premise that congressional oversight, properly arranged, can and must provide an important counterbalance to the Presidency's natural tendency toward unilateral bureaucratic action.

137. HOWELL, *supra* note 11, at 101.

138. *See id.* at 101.

139. *See id.* at 107–08.

140. *See, e.g.*, Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1814 (2007) (contending that this type of oversight will often result in a reflection of the views of a subset of legislators rather than Congress as a whole).

should not be overstated. As Professor Lisa Schultz Bressman notes, the belief in a single presidential perspective is somewhat dubious, as are the extent of the benefits that are believed to derive from it. Far from applying a unified perspective on administrative matters, the President is rarely involved in directing agency decisions.[141] Rather, Executive Branch oversight of bureaucratic decisionmaking is routinely conducted by a variety of officials, such as White House staff members.[142] It is simply implausible that a significant amount of this oversight is ever brought to the President's attention, or even to a single subordinate within the Executive Branch. Additionally, it may be that the President is just as susceptible to factionalism and capture by vociferous or powerful interest groups as are members of Congress.[143]

Complete delegation enhances reliance on presidential oversight by largely restricting effective congressional attempts at influence to the legislative process. As with the enforcement problem, the presidential primacy problem can result in greater agency autonomy where agencies resist both congressional and presidential pressure. Additionally, and perhaps as concerning, complete delegation's enhancement of the presidential primacy problem undermines checks and balances by enabling presidential unilateralism. To the extent either of the political branches can hold agencies to account, the Presidency has many more opportunities to influence or to control their delegated legislative, executive, and adjudicative decisions.

III. RELAXING COMPLETE DELEGATION

As already described in detail, courts have developed and applied complete delegation across multiple areas of administrative law. Moreover, courts have done so where specific constitutional mandates appear to require it, and where no such specific constitutional mandates require its adoption. This significantly limits the ability of Congress to manage the distance between its policy preferences and those of administrative agencies, a problem that is only enhanced by judicial acceptance of the President's dominance in overseeing administrative decisionmaking. It also seems that Congress has internalized complete delegation when it comes to legislative oversight. Several statutes and House and Senate rules

141. *Id.*

142. *Id.*

143. *See id.* at 1815 (citing Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1231–46 (2006)) (explaining that the President is often motivated to accommodate a more narrow geographical and population constituency due to the effects of the electoral college).

subdelegating oversight authority to committees are carefully worded so as to avoid the investiture of policymaking authority in those committees.[144] Instead, Congress subdelegates "insignificant" authority to the committees, largely encompassed by such activities as investigation and information gathering.[145] While these tools can prove effective in influencing bureaucratic decisionmaking, their numerous deficiencies and lack of judicial enforceability significantly reduce their usefulness in helping Congress manage agency slack.

As discussed above, courts have concluded that they can only recognize congressional involvement in law administration when Congress is legally empowered to control its terms and conditions, and Congress is legally empowered to assert this control only when it acts through legislation.[146] Accordingly, judicial rejection of congressional postdelegation involvement in law administration assumes that, for Congress, it is control or nothing at all.

Courts need not be so severe in their treatment of congressional influence because permitting members or oversight committees a judicially cognizable role in agency policymaking need not result in the parliamentarianism feared by the Founding Era. Indeed, the pooling of

144. *See, e.g.*, SENATE MANUAL, S. DOC. NO. 110-1, at 41 (2008) ("Each standing committee, including any subcommittee of any such committee, is authorized . . . to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents . . . as may be authorized by resolutions of the Senate."); JEFFERSON'S CONSTITUTION MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 110-162, at 563 (2009) ("For the purpose of carrying out any of its functions and duties . . . a committee or subcommittee is authorized . . . to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.").

145. I use the term "insignificant" here not to indicate the practical unimportance of information gathering but to distinguish it from the three categories of "significant authority" the Court has described in its separation-of-powers cases. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 126 (1976) ("We think . . . that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in a manner prescribed by [the Appointments Clause]."). In *Buckley*, the constitutionality of the appointments procedures for the Federal Election Commission commissioners turned on whether the commissioners exercised significant authority, which the Court indicated were executive, legislative, or adjudicative powers. *See id.* at 109–13. Investing the commissioners with recordkeeping, disclosure, and investigative functions did not pose a constitutional problem. *Id.* at 137 ("Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them.").

146. *See supra* Part I.

significant authority—executive, legislative, or adjudicative—in the administrative state poses graver separation-of-powers concerns than would an increased (though still limited) congressional role in law administration. Properly conceived and structured, a judicial stance that emphasizes *participation in* agency decisionmaking rather than *control of* agency decisionmaking can increase the political accountability of agency policymaking. Moreover, it can do so without unduly increasing congressional power at the expense of the Executive or the Judiciary.

This Part lays out the proposal for "partial subdelegation," an alternative to complete delegation in the congressional influence context. The difference between complete delegation and partial subdelegation hinges on the frequently overlooked distinction between decisional control and decisional participation in administrative decisionmaking. Whereas complete delegation actively discourages Congress's postdelegation influence of agency officials due to a fear that congressional subgroups will assume control of bureaucratic decisionmaking, partial subdelegation supports limited congressional subgroup participation in bureaucratic decisionmaking to enhance the political accountability of agency policymakers. At its core, partial subdelegation would lift the specter of judicial invalidation where agencies cite congressional postdelegation policy preferences as a factor in the policy choices they make. Instead, partial subdelegation would make congressional policy preferences a factor, under limited circumstances, in the exercise of delegated agency policymaking discretion. While agencies would not be required to adopt those preferences as their own, they would be required to explain why they chose not to do so. This information forcing would support congressional participation in agency policymaking and make it difficult for bureaucrats to make wholly independent policy judgments outside the supervision of Congress.

Partial subdelegation would only apply where agencies have been delegated some policy discretion (and hence when political views are most relevant), such as when they are required to interpret ambiguous statutory provisions or when they are expressly delegated the authority to make law. Courts would employ partial subdelegation if two showings can be made. First, courts must be satisfied that factoring in congressional policy preferences would not lead the agency to act ultra vires or otherwise illegally. Second, courts must be satisfied that other nonpolitical factors do not point clearly in another policy direction. Importantly, partial subdelegation would calibrate congressional influence so as to complement presidential oversight, rather than supplant it. Accordingly, to the extent that evident presidential and congressional policy views conflict, where congressional preferences are a lesser included of presidential preferences,

or vice versa, the President's preferences would trump. Taken together, these features could secure for congressional subgroups (ideally a duly authorized committee overseeing a particular agency) a participatory role in agency policymaking that increases agency political accountability while reducing agency slack.

What follows is an illustration of how partial subdelegation might operate in the *Chevron* context, where *Chevron* requires agencies to make critical policy choices in order to fulfill the regulatory mandates implied by ambiguous statutory provisions. This Part then explains how partial subdelegation would address the specific agency slack problems of enforcement and presidential primacy described in Part II.

A. Partial Subdelegation: A Chevron*-Based Example*

The familiar *Chevron* two-step analysis provides the basic framework by which courts review agencies' interpretations of ambiguous statutes. Under *Chevron* Step One, courts look to the plain language of the statute to determine whether "Congress has directly spoken to the precise question at issue."[147] If it has, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[148] If Congress has not spoken clearly on the issue—if the statute is silent or ambiguous—courts proceed to *Chevron* Step Two, which instructs them to defer to an agency's reasonable interpretation of the statute.[149] In essence, *Chevron* Step Two tells courts to test whether an agency's interpretive choices fit within the realm of ambiguity left by the statute. *Chevron* requires courts to accept an agency's choices if within the realm of ambiguity, but to reject the agency's choices if outside the realm of ambiguity; however, *Chevron* does not permit courts to reject an agency's interpretation simply because they *disagree* with an agency's interpretation.[150]

At its most basic level, the *Chevron* analysis is equal parts statutory interpretation and institutional choice.[151] The statutory interpretation part

147. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

148. *Id.* at 842–43.

149. *Id.* at 843–44.

150. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005) ("'[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.' . . . *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps." (quoting Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 742 (1996))).

151. *See* Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 22 (2007) ("Yet *Chevron*'s formal rule is geared not just to promote fidelity to [the enacting] Congress—the primary goal in the statutory interpretation literature—but also to limit judicial power

of *Chevron* requires any government entity confronted with ambiguous statutory language to determine Congress's intent with as much certainty as reliable evidentiary sources permit.[152] The purpose of this evidence must always be the same: to aid the interpreter in faithfully identifying and adhering to the enacting Congress's policy choices. This is true whether those sources are limited to statutory text and basic syntactical analyses[153] or whether they also include such extratextual sources as legislative history and the contemporary legal contexts in which statutes were passed.[154] In this sense, *Chevron* does not ask courts to deviate from standard statutory interpretation.

The institutional choice part of *Chevron* establishes the default rule that agencies, not courts, are the primary interpreters of ambiguous regulatory statutes.[155] Where traditional tools of statutory construction fail to narrow an ambiguous statute's interpretive possibilities to a single "clear" meaning, courts must defer to an agency's reasonable interpretation of the statute.[156]

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vis-à-vis other constitutional agents.").

152. *Chevron* Step One instructs courts to use "traditional tools of statutory construction" to determine whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 843 n.9.

153. "The simplest version of textualism is enforcement of the 'plain meaning' of the statutory provision: that is, given the ordinary meanings of words and accepted precepts of grammar and syntax, what does the provision signify to the reasonable person?" WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38 (1994).

154. *See id.* at 225–39 (emphasizing that legislative history may be useful as evidence of whether Congress chooses to maintain historical practices or to discontinue them).

155. Some commentators have questioned whether the Supreme Court has adhered to this institutional choice in its post-*Chevron* cases. *See, e.g.*, Beermann, *supra* note 4, at 151 (pointing out that the Court has not been as deferential to agency interpretation as the language of the *Chevron* opinion would otherwise indicate they should be, perhaps because "the Court is an activist institution with final say, and it appears that the Court finds it difficult to step aside and allow an agency to interpret a statute contrary to what the Court believes is the most accurate (in terms of legislative intent) or best (in terms of policy) meaning of the statute").

156. Since ambiguous statutes are susceptible to multiple interpretations of varying plausibility, it is somewhat disingenuous to assert that courts or agencies are actually "interpreting" what an enacting Congress intended the statute to mean. Instead, those charged with resolving the ambiguity must scramble to make what is essentially a policy judgment guided (though not controlled) by evidence of the enacting Congress's motivations, among other things. *See* Jamelle C. Sharpe, *Toward (A) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 397 n.198 (2011) (arguing that judges are forming policy when they interpret unclear statutes); *see also* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 525 (1989):

> At stake in *Chevron* was the fate of one relatively small but not insignificant slice of the regulatory power pie: the authority to interpret the statutes that define the policy-making universe. The Court's resolution deliberately moves that power squarely into

While this default choice of agencies over courts is derived to some extent from notions of institutional competence, it is also substantially driven by assumptions about political accountability. After determining that the Clean Air Act (CAA) Amendments of 1977 were silent as to whether several pollution-emitting devices at a single industrial location could be grouped under a single "bubble,"[157] the Supreme Court observed that "[i]n contrast [to judges], an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon *the incumbent administration's* views of wise policy to inform its judgments."[158] Even more explicitly, the reasons the Court provided for condoning Congress's implicit delegation choice provides even stronger evidence of the Court's assumption that Congress's role in managing statutory ambiguity under *Chevron* ends with the enactment of the statute being interpreted:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute . . . .[159]

Numerous commentators have read this language, and other aspects of the *Chevron* decision, as demonstrating the Court's endorsement of the "presidential control model" of agency accountability, which emphasizes the primary (some would say exclusive) role the President has in managing bureaucratic drift.[160] The persuasiveness of such a reading is clear: to the

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the President's domain. By relinquishing the authority to determine statutory "meaning" to agencies whenever Congress has failed to speak clearly and precisely, *Chevron* enlarges the quantum of administrative discretion potentially amenable to direction from the White House.

157. *Chevron*, 467 U.S. at 840.

158. *Id.* at 865 (emphasis added).

159. *Id.* at 865–66.

160. *See, e.g.*, Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 851 (2012) ("The presidential control model of agency legitimacy has been reflected in a number of the Supreme Court's most important administrative law decisions over the past quarter century, including the *Chevron* decision, which explicitly endorsed the notion that executive branch agencies could 'properly rely upon the incumbent administration's views of wise policy to inform its judgments.'" (quoting *Chevron*, 467 U.S. at 865)); Bressman, *supra* note 140, at 1763–65 ("*Chevron*, more than any other case, is responsible for anchoring the presidential control model . . . recogniz[ing] that politics is a permissible basis for agency policymaking."); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 988 (1997) ("Increasingly, scholars (and, at times, the judiciary) look to the President not only to improve the managerial competence and efficiency with which regulation occurs but also, and more

extent that political accountability reduces or prevents agencies from improvidently exercising policymaking discretion, the *Chevron* Court assumed that it would be imposed primarily through the President. Congressional oversight, on the other hand, played no explicit role in the *Chevron* Court's accountability calculus. The Court made no mention of the role federal legislators might play in ensuring that agencies are held politically accountable for their interpretive choices. In this respect the opinion is consistent with complete delegation; it strongly implies that Congress's role in shaping statutory meaning is limited to the passage of amendatory legislation.

Partial subdelegation would change this by making an agency's responsiveness to legislators' policy preferences—and hence an agency's political accountability—a factor in determining whether the agency's Step Two interpretation is reasonable. A showing of responsiveness would support *Chevron* deference, whereas the lack of such a showing would militate against it.[161] Take the facts of *Chevron* itself as an example, and assume that the Environmental Protection Agency (EPA) adopts the bubble theory under the following six scenarios: (1) both legislators and the President endorse adoption of the bubble theory, (2) both legislators and the President reject the bubble theory, (3) legislators endorse the bubble theory but the President rejects it, (4) the President endorses the bubble theory but legislators reject it, (5) neither legislators nor the President express any discernible preferences regarding the bubble theory, and (6) legislators reject the bubble theory and the President expresses no discernible preference regarding it.[162] Scenarios (1) and (5) pose easy cases for courts,

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deeply, to supply the elusive essence of democratic legitimation."); Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398, 401–02 (Peter L. Strauss ed., 2006) (observing that *Chevron* "broke new ground," in part, by asserting that agencies are held politically accountable because they are "subject to the general oversight and supervision of the President").

161. Partial subdelegation is similar to the investigative powers that Congress routinely delegates to its committees in two important ways. First, both force agencies to provide explanations for their decisions at Congress's behest. Second, both permit this explanation-demanding authority to be wielded on Congress's behalf by one of its committees. In *Buckley v. Valeo*, the Court distinguished between Congress's powers of investigation and its powers of legislation. There, it said powers "of an investigative and informative nature" fall into "the same general category as those powers which Congress might delegate to one of its own committees." *Buckley v. Valeo*, 424 U.S. 1, 137 (1976). Law-altering authority, by contrast, can only be wielded by Congress as a whole. *Id.* at 141. As partial subdelegation is also reason-forcing, as opposed to law-altering, it accords with the intracongressional delegations of power that the Court has already recognized as legally permissible.

162. I have purposely omitted the scenario in which the President speaks to the EPA's interpretation in the face of congressional silence. Given the framework laid out here, whether the EPA has an easier or a harder time getting *Chevron* deference would depend on

as neither presents serious political accountability concerns. Under Scenario (1), the EPA has done the very thing that its political principals prefer and so no agency slack issue is raised. Likewise under Scenario (5), the political branches have either failed to make their preferences discernible or chosen not to involve themselves in the EPA's policy decision. Either way, courts could reasonably construe their silence as ratification. For different accountability reasons, Scenarios (2), (3), and (4) also present easy cases for courts. Each scenario would be resolved by partial subdelegation's subsidiarity principle, under which congressional influence is supplemental to that of the President. Where the EPA is already following a presidential policy preference that falls within the scope of the CAA's ambiguity (Scenario (4)), courts should be inclined to grant *Chevron* deference even though legislators disagree. Where the EPA has rejected the President's rejection (Scenario (3)), courts should be disinclined to grant *Chevron* deference, even though legislators agree with the EPA. Courts should be similarly disinclined to grant deference where both the President and legislators disagree with the EPA (Scenario (2)). Of course, courts should ignore either the President, the legislators, or both if their preferences fall outside the scope of the CAA's interpretive ambiguity or would otherwise cause the EPA to act illegally.[163]

The most interesting partial subdelegation cases, and the ones that most clearly present a break from current law, would arise under Scenario (6), which is based on a conflict between the EPA and federal legislators without the President to serve as a tie-breaker.[164] Here, disinclination toward *Chevron* deference could support legislators' efforts to manage agency slack. Unlike the current state of play in which courts meet

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whether it agrees or disagrees with the President's policy preferences, provided those preferences are legally permissible.

163. The partial subdelegation approach outlined here is distinguishable from those situations in which an agency simply capitulated to congressional pressure with no independent analysis or reasoning of its own. "Cases involving documented congressional, rather than presidential, interference in agency decisionmaking confirm that political preferences simpliciter will not suffice to support decisions subject to judicial review." Strauss, *supra* note 44, at 711. In the *Chevron* context, partial subdelegation would require the agency to reach a reasoned decision that explains its agreement or disagreement with its legislative overseers. It would accordingly avoid giving legislators impermissible control over agency decisionmaking while also giving legislators more consideration than any other member of the public. *But cf.* Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 365 (D.C. Cir. 1989) (invalidating an agency decision conforming to legislators' policy preferences where the agency had indicated that the policy preferences were based on inaccurate premises).

164. This scenario could also apply to independent agencies that, because of their structure, are heavily insulated from presidential political pressure.

legislators' policy views with suspicion or hostility,[165] partial subdelegation would create a legal space in which courts could consider those views without giving them dispositive weight in agency interpretation. As with the other scenarios already discussed, whether courts ultimately grant deference would depend on the other factors that make an agency interpretation reasonable, such as its fidelity to the discernible intent of the enacting Congress, changes in factual circumstances or the regulatory environment, and the scientific judgment of the EPA's experts.[166]

Perhaps the biggest challenge for courts applying partial subdelegation would be discerning legislators' and the President's policy preferences. Returning to the *Chevron*-based example, partial subdelegation would require courts to figure out whether federal legislators had expressed concerns regarding the "bubble theory" and what the content of those concerns are before figuring out whether the EPA had addressed them. As other commentators have pointed out, there are several sources from which courts could glean the policy preferences of the political branches. On the Executive side, courts could look to executive orders, presidential directives, and other more informal presidential communications like campaign issues or perceived electoral mandates.[167]

On the congressional side, courts could look to the history of congressional–agency interactions to determine whether the agency has been responsive to legislators' views. A potential model for evaluating this back-and-forth—particularly where Congress has been legislatively active—would be the Court's use of subsequent legislative history in *FDA v. Brown & Williamson Tobacco Corp.*[168] There the Court reviewed Congress's history of legislating in the area of tobacco regulation to determine whether the Food and Drug Administration (FDA) had properly interpreted the term "drug" in the Food, Drug, and Cosmetic Act (FDCA)[169] to include tobacco products.[170] In rejecting the FDA's interpretation, the Court looked to Congress's history of tobacco regulation, concluding that "[t]aken together, these actions by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate

165. *See supra* Part I.A.3.

166. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005) (listing changes in prevailing factual circumstances or in administration as a reasonable basis for agencies changing their interpretations of ambiguous statutes).

167. *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 58–62 (2009).

168. 529 U.S. 120 (2000).

169. *See* 21 U.S.C. § 321(g)(1) (1994) (defining the term "drug" for purposes of the statute).

170. *Brown & Williamson*, 529 U.S. at 125–36, 153–56, 159–61.

tobacco products."[171] The Court also emphasized that the FDA had disavowed the statutory authority to regulate those products during that period.[172] From this the Court reconstructed a dialogue of sorts between Congress and the FDA on the interpretive issue at the heart of the case. "This attention to subsequent congressional action, over and even against a textual reading of the statute, shows the Court looking to actions of contemporary institutions to gain purchase on the meaning of the statutory question before it."[173]

Where Congress has not been as legislatively active, courts could look to written comments filed by legislators during notice-and-comment rulemaking, questions asked and statements made during oversight hearings, or minutes taken from ex parte meetings with agency officials.[174] To be sure, resorting to these materials would impose on courts the potentially daunting task of determining which are sufficiently representative of Congress's policy views to be given due consideration.

> Although this might sound like a difficult task to impose on the courts, it is not all that different from how courts currently give different weight to different types of legislative history when construing statutes—giving more weight, for example, to committee reports than to other types of legislative history.[175]

Moreover, Congress could resolve this problem by statute. Instead of leaving courts to discern from cacophony what Congress's policy views are on a given interpretive issues, Congress could statutorily subdelegate to an oversight committee (for example, the U.S. Senate Committee on Environment and Public Works, which oversees the EPA) responsibility for speaking on its behalf. Legislators who wish their policy views to be given a chance at judicial recognition would then be required to funnel them through the process adopted by the committee. This procedure would have beneficial signaling effects for courts. Where legislator comments do not come from the committee, courts could grant them less weight in determining their representativeness. Where legislator comments do come from the duly designated committee, courts could have far more confidence that they reflect Congress's current views on administrative interpretation.

At this point it may be helpful to distinguish partial subdelegation from two other recent and very insightful proposals relating to the political

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171. *Id.* at 155.

172. *Id.* at 145–46.

173. Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 46–47 (2004).

174. *See* Beermann, *supra* note 4, at 121–39; Watts, *supra* note 167, at 63.

175. Watts, *supra* note 167, at 65 n.283.

accountability of agencies. Professor Jack Beermann has suggested that courts base the availability of *Chevron* deference on how responsive agencies are to their congressional overseers.[176] In the related context of "arbitrary and capricious" review, Professor Kathryn Watts has suggested that courts permit agencies to explicitly account for presidential policy preferences when making policy choices reviewable under the *State Farm* "arbitrary and capricious" standard.[177] Like partial subdelegation, these proposals would task courts with accounting for political influence in agency decisionmaking in ways that increase agencies' political accountability. Partial subdelegation, however, differs from Professor Beermann's and Professor Watts' proposals in several important respects.

Professor Watts suggests, in the context of arbitrary and capricious review, that courts should permit both the President and Congress to play a greater role in ensuring the political accountability of agencies.[178] By contrast, and as explained above, this Article places comparatively greater emphasis on how the judiciary can and should allow federal legislators (particularly duly appointed oversight committees)[179] to play a greater role in supporting federal legislators' efforts to manage agency slack. The President currently has robust tools of influence at his disposal, and courts are more inclined to recognize his powers of administrative influence and control than they are those of federal legislators. To the extent partial subdelegation provides a more defined role for the President in how courts address political efforts at managing agency slack, it does so primarily to properly contextualize the increased role that courts should allow federal legislators to play.

Professor Beermann has approached the question of political accountability by asking whether courts or agencies are better positioned to understand congressional intent.[180] A proponent of what he terms "congressional administration"—substantial congressional involvement in law administration—would support a highly deferential vision of *Chevron*, one that reduces judicial interpretive involvement in favor of greater interpretive independence for agencies.[181] Provision of *Chevron* deference would depend on whether "there are likely to be good channels of communication between Congress and the agency," with a withholding of

176. Beermann, *supra* note 4, at 151.

177. Watts, *supra* note 167, at 8–9.

178. *Id.* at 57 ("Ultimately, this Section concludes that—if fully disclosed in the rulemaking record—all [enumerated presidential and congressional] sources of political influences serve as potentially valid sources.").

179. *See infra* Part IV.A.

180. Beermann, *supra* note 4, at 152.

181. *Id.*

Chevron deference when there are not.[182]

While the partial subdelegation proposal advanced in this Part accords with Professor Beermann's suggestion that courts should formally acknowledge Congress's present role in how agencies conduct statutory interpretation, it parts ways with that suggestion in one significant respect. It is not clear that increasing the level of *Chevron* deference courts accord agency interpretation will necessarily increase Congress's ability to rein in agency slack. As already described, the President has developed nimble, effective tools for overseeing and influencing agency decisionmaking, including decisions made by independent agencies.[183] Additionally, Presidents have been using those tools more aggressively with each succeeding administration.[184] Insulating these decisions from judicial scrutiny, the practical effect of the *Chevron* Step Two analysis, without more, could have little impact on how effectively federal legislators solicit responsive agency decisionmaking relative to the President. Assuming that the President already enjoys a "home court" supervision advantage over Congress,[185] targeted applications of the current *Chevron* analysis without also increasing judicial receptivity to legislator influence could result in greater agency *independence* from Congress (or greater dependence on presidential oversight) where legislators have the greatest interest in influencing agency interpretation. By contrast, partial subdelegation would give policy considerations important to legislators—particularly duly appointed oversight committees—a more direct impact on the deference question, and thus calibrate the level of judicial scrutiny in a way that is more responsive to the agency slack concerns raised in Part II.

B. Partial Subdelegation and Agency Slack

Partial subdelegation has the potential to significantly increase Congress's ability to influence agency interpretation and, hence, to resolve the enforcement and dual-principal problems identified in Part II. First, partial subdelegation addresses the enforcement problem by giving overseeing legislators a judicially supported voice in bureaucratic decisionmaking. Second, partial subdelegation addresses the presidential primacy problem by giving voters and other interested constituencies an additional and more robust political recourse for addressing their concerns

182. *Id.*

183. *See supra* Part II.B.

184. *See supra* Part II.B.

185. *See, e.g.*, Jonathan Macey, Essay, *Executive Branch Usurpation of Power: Corporations and Capital Markets*, 115 YALE L.J. 2416, 2421–22 (2006) (describing the President's capacity for unilateral administrative action).

regarding bureaucratic policymaking.

With respect to the enforcement problem, partial subdelegation provides legislators with a method for securing judicial assistance without resorting to the cumbersome and likely ineffective path of legislative override. Agencies would be aware that their path to *Chevron* deference would be made more difficult if they fail to listen to legislators' concerns and take those concerns into account. The strategic question for agencies would then be the likelihood of deference refusal or remand in addition to the likelihood of legislative override. Though the issue is not beyond doubt, the chances of deference refusal or remand are likely higher than those of a corrective bill successfully navigating the process of bicameralism and presentment. Of course, agencies would still have to balance this increased congressional pressure against any pressure that they receive from the President. Nevertheless, partial subdelegation should give agencies greater incentive to make policy choices that more closely align with those of legislators because of the increased risk of being denied *Chevron* deference in a court challenge. In sum, partial subdelegation would ensure that agencies not only hear oversight committees but also *listen* to them.

Additionally, partial subdelegation would directly address the presidential primacy problem, which arises from asymmetrical reliance on the President's comparatively more effective oversight capabilities. Where Congress statutorily delegates to particular committees the task of expressing Congress's policy views, partial subdelegation provides a streamlined method for addressing Congress's collective action problem, which, again, does not similarly hinder the speed and effectiveness of presidential decisionmaking.[186] Instead of securing the agreement of a majority of the members of Congress and overcoming the numerous veto gates and supermajority voting rules required to pass legislation, partial subdelegation could more effectively facilitate agreement by permitting a handful of members to speak on behalf of the body as a whole.[187] Even where Congress decides not to provide for such explicit and exclusive committee delegations, partial subdelegation would commit courts to finding representative legislative oversight concerns in a manner they already employ when reading legislative history.[188] Moreover, partial

186. *See supra* Part II.B.

187. *Cf.* Amitai Aviram, Path Dependence in the Development of Private Legal Systems 12–13 (April 17, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998991 (citing Andrew R. Dick, *When Are Cartels Stable Contracts?*, 39 J.L. & ECON. 241 (1996); George J. Stigler, *A Theory of Oligopoly*, 72 POL. ECON. 44 (1964) (describing how, in the context of cartels, collective action becomes more difficult as the number of cartel members increases)).

188. *See supra* notes 174–175 and accompanying text.

subdelegation should cause agencies to be more willing to divulge information to committees and to thoroughly explain how they have used that information. Committee votes of disapproval would be based largely on the information agencies provide to members and on the members' judgments about agency responsiveness, policy and strategic motivations, and decisional thoroughness. Accordingly, agencies would have a powerful incentive to ensure that committees do not misapprehend the basis for their decisions and should therefore be expected to err on the side of disclosure as opposed to secrecy. Finally, and perhaps most importantly, partial subdelegation could operate to make independent agencies, which are well insulated from presidential influence, more responsive to political concerns.

IV. OBJECTIONS

What follows is an attempt to anticipate and address important objections to partial subdelegation. To be sure, partial subdelegation has its downsides; it was not conceived as part of a Panglossian delusion. The primary potential objections to partial subdelegation discussed here fall into three categories: (1) its practicality given the dysfunction often thought to define congressional decisionmaking, (2) its constitutionality given the Supreme Court's decision in *INS v. Chadha*, and (3) its necessity given Congress's existing methods of oversight and influence.

A. Practicality

A critic of partial subdelegation could argue that the committee system within Congress is ill-suited to wielding the power that partial subdelegation provides. Powerful chairs and ranking members control the issues on which their oversight committees focus. Even if partial subdelegation does have the effect of improving the tools of congressional oversight, one could assert that it would also exacerbate the problem of politically motivated investigation of administrative decisionmaking. Because members of Congress pay closest attention to those issues from which they can garner political advantage and far less to those issues that promote civic values, such as reasoned decisionmaking and public accountability, partial subdelegation would give committees expanded opportunities for wasting finite resources on counterproductive political grandstanding or on catering to powerful interest groups that have "captured" politicians. These concerns echo others frequently expressed by critics who regard congressional oversight as generally ineffective or counterproductive.

Partial subdelegation is not calculated to remedy the structural decisionmaking and access problems inherent in the congressional committee system. Instead, partial subdelegation focuses on how Congress

can exercise greater influence over agency interpretation in a manner consistent with existing constitutional limitations and accepted modes of oversight. It is not directed at who within Congress would be most likely to wield that power, or the subjects to which that power would be applied.

Nevertheless, courts and legislators could deploy partial subdelegation in ways that make it easier for courts and agencies to discern and characterize legislators' concerns about agency policies, while minimizing the potential for procedural abuse. Although courts are certainly adept at sifting through Congress's nonstatutory work product to discern congressional intentions and views[189]—the method that would have to be employed under the individual legislator-based model of partial subdelegation—more attention within Congress to providing clear lines of communication to courts and agencies would better address abuse and coordination concerns.

For example, legislators could structure committee-based partial subdelegation to require bicameral bipartisan support before communicating concerns to agencies. A single joint oversight committee for a single agency, manned by members of both houses and both parties, could be statutorily invested with partial subdelegation responsibility. Presumably, this bicameral/bipartisan structure would significantly increase the costs of reaching a disapproving "congressional" view on agency policy. By increasing these costs, such a structure would likely reduce the instances in which federal legislators signal their expectation that agency officials explicitly account for their views on agency policy and, hence, the instances in which courts reviewing those policies would expect that agency officials provide legislator-regarding explanations. The single committee partial subdelegation structure could also reduce the coordination and competition problems among oversight committees that otherwise arise when multiple committees communicate their policy concerns to agencies. Because courts would expect agencies to specifically account only for the views of a committee given partial subdelegation responsibility, agencies would be able to prioritize their solicitousness of legislators' views based on those judicial expectations. Such a structure could also promote partial subdelegation's legitimacy within Congress and with the public, as deference could only be eliminated where there is substantial agreement among members. While providing a structure for bicameral, bipartisan participation, the joint committee form of partial subdelegation would still provide substantial logistical improvements over other mechanisms—such as the Congressional Review Act of 1996's joint resolution procedure—which generate all of the coordination problems

189. *See supra* notes 174–175 and accompanying text.

caused by normal bicameralism and presentment.[190]

Another practical concern relates to the comparative competencies of oversight committees and agencies. One could argue that an agency's expertise—scientific, technical, familiarity with the statutory scheme, familiarity with regulated entities, etc.—so far outstrips that of a member of Congress as to make partial subdelegation a poor policy choice.[191] Allowing too much congressional interference will reduce regulatory effectiveness to an intolerable degree. As an initial matter, the disparities between legislative and agency expertise may not be as great as critics might believe. The congressional committee system has developed, at least in part, to allow members to develop expertise in substantive regulatory areas over their years of service. A committee chairperson, for example, is almost invariably a senior member of her party and has served on her oversight committee for many years. While she is unlikely to have the same degree of expertise as civil service employees in the agency she oversees, she is no novice either. Additionally, administrative procedures force agencies to provide information to members, which reduces these asymmetries.[192] Finally, commitment to agency expertise is a *congressional choice*, not a constitutional requirement. The Constitution does not require courts to promote technical expertise to the exclusion of all other values. Accordingly, an enacting Congress is free to determine the mix of political influence and technical expertise that goes into agency decisionmaking processes.

A final practical concern relates to how partial subdelegation would affect the stability of agency decisionmaking. Returning to the *Chevron*-based example from Part III, would the reasonableness of an agency's interpretation be in doubt until legislators or oversight committees gave the interpretation their blessing? In brief, the answer to this question is "no." Partial subdelegation's effect would be to add legislators' policy views to the considerations agencies may take into account (and courts may accept) when they formulate their policies. The mechanics of the *Chevron* inquiry, and the effect that inquiry has on settling agency expectations, would not change. Under *National Cable & Telecommunication Ass'n v. Brand X Internet Services*, the Supreme Court has already acknowledged that agencies can change their interpretive positions, so long as those new positions and the justifications supporting them are reasonable.[193] Apart from adding

190. *See supra* note 116.

191. *See* Bressman, *supra* note 140, at 1767–71 (describing informational asymmetries between Congress and agencies).

192. *See id.* at 1769–70 (arguing that this policy allows Congress to increase the probability that agency policies will mirror the preferences of their constituents).

193. 545 U.S. 967, 1001 n.4 (2005).

legislators' views to the reasonableness calculation as described in Part III, partial subdelegation would do nothing to disturb this arrangement.

Assume, for instance, that federal legislators change their views regarding an agency's interpretation of an ambiguous statute after a court has approved that interpretation under *Chevron*. The fact that legislators have changed their views would not be enough to warrant another round of judicial review. As is currently the case, courts would be required to revisit an agency's statutory interpretation if the *agency* changed its position. Partial subdelegation would again obligate the agency to explain how it has responded to legislators' concerns, those concerns being identified by the court at the time of the subsequent judicial review.

While the opposite system—one in which judicial review would be triggered by a change in legislators' views rather than a change in the agency's views—would arguably do more to facilitate the management of agency slack, it would also raise substantial predictability and constitutionality concerns. With respect to predictability, legislators may change their interpretive views more frequently than agencies are inclined to and so frequently that it would be very difficult for agencies to know the reasonableness of their interpretations at any given moment. Relatedly, courts may find many "false positives," concluding that legislators have changed their views when in fact they have not. With respect to constitutionality, a system that permits Congress to "veto" an agency's interpretation—by allowing legislators to determine when the reasonableness of an agency's interpretation is placed in jeopardy—may run afoul of *Chadha*'s admonition that Congress not alter legal arrangements and obligations outside of the formal legislative process. Taken together, these predictability and constitutionality concerns militate against a legislator-initiated judicial review system, and in favor of an agency-initiated system, despite any attendant decrease in agency slack management and political accountability.

B. Constitutionality

A critic of partial subdelegation could argue that the Supreme Court's decision in *INS v. Chadha* precludes Congress's postenactment involvement in shaping statutory meaning and therefore precludes partial subdelegation. By providing federal legislators with a judicially supported role in agency policymaking—for example, in interpreting ambiguous statutes—partial subdelegation would facilitate that which *Chadha* categorically disallowed. An alternative framing would argue that Congress is constitutionally incapable of speaking with one voice through delegation, at least not in a way that courts are obliged to recognize. Because doing so would

undermine the constitutional limitations on congressional policymaking codified in the Constitution,[194] Congress simply cannot delegate to a subpart of itself that which the Constitution requires Congress to do as a whole.[195]

This criticism can be addressed by distinguishing between partial subdelegation and "full" subdelegation. As explained in Part III, partial subdelegation suggests that courts ensure that agencies have accounted for legislators' policy views. Agencies are not required to accept legislators' positions, just to explain their reasons for doing so or not.

Partial subdelegation hinges not on control but on voice and participation. It gives federal legislators a voice in agency policy formation without giving them any control over it. Accordingly, there is no danger that legislators are acting legislatively (in the *Chadha* sense) because legislators are in no way claiming or exercising the power to make arbitrary policy choices that have the force of law.

By contrast, decisional control would be a hallmark of "full" subdelegation, and would give ambiguity-*resolving* authority to congressional oversight committees. Congress's desired result under full subdelegation would be for courts to defer to legislators' interpretation under *Chevron*, instead of instructing courts to make their independent determinations. Accordingly, full subdelegation would have to overcome several constitutional and theoretical difficulties to be a viable alternative to complete delegation. First and foremost, it would have to be established that congressional retention of the power to make interpretive choices is somehow distinct from retaining the power to alter legal rights and obligations outside of the constitutionally prescribed legislative process. Stated differently, it would have to be clear that the "interpretation" that full subdelegation permits could be convincingly differentiated from the "legislation" to which *Chadha* applies. This Article does not claim that such a distinction is possible.

A different formulation of this claim could assert that congressional

194. *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 899–900 (2004) (describing the intended effects of Article I, Section Seven).

195. Professor Manning has forcefully made this argument in the context of textualist rejections of legislative history. *See, e.g.*, John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 698 (1997) ("If Congress effectively relies on its components to speak for the institution—to express *Congress's* detailed intent—the practice offends the Lockean injunction against the delegation of legislative authority."); *id.* at 706 ("When a court assigns legislative history decisive weight because of the speaker's legislative status, it permits a committee or sponsor to interpret a law on Congress's behalf."); *id.* at 723 ("Lawmaking would surely be cheaper and more efficient if Congress could assign committees authority to interpret laws *conclusively*." (emphasis added)).

interpretation of ambiguous federal laws unconstitutionally infringes on the President's responsibility to "take care that the laws be faithfully executed."[196] The Take Care Clause is directed at the President and no one else. In order for the President to implement federal law, it is first necessary for him to interpret the laws he implements. The fact that the Take Care Clause is directed solely at the President, and makes no mention of Congress, indicates that he must interpret federal law free from congressional interference. There are at least two responses to this argument. First, it may prove too much. To argue that the Take Care Clause gives the President such expansive province over the laws he is tasked with interpreting would invalidate many laws in which Congress has given interpretive responsibility to either Congress or the Judiciary. At least one federal court, writing after *Bowsher v. Synar*, has considered and rejected this possible interpretation of the Clause.[197] Second, partial subdelegation reconciles with the Take Care Clause by accounting for the differing relationships that agencies have with the President and federal legislators. While both the President and Congress are political principals to the agencies,[198] the President is *primus inter pares* when it comes to oversight. Partial subdelegation acknowledges the President's superior position by directing courts to defer to him when his policy views conflict with those of federal legislators.[199]

It is possible that partial subdelegation would lower the costs of legislation so significantly that Congress would have less incentive to go through the legislative process. When given the option of delegating policymaking authority to bureaucrats it cannot control or to themselves, the choice is obvious.[200] Allowing such a choice would also allow Congress to systematically circumvent the procedural controls the Framers deemed critical to securing checks and balances.

This concern is a serious one; partial subdelegation is calculated, in part, to give legislators a judicially cognizable tool for managing agency slack other than legislative override. That being said, it is not entirely clear that partial subdelegation would result in an overall reduction of legislation (and

196. *See* U.S. CONST. art. II, § 3.

197. *See* Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 990 (3d Cir. 1986) (observing that "[t]he mere fact that a non-executive government official interprets the law . . . does not in and of itself mean that this official infringes on the President's authority to execute the law" and that "many laws specifically delegate authority either to the judiciary or to Congress, in the administration of which these branches must interpret the law and may even make binding decisions").

198. *See supra* Part II.

199. *See supra* Part III.A.

200. *See* Manning, *supra* note 195, at 718–20.

the procedural restrictions that accompany it), so much as it would shift the focus of legislation to other topics. Unlike subdelegation of direct interpretive authority—the type of full subdelegation this Article rejects—partial subdelegation just introduces an additional factor to judicial review of agency policymaking.

C. Necessity

Critics of partial subdelegation could argue that it is unnecessary given that Congress already has a plethora of oversight-oriented control methods at its disposal which together are sufficiently effective at managing administrative agency slack. Hearings, investigations, and control over the budgetary process already provide Congress with substantial influence (some would say de facto control) over administrative decisionmaking, including agency statutory interpretation. This is in addition to the *ex ante* control Congress exercises by shaping agency delegations in the first place. Accordingly, partial subdelegation would add only complexity and redundancy to an already complex and redundant system. An alternative form of this criticism would point out that Congress is free to make difficult policy decisions itself, even if it does so poorly; Congress only has itself to blame for the dramatic increase in executive delegations over the past several decades, and it could stop delegating so much policymaking authority to the Executive Branch any time it chooses.

While these substantial critiques cut against the necessity of partial subdelegation, they are also founded on contestable factual premises. To be sure, Congress exercises far greater control over administrative agencies than it ever will over judicial decisionmaking because the latter is largely immune to the coercive effects of legislative oversight.[201] That does not necessarily mean, however, that Congress systematically dominates administrative decisionmaking. Professor Douglas Kriner succinctly summarized the prevailing criticisms of the "congressional dominance" model as follows:

> [T]he precise mechanisms through which oversight alone can influence executive behavior and the course of policymaking are frequently ignored. Recommendations by oversight committees are nonbinding and have no force of law. Congress does have budgetary control over executive departments and agencies, an important means of leverage. However, as noted by skeptics of congressional dominance theories in the literature on bureaucratic control, budgetary tools are somewhat clumsy instruments for encouraging greater executive compliance with legislative intent. Moreover, oversight committees themselves normally lack appropriations authority,

201. *See* Sharpe, *supra* note 101.

> which diminishes the credibility of any threatened committee sanctions for noncompliance. Indeed, in most situations an oversight committee's only formal recourse is to propose new legislation that would legally compel a change in course. However, such efforts are subject to the collective action dilemma and intricate procedures riddled with transaction costs and super-majoritarian requirements, not to mention a presidential veto.[202]

Given the realities of congressional oversight as it currently is practiced, one should pause before concluding that Congress already has all of the postenactment influence over bureaucratic decisions that it needs.

Critics of partial subdelegation could also argue that the reason-forcing function served by partial subdelegation is already fulfilled by the record requirements imposed by § 553 of the Administrative Procedure Act (APA). As construed by the Supreme Court and the D.C. Circuit, agencies engaged in notice-and-comment rulemaking are already required to respond to the significant comments submitted to them by members of the public and members of Congress alike.[203] Partial subdelegation would only duplicate the reason-forcing mechanism the APA already provides.

It is true that both partial subdelegation and notice-and-comment rulemaking could force an agency to explain its policy choices. Both permit members of Congress to formally question how agencies interpret the statutes on which their proposed rules are based. Both place on agencies receiving such inquiries the obligation of providing responsive answers. The difference between the two lies in their respective communicative clarity and in their scopes of applicability. Partial subdelegation could also

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202. Douglas Kriner, *Can Enhanced Oversight Repair "the Broken Branch"?*, 89 B.U. L. REV. 765, 784–85 (2009) (footnotes omitted). *See generally* Terry M. Moe, *An Assessment of the Positive Theory of "Congressional Dominance,"* 12 LEG. STUD. Q. 475 (1987) (setting forth the foundation behind "congressional dominance" and contending that it is inappropriately applied to an analysis of bureaucratic control). One could argue that the difficulties endemic to the legislative process would also undermine the representational legitimacy of the partial subdelegation process. If Congress as a whole cannot agree on legislation to override an agency's statutory interpretation, would not an oversight committee's voting disapproval demonstrate slack between the committee and congressional policy preferences? There may be merit to this criticism in some cases; slack is inevitable in a system of nested delegations. One cannot, however, conclusively infer from Congress's and its committees' responses to a wayward agency's interpretation of a statute a difference in their views on that interpretation. As mentioned earlier in this Article, the legislative process (through which Congress as whole speaks) is marked by numerous pitfalls that do not similarly hinder committee decisionmaking. Accordingly, Congress's inability to override agency interpretation may in no way be tied to its approval or disapproval of it.

203. Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 441 (D.C. Cir. 2012) (citing PPL Wallingford Energy LLC v. FERC, 419 F.3d 1194, 1198 (D.C. Cir. 2005)) ("A regulation will be deemed arbitrary and capricious, if the issuing agency failed to address significant comments raised during the rulemaking.").

be helpful in addressing some of the deficiencies others have identified in the notice-and-comment rulemaking process.

Unlike comments submitted by members during notice-and-comment rulemaking, partial subdelegation can be structured to systematically funnel congressional opinion into a single, clear statement. This level of communicative clarity is not typically matched in the notice-and-comment process, in which members of Congress enter (sometimes contradictory) comments in the formal rulemaking record or choose to informally communicate their views to agency officials through ex parte contacts anyway.

CONCLUSION

Congress does not receive much sympathy these days. Indeed, it may not deserve any. With the institution suffering from all-time lows in its approval rating,[204] it may seem particularly odd to advocate for *greater* congressional control over bureaucratic decisionmaking. Nevertheless, this Article does exactly that. The reason is not that Congress is "misunderstood" by the public or by the press; members' current inability to compromise on issues of national importance[205] provide a reasonable basis for disapprobation.

The reason, rather, is that empowering Congress as an institution is still necessary to uphold the Constitution's structural protections preventing governmental overreaching. As this Article has shown, courts systematically adopt the complete delegation doctrine, which restricts Congress's capacity to influence bureaucratic decisionmaking. When coupled with the President's natural advantages in policing administrative conduct, complete delegation puts Congress at a substantial disadvantage when it comes to managing agency slack. Concentrating too much oversight control in either of the political branches undermines the separation of powers and checks and balances that the Framers believed to

204. In a recent survey, Gallup pegged the 112th Congress's October 2011 approval rating at 9%, which was lower than that of the IRS (40%), lawyers (29%), Richard Nixon during Watergate (24%), British Petroleum during the Gulf Coast Oil Spill (16%), and Paris Hilton (15%). Congress did manage to tie Hugo Chavez (9%), and to beat out Fidel Castro (5%). Chris Cillizza, *Congress' Approval Problem in One Chart*, WASH. POST, Nov. 15, 2011, http://www.washingtonpost.com/blogs/the-fix/post/congress-approval-problem-in-one-chart/2011/11/15/gIQAkHmtON_blog.html.

205. *See* Ezra Klein, *14 Reasons Why This Is the Worst Congress Ever*, WASH. POST, July 13, 2012, http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/ (reporting that the 112th Congress passed roughly half as many public bills into law as the next least productive Congress on record).

be critical in preventing governmental tyranny.[206]

Accordingly, this Article identifies a novel method for facilitating more effective bureaucratic oversight: give Congress a judicially enforceable voice in how courts review agency policymaking. From a practical perspective, partial subdelegation would force agencies to provide considered justifications for accepting or rejecting legislators' policy views. This increased responsiveness to Congress would serve as a more useful complement to the influence wielded by the President.

206. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1977) (observing that the accumulation of legislative, executive, and judicial power in one organ of government "may justly be pronounced the very definition of tyranny").