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Douglas R. Williams
Saint Louis University School of Law, williaj2@slu.edu

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CONGRESSIONAL ABDICATION, LEGAL THEORY, AND DELIBERATIVE DEMOCRACY

DOUGLAS R. WILLIAMS*

Congressional power . . . is never lost, rarely taken by force, and almost always given away.¹

Congress, as an institution, has, over the years, given away a lot of power to the Presidency.² Dr. Louis Fisher's account of Congressional abdication focuses on two fundamental areas of constitutional governance: the power to take the nation to war and the power of the purse.³ In this essay, I consider first whether Congressional abdication might be viewed as a more general phenomenon, extending into other areas to which the Constitution assigns responsibility to Congress. I then offer some thoughts on why Congress might abdicate its constitutional powers.

The question of whether and why Congress abdicates power is a complex one.⁴ In Part I, I consider the distinction Dr. Fisher draws between abdication and delegation. I conclude that, with respect to war and budgetary matters, congressional behavior is different from ordinary forms of delegation. Nonetheless, delegation poses some of the same general concerns that attend Dr. Fisher's claim of abdication. For that reason, it makes sense to consider these behaviors as linked, with an initial hypothesis that they stem from the same general conditions.

* Associate Professor of Law, Saint Louis University School of Law.

1. David B. Frohnmayer, *The Separation of Powers: An Essay on the Vitality Of a Constitutional Idea*, 52 OR. L. REV. 211, 220 (1973).

2. And arguably to the courts, as well. See Steven Puro, *Congress-Supreme Court Relations: Strategies of Power*, 19 ST. LOUIS U. PUB. L. REV. 117 (2000). But that's another story to be told elsewhere. See also Douglas R. Williams, *Demonstrating and Explaining Congressional Abdication: Why Does Congress Abdicate Power?*, 43 ST. LOUIS U. L.J. 1013 (1999).

3. Louis Fisher, *War and Spending Prerogatives: Stages of Congressional Abdication*, 19 ST. LOUIS U. PUB. L. REV. 7 (2000) (hereinafter *Stages*).

4. Studies of congressional behavior are voluminous. For a sampling, see DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974); MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); *CONGRESS: STRUCTURE AND POLICY* (Mathew D. McCubbins & Terry Sullivan eds., 1987); *CONGRESS RECONSIDERED* (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 5th ed. 1993); KAY L. SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986).

In Part II, I explore the question of why Congress might willingly choose to give away power. In my view, partial explanations or factors of significance are about the best one can hope to identify in pursuing this inquiry. I will first argue that, to the extent that Congress may be said to have abdicated its constitutional authority, a public choice analytic supplies a useful starting point. On this view, individual Members of Congress will act in ways that maximize their opportunities for reelection. In some circumstances, choices that maximize reelection opportunities may compromise institutional powers and responsibility. In cases of this sort, we should expect the interests of individual members in advancing their own fortunes to dominate over the members' interest in advancing institutional interests.

In Part III, I introduce another important factor contributing to congressional abdication. Recognizing that legal theory and decisional law effectively set the ground rules within which public programs may operate, I argue that current theory and doctrine have facilitated a shift in authority from Congress to the Presidency — a shift in power in which Congress has largely acquiesced. This shift is broadly consistent with the observations in Part II, for legal theory and norms support those institutional arrangements that favor and promote activities by members that are likely to maximize their prospects of reelection.

In Part IV, adopting a perspective that respects and values constitutional provision for deliberative democracy, I speculate about the effects of delegation and abdication. Dr. Fisher concludes that shifts in power from Congress to the Presidency “undermine democracy and the rule of law.”⁵ Similarly, critics of delegation insist that the practice “weakens democracy” and “endangers liberty.”⁶ My conclusions are more mixed. In many cases, it may be entirely unclear from which institution — Congress or the Presidency — one could expect greater responsiveness to the public and opportunities for deliberation about public goods. Tentatively, it appears that the Presidency may be more capable of fostering public dialogue about certain programs, but may have incentives toward autocracy in other areas of decision making. Somewhat unexpectedly, these observations lead back to Lou Fisher's argument. His insistence upon making a categorical distinction between abdication and delegation when considering the powers of war and budgets can be supported by examining the broad circumstances in which executive action may be prone to autocracy. I conclude that in these areas, strong congressional involvement is likely to be necessary to ensure an effective, deliberative, and responsive process, while in other areas, broad delegations of authority may facilitate public deliberation and democratic processes.

5. Fisher, *Stages*, *supra* note 3, at 63.

6. DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 99-118 (1993).

I. ABDICATION, DELEGATION, AND CONGRESSIONAL RESPONSIBILITY

In considering congressional abdication, the primary focus of Dr. Fisher's work has been on war and budget powers. In these areas, Dr. Fisher makes a compelling case that Congress's behavior amounts to such a distortion of the constitutional structure that one could reasonably conclude that Congress has abdicated power, or at least, responsibility. I, like Professor Devins, harbor some reservations about whether "abdication" is the appropriate term,⁷ but I also adhere to a conclusion I reached in an earlier essay: There is something different about the manner in which Congress approaches questions of war and budgets than the manner in which Congress exercises (or abdicates) its other constitutional authority.⁸ As Dr. Fisher details, in matters of war and budgets Congress has not only acceded to Presidential prerogatives, but has also concurred with Presidential interpretations of the Constitution that diminish congressional authority while advancing broad executive powers.⁹

While it is useful to place Congress's handling of its war and budgetary authority in a distinct analytic category to highlight the constitutional difficulties that attend these practices, it is less useful to maintain this separate category in attempting to explain the practices. In other important areas of governance, Congress grants wholesale authority to the President and agencies to make national policy. Relatedly, when Congress appears to have legislated with great specificity, agencies (and courts) often find "gaps" in the statutory language that enable the agency to refocus public programs to achieve policies favored by the administration, and Congress usually remains mute. This is the "delegation" problem, but it bears a close family relation with Dr. Fisher's description of abdication. Dr. Fisher is unconcerned with this sort of Congressional behavior, because in his view this practice, unlike abdication of war and budgetary authority, is "necessary."

I do not disagree with Dr. Fisher's conclusion, but the insistence upon treating abdication as something different from and more serious than "delegation" remains troubling. Legal considerations aside (most forms of delegation are not treated as raising colorable constitutional issues),¹⁰ it is not self-evident that we should be more concerned with Congress's response to presidential exercises of war and budgetary authority than with Congress's willingness to hand over substantial lawmaking authority to the President and agencies - or Congress's acquiescence in Presidential or agency policy initiatives - in other important areas of governance. Dr. Fisher's concern about congressional abdication is not that governmental powers are lying dormant in

7. Neal Devins, *Abdication By Another Name: An Ode to Lou Fisher*, 19 ST. LOUIS U. PUB. L. REV. 65 (2000).

8. See Williams, *supra* note 2, at 1021-22.

9. Fisher, *Stages*, *supra* note 3, at 56-57.

10. *But see* Am. Trucking Ass'n v. EPA, 175 F.3d 1027 (D.C. Cir. 1999).

the face of serious need for their exercise. Rather, his concern is that power is being exercised by the wrong institution and that this practice lacks constitutional integrity. His concern is about separation of powers and a respect for the architecture of the Constitution. In general terms, Dr. Fisher sees congressional abdication of war and spending powers as a threat to “democracy and self-government.”¹¹

These same concerns animate discussions of excessive delegations of legislative power.¹² Delegation yields a governing structure in which “[m]ost public law is legislative in origin but administrative in content.”¹³ In short, through delegation — a practice “hardly discernible from a reading of either our eighteenth-century Constitution” — “we live in an administrative state.”¹⁴

Critics of delegation insist that Congress is constitutionally responsible for setting the course of public policy and that the President and agencies are obligated to adhere to that course, not to set sail in pursuit of policy objectives of their own. On this view, the constitutional architecture, by placing “legislative” power in the hands of Congress and creating “a single, finely wrought and exhaustively considered, procedure,”¹⁵ ensured that lawmaking would be a deliberative process, subject to consensus among various constituencies’ representatives: the local constituencies represented in the House; the states represented in the Senate, and the nation as a whole represented by both houses and the presidency. Critics of delegation insist that the practice subverts this constitutional arrangement, with untoward effects on the public weal.¹⁶ Delegation, on this view, raises the “constitutional problem . . . that Congress has not fulfilled its constitutional responsibilities.”¹⁷

Jerry Mashaw, an acknowledged advocate of delegation,¹⁸ summarizes these concerns:

The everyday, numerical, and experiential dominance of administrative over legislative and judicial lawmaking seems both unavoidable and troubling. Unavoidable because as we have demanded more from government we have necessarily demanded more administrators to carry out the programs and policies adopted. Troubling because administrative governance affronts our

11. Fisher, *Stages*, *supra* note 3, at 7.

12. These concerns are classically expressed in THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (1979).

13. JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 106 (1997).

14. *Id.*

15. *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

16. For a summary of these concerns, see Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 319-21 (2000).

17. Ernest Gellhorn, *Returning to First Principles*, 36 AM. U.L. REV. 345, 347 (1987).

18. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81 (1985).

common understanding of how American democracy is supposed to operate. . . . Citizens . . . wonder what it means to have a “democracy” run importantly by unknown, “faceless” bureaucrats¹⁹

In a more vigorous and sustained manner, David Schoenbrod charges that “delegation undercuts democracy, undoes the Constitution’s most comprehensive protection of liberty, and ultimately makes government less effective in achieving the popular purposes of regulatory statutes.”²⁰ Delegation, on this view, allows lawmakers to “fool us and . . . to mortgage the nation’s future to prolong their own time in power.”²¹ Schoenbrod is not alone in drawing such grave conclusions about delegation.²²

If delegation may credibly be viewed as posing such dangers to our constitutional form of government, it is different from abdication only by degree, not by kind or effect. Indeed, for some, delegation is synonymous with abdication. Theodore Lowi dramatically describes broad delegations as “the voluntary, self-conscious rendering of legislative power to the President, thence to the agencies in the executive branch” and as something perhaps even more serious than abdication. For Lowi, delegation is “legiscide.”²³

There are, of course, those who defend delegation on pragmatic, democratic, and constitutional grounds.²⁴ My purpose here is not to travel that well-worn path of debate — though I agree with the proponents of delegation — but simply to demonstrate that delegation shares critical features with, and raises the same concerns as, the arguably more extreme congressional behavior of abdication. To understand why Congress abdicates, we will also have to understand why Congress delegates. Both practices signal an unwillingness or inability on the part of Congress to assert its constitutional authority, preferring instead to pass that responsibility to the President and agencies. As an intuitive matter, we should expect that the reasons for both behaviors are largely the same.

19. MASHAW, *supra* note 13, at 107.

20. SCHOENBROD, *supra* note 6, at 14.

21. *Id.* at 20.

22. See, e.g., Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295 (1987); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Peter H. Aranson, Ernest Gellhorn, & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

23. Lowi, *supra* note 22, at 299.

24. See MASHAW, *supra* note 13; Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512 (1992); David Epstein and Sharyn O’Halloran conclude that “Congress does not delegate wholesale to the Executive,” and that the delegation that does occur is desirable from a governance perspective. David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 985 (1999); For the view that arguments against delegation on grounds that it is undemocratic are vacuous — a point to which I am sympathetic — see Dan M. Kahan, *Democracy Schmocracy*, 20 CARDOZO L. REV. 795 (1999).

II. INSTITUTIONAL AUTHORITY AND INDIVIDUAL INCENTIVES: REPRESENTATION, DELEGATION, AND ABDICATION

A simple, straightforward explanation for delegation/abdication is that Congress is doing nothing more than supplying the public with what it has demanded. This explanation is premised on the obvious: Members of Congress are forced to respond to constituent demands or face the prospect of losing their jobs. As Madison put it in discussing the House of Representatives, legislators have “an immediate dependence on, and an intimate sympathy with, the people.”²⁵ Absent some convincing evidence that the electoral system is subject to some rather severe malfunctioning due uniquely to delegation and/or abdication, it is difficult, or at least counter-intuitive to suggest that congressional abdication and delegation are “undemocratic.” If that is so, one would expect that the turnover rate in Congresses that have chosen to abdicate or delegate broadly would be very high indeed. As to potential malfunctioning within the electoral system, we can acknowledge that a variety of collective action problems and corrupt practices may permit legislators to act in ways that a majority of their constituents disfavor.²⁶ There is, however, no persuasive reason to expect that those problems are more acute in a regime where delegation and abdication are the norm than in a regime where they do not obtain.

Professor Schoenbrod, does suggest that delegation enables legislators to hoodwink the voting public, presenting them with claims of accomplishments and responsibility that are basically vacuous.²⁷ This effect, if true, demonstrates a malfunctioning of the electoral system the causative factor of which is delegation, distinguishing this factor from other problematic collective action scenarios. One can appreciate Professor Schoenbrod’s efforts to bring delegation into the spotlight, encouraging public scrutiny and deliberation about this practice. But his argument against delegation on this point simply proves too much. If Schoenbrod is right that Congress can fool the public through delegation — and there are no strong reasons for believing that it can — his argument is, at best, a bit awkward. If the public lacks the sophistication or interest to scrutinize legislators’ claims, it is not at all clear that, if this is democracy, we should want any part of it.

As Schoenbrod himself acknowledges, “We can refuse to reelect legislators who make laws we dislike.”²⁸ Thus, an engaged public that is

25. THE FEDERALIST, NO. 51, at 163 (Alexander Hamilton & James Madison) (The University of Chicago ed., 1952).

26. The literature on collective action problems is vast. The generative text is MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

27. SCHOENBROD, *supra* note 6, at 14.

28. *Id.*

dissatisfied with broad forms of delegation can simply select legislators who will refuse to engage in such practices. Mashaw puts this point nicely:

A decision to go forward notwithstanding continuing ambiguity or disagreement about the details of implementation is a decision that the polity is better off legislating generally than maintaining the status quo. Citizens may disagree, but they can also hold legislators accountable for their choice. If citizens want more specific statutes, or fear that legislating without serious agreement on implementing details is dangerous, they can, after all, throw the bums out.²⁹

An unengaged, ill-informed electorate may unwittingly dislike delegation and be unable to see it. This environment would free legislators from the discipline of accountability. As I shall explain below, however, there is no reason to expect that the type of legislative behavior preferred by Schoenbrod would increase legislative accountability or lead to more informed decisions by the electorate. But assuming Schoenbrod is right, we could simply conclude that the electorate is getting no more or no less than what it bargained for. As a *prima facie* matter, I am unwilling to assign such ignorance or incapacity to the public, preferring a more beneficent view of the electorate's capacities for understanding legislative choice, including the choice to delegate power broadly or to abdicate authority entirely.³⁰ *Prima facie*, then, delegation is practiced as a congressional response to public demand.

The idea that congressional behavior may be explained as a function of constituent demand is the basic idea that informs public choice theory.³¹ The

29. MASHAW, *supra* note 13, at 146-47; *see also id.* at 139 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 134 (1980)):

The . . . demand for legislative decision making as a prerequisite to accountability is . . . incomplete. . . I find it difficult to understand why we do not presently have exactly the "clowns . . . we deserve." The dynamics of accountability apparently involve voters willing to vote upon the basis of their representative's record in the legislature. Assuming that our current representatives in the legislature vote for laws that contain vague delegations of authority, we are presumably holding them accountable for that at the polls. How is it that we are not being represented?

30. An interesting problem for those who would introduce the problem of "democracy" in support of or against delegation/abdication is the apparent lack of interest in self-rule by the voting public. One source reports that "fewer than half of voting-age citizens take part in House elections in presidential years and fewer than 40 percent vote in off years." ROGER H. DAVIDSON & WALTER J. OLESZEK, *CONGRESS AND ITS MEMBERS* 97 (6th ed. 1998).

31. *See* Daniel A. Farger & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987), *reprinted in part in* MAXWELL STEARNS, *PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY* 5, 16 (1997):

The core of the [public choice] models is a revised view of legislative behavior. In place of their prior assumption that legislators voted to promote their view of the public interest, [public choice scholars] now postulate that legislators are motivated solely by self-interest. In particular, legislators must maximize their likelihood of reelection. A legislator who is not reelected loses all the other possible benefits flowing from office.

theory is that, as a matter of rational choice, legislators will act in ways that maximize their preferences, with the dominant preference being a desire for reelection.³² Importantly, the basic unit of analysis for this theory is the individual legislator, not the institutional Congress. Note also, that in order to have explanatory value, the theory does not require that every member's preference for reelection will dominate that member's other preferences — e.g., a preference for fiscal responsibility. Rather, and because Congress acts collectively, the theory will be useful so long as members' aggregated preferences for reelection dominate over members' other aggregated preferences.

Given this structure of incentives facing members of Congress, we are faced with the distinct prospect that legislators may act in ways that promote their own electoral fortunes while jeopardizing the functional role of the institution as a whole. This result will obtain in circumstances where the action that advances individual legislators' interests in reelection and the action that advances institutional interests are not the same.

The rather vast literature on Congress tends to support the conclusion that individual and institutional interests will often diverge. For example, in their useful work, *Congress and its Members*, Roger Davidson and Walter Oleszek, devote a lot of space to explicating a Burkean "two Congresses" thesis.³³ One functional Congress "act[s] as a collegial body, performing constitutional duties and debating legislative issues."³⁴ The other serves as "the representative assemblage of 540 individuals."³⁵ Davidson and Oleszek conclude that "the Constitution and subsequent historical developments affirm Congress's dual functions of lawmaker and representative assembly. Although the roles are tightly bound together, they nonetheless impose separate duties and functions."³⁶ While acknowledging that members' duties to respond to the insistent demands of voters and constituents is "not specifically spelled out in the Constitution," Davidson and Oleszek rightly conclude that "these duties flow from the constitutional provisions for electing representatives and senators."³⁷

The important insight here is that "[t]he electoral fortunes of its members depend less upon what Congress produces as an institution than upon the

32. For a brief discussion of this model, including its shortcomings, see Williams, *supra* note 2, at 1035-44.

33. DAVIDSON & OLESZEK, *supra* note 30, at 1-37; see also Aranson et al., *supra* note 22, at 43 (discussing "fundamental tension between a legislator's role as a delegate of narrow interests and his role as a trustee for his district and for the nation").

34. DAVIDSON & OLESZEK, *supra* note 30, at 4.

35. *Id.*

36. *Id.* at 6.

37. *Id.* at 5-6.

support and goodwill of voters hundreds or thousands of miles away.”³⁸ Mashaw puts the point more directly. To voters choosing a representative, “the congressperson’s position on various issues of national interest is of modest, if any importance. The only question is, Does he or she ‘bring home the bacon.’”³⁹

When voter support and goodwill can be nurtured by actions that are in derogation of Congress’s institutional interests, public choice theory predicts that legislators will generally choose to abandon institutional concerns in order to promote their individual interest in reelection. In fact, the disjunction between individual incentives and institutional interests may be such that, for members, it “dictates a strategy of opening as much space as possible between themselves and ‘those other politicians’ back in Washington” — namely, the Congress as an institution.⁴⁰ Or, as Richard Fenno aptly concludes, members will “run for Congress by running *against* Congress.”⁴¹

Although this conclusion seems to point to a potential problem of governance, we should not rush from this consequence to the additional conclusion that it is inconsistent with the Constitution. The Constitution does not require Congress to act wisely or in ways that promote the provision of public goods over the provision of private goods. Rather, the Constitution structures exercises of power in ways that the framers hoped would promote public-regarding outcomes over private-regarding ones.⁴² Recall that the Constitution was designed in part on the Madisonian premise that effective governments are those that are structured in ways that make use of, rather than attempt to suppress, the self-interest of individual political leaders.⁴³ But just as importantly, as Davidson and Oleszek make clear, the reason that individual interests may hamper institutional capacities is that the Constitution structures the legislative branch in ways that permit — indeed, encourage — such results.

As I have suggested elsewhere, the framers may have been insufficiently attentive to the institutional effects of self-interested behavior in fashioning their constitutional blueprint.⁴⁴ On the other hand, the provisions of Article I suggest (or at least support) precisely the opposite conclusion — namely, that the framers understood that the electoral demands placed on members would often require individual responses that diverged from the interests of the institution as a whole. They may very well have been familiar with Burke’s

38. *Id.* at 4-5.

39. MASHAW, *supra* note 13, at 152.

40. DAVIDSON & OLESZEK, *supra* note 30, at 7-8.

41. RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 168 (1978).

42. *See generally* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

43. THE FEDERALIST NO. 51, *supra* note 25, at 163.

44. Williams, *supra* note 2, at 1016.

speech in Bristol in 1774, elaborating the dual character of representative government. Burke described a popularly elected legislature both as “a Congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates,” and as “a deliberative assembly of one nation, with one interest, that of the whole — where not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole.”⁴⁵ Perhaps less obviously, the framers may have realized that frequent elections would force members to consider carefully the electoral consequences of their actions. As a result, members’ individual interests would serve as a sort of internal hedge against the tendencies of legislatures to dominate the political arena, lessening the threat of legislative tyranny with which the federalist framers were so clearly concerned.⁴⁶ While entirely speculative, it may very well be that in structuring Congress, the framers recognized that individual and institutional interests would, at times, diverge and provided incentives that permit individual interests to dominate precisely to ensure that Congress would not become too powerful.

In any event, delegation and abdication are the predictable results of the institutional design, for this behavior is, in a number of ways, broadly consistent with the general tendency of legislators to prefer actions that advance individual interests over institutional ones. First, and perhaps most obvious, delegation and abdication do not demand nearly as much knowledge or information about the pertinent issues as is required to enact detailed, rule-like legislation (at least if members deem it important to understand the effects of and reasons for their votes). As a consequence, by abdicating or delegating, members avoid the costs of obtaining and understanding information. Not only does this reduce the sheer workload of legislators, it also becomes an effective strategy for dealing with the vast uncertainties — both in terms of actual policy effects and political repercussions — that accompany many

45. Edmund Burke, *Speech to Electors at Bristol*, in BURKE’S POLITICS (Ross J.S. Hoffman & Paul Levack, eds. 1949), quoted in DAVIDSON & OLESZEK, *supra* note 30, at 12.

46. It is widely understood that the Federalist framers feared powerful legislatures. Madison expressed this concern explicitly. See THE FEDERALIST NO. 48, at 157 (James Madison) (The University of Chicago ed., 1952) (“The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”); see *id.* (“[I]t is against the enterprising ambition of [the legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions.”); see also THE FEDERALIST NO. 51, *supra* note 25, at 163:

In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions.

forms of regulatory action.⁴⁷ An added benefit is that delegation, by minimizing the need for information, frees up scarce resources that members may devote to constituent services believed to be more directly relevant to the members' electoral prospects.⁴⁸

Second, delegation enables members to mediate disputes among conflicting constituent groups without coming down strongly on one side or the other. Broad delegations often funnel the conflict over the distribution of benefits and burdens in public programs from the legislative to the administrative forum, in which incremental adjustments can be made that tend to lessen the hardships experienced by those who "lose" the battle for benefits and burdens.⁴⁹ Mashaw notes, for example, that broad delegations facilitate both temporal and situational variances in regulatory requirements that may better account for the actual effects of regulation than is possible through legislation that eliminates the possibility of such variances by tightly constraining administrative discretion.⁵⁰ In this manner, legislators may minimize the chances of alienating important constituents and thus increase their chances of reelection. More generally, and especially when coupled with uncertainty about the effects of various policy choices, "with greater . . . conflict there is a stronger incentive for Congress to pass the hot potato to the agency by broadening the scope and instruments of delegated authority."⁵¹

Third, broad delegation may permit legislators to exert influence over the implementation of delegated authority in ways that would likely be much more difficult in a regime of more rule-like legislation.⁵² This influence may frequently service particular constituents' interests, enabling members to gain visible credit and shift blame in ways that might be unlikely without abdication or delegation at the institutional level.⁵³ As McCubbins and Schwartz argue, congressional oversight is less costly to members and more effective, in terms of electoral prospects, when undertaken in response to specific complaints about administrative action voiced by important constituents than when conducted systematically.⁵⁴ To the extent that broad delegations enable

47. Mathew D. McCubbins & Talbot Page, *A Theory of Congressional Delegation*, in CONGRESS: STRUCTURE & POLICY 409, 416-18 (Mathew D. McCubbins & Talbot Page eds., 1987).

48. See Aranson et al., *supra* note 22, at 21-2. Epstein and O'Halloran conclude that delegation tends to get broader as the issues become more complex. Epstein & O'Halloran, *supra* note 24, at 984. ("[A]s issue areas become more informationally intense, no matter how information is measured, more authority is delegated. . .").

49. Aranson et al., *supra* note 22, at 33, 39.

50. Mashaw, *Prodelegation*, *supra* note 18.

51. McCubbins & Page, *supra* note 47, at 419.

52. Aranson et al., *supra* note 22, at 58.

53. *Id.*

54. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, in CONGRESS: STRUCTURE & POLICY 426, 429 (1987).

administrators to exercise the flexibility to respond to legislators' inquiries in ways that reduce friction between the agency and legislators, such delegations enhance legislators' effectiveness in dealing with constituents' complaints, directly increasing the likelihood of electoral success.

Fourth, delegation may permit legislators to take action in response to public demand for legislation in circumstances where, if precise statutory standards were required, conflicts among legislators themselves might yield a stalemate, preventing Congress as an institution from taking any action at all.⁵⁵ In this fashion, legislators can avoid the charge of being part of a "do-nothing" institution.

Finally, we should not discount the possibility that delegation may be viewed by legislators (and the public) as an appropriate institutional response to serve important public interests:

[C]onsider a fairly complex policy area — say, airline safety — in which legislators are confident that the regulator's policy goals are nearly identical to their own. Delegating under such circumstances with broad discretion would result in outcomes close to those preferred by legislators and, by transitivity, to those preferred by their constituents as well. . . . In contrast, forcing Congress to provide a detailed policy algorithm may result in the regulator's having to implement policy that neither she nor the legislators in the enacting coalition would have preferred. True, a good algorithm will deliver good policy, but relatively uninformed legislators may not even possess sufficient expertise to be sure that their road map will lead to the desired destination, rather than a dead end.⁵⁶

Empirical surveys support the more general conclusion that the breadth of delegated power "increases when it better suits legislators' need for reelection, and it decreases when legislative policymaking becomes politically more efficient."⁵⁷

The incentives favoring abdication in matters involving war are somewhat different, but basically follow the same logic.⁵⁸

The framers did not clearly seek to check these incentives by including an express prohibition against delegation. Indeed, the sweeping clause, providing congressional authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" powers conferred by the Constitution, may plausibly be viewed as textual evidence of an apparent unconcern for express statutory delegation.⁵⁹ From an historical perspective, delegation has been a

55. *Id.*

56. Epstein & O'Halloran, *supra* note 24, at 986-87.

57. *Id.* at 985.

58. *See* Williams, *supra* note 2, at 1015-16.

59. U.S. CONST. art. I, § 8, cl. 18; *see generally* William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the "Sweeping Clause,"* 36 OHIO ST. L.J. 788 (1975).

rather consistent approach to achieving public policy objectives.⁶⁰ From a normative perspective, delegation raises complex issues, but it does not suffice to declare the practice “undemocratic” and move quickly to the conclusion that a strong judicial stance against the practice is warranted. These considerations are addressed in Part IV.

III. LEGAL THEORY AND THE DECLINE OF CONGRESSIONAL AUTHORITY

To this point, I have argued that Congress will tend to delegate/abdicate constitutional authority in response to public demand, measured in terms of how individual legislators believe prospects for reelection are affected by the various choices they face in exercising the authority of their offices. In this part, I will argue that legal theory has contributed to the shift in power from the Congress to the presidency and the bureaucracy.

A. *Expansion of National Legislative Power Contributes to the Erosion of Congressional Authority*

The primary complaint of those who view delegation/abdication as a constitutional impropriety is that it corrupts the political process by enabling legislators to confer private benefits at public expense⁶¹ or that it facilitates national action by shortcutting the constitutionally-prescribed process for reaching a consensus on the need for such action.⁶² Those who share these views often argue that a rigorous, judicially enforced ban on broad delegations, while now largely a constitutional anachronism,⁶³ (will redress) to these concerns. Then-Justice Rehnquist summarized the functions of the nondelegation doctrine in *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*,⁶⁴ noting:

[T]he nondelegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly government administration that important choices of social policy are made in Congress, the branch of our Government most responsive to the popular will. . . . Second, the doctrine guarantees that. To the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an ‘intelligible principle’ to guide the exercise of the delegated discretion. . . . Third, and derivative of the second, the doctrine ensures that courts charged

60. See, e.g., *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813) (upholding delegation to the President to impose trade restrictions); see generally Sunstein, *supra* note 16, at 322 (“[T]he practice of early congresses strongly suggests that broad grants of authority to the executive were not thought to be problematic.”).

61. See Aranson et al., *supra* note 22, at 37-63.

62. SCHOENBROD, *supra* note 6, at 117-18; Fisher, *Stages*, *supra* note 3, at 51-55.

63. But see *American Trucking Ass’n*, 175 F.3d at 1027 (holding that the EPA’s interpretation of the Clean Air Act effected an unconstitutional delegation of legislative power).

64. 448 U.S. 607 (1980).

with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.⁶⁵

In my view, pinning hopes on the delegation doctrine to service these functions misses the mark or is, at the least, incomplete, masks other important factors, and fails to account for the current administrative law system.

I start from an obvious premise. The scope of permissible delegation is a function not only of the constraints imposed by a nondelegation principle, but also of how much authority Congress itself enjoys. Put slightly differently, even if Congress could delegate without constraint, it could only delegate such authority as the institution itself may exercise. The more power Congress has, the more power it may delegate. In my view, opponents of delegation — at least those of a decidedly conservative cast (and most are) — are aiming at the wrong target, with the result that their arguments against delegation mask the object of their jealousy. To take a very simple example, Schoenbrod uses the Clean Air Act as an example to support the sweeping conclusion that “‘American public bureaucracy is not designed to be effective,’ but rather to advance the interests of ‘those who exercise political power.’”⁶⁶ But in order to so advance such interests, it would be necessary, first, to conclude that Congress - and derivatively, the bureaucracy, pursuant to delegation — was vested with constitutional authority to regulate activities that contribute to air pollution. More specifically, it is necessary to conclude that the Clean Air Act — and virtually every other statute administered by an agency — is an appropriate exercise of Congress’s authority to regulate interstate commerce.

While that conclusion now seems hardly worth questioning, even considering the Court’s recent, more restrictive reading of the commerce clause,⁶⁷ it was not always so. Indeed, prior to the expansive interpretation of the commerce clause that has been used to sustain the administrative state, it is likely that the courts would have treated the Clean Air Act as beyond the scope of congressional power, even if the delegation were deemed to be otherwise appropriate.⁶⁸ It seems clear, however, that broad delegations and legislation resting on expansive interpretations of the commerce clause go hand in hand. Indeed, in the most famous delegation case, *A.L.A. Schechter Poultry Corp. v. United States*, the Court concluded that the National Industrial Recovery Act, permitting the formulation of “codes of fair competition,” was both an unconstitutional delegation of legislative power and beyond congressional

65. *Id.* at 685-86 (Rehnquist, J. dissenting).

66. SCHOENBROD, *supra* note 6, at 81 (quoting Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN* 26 (John E. Chubb & Paul E. Peterson eds., 1989)).

67. *See, e.g.*, *United States v. Morrison*, 120 S. Ct. 1740 (2000).

68. *See, e.g.*, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

authority under the commerce clause.⁶⁹ Moreover, tellingly, despite an occasional lawsuit raising delegation issues — all of which were unsuccessful⁷⁰ — there apparently was virtually no mention of a “delegation problem” prior to the massive expansion of federal power that began with the New Deal.

Had the Court adhered to the views expressed in *Schechter, E.C. Knight*, and like cases — namely, that “[c]ommerce succeeds to manufacture and is not part of it,”⁷¹ and that Congress may only assert its authority over activities that are actually in interstate commerce or that “directly affect” interstate commerce⁷² — the scope of congressional power would have remained rather severely limited and the subject matter of many of the existing regulatory programs would remain within the province of state and local governments. The opportunities for members of Congress to confer private (and public) benefits through delegation or otherwise would correspondingly be limited. Paradoxically, by increasing the opportunities for members to deliver benefits to their constituents, the courts’ expansion of congressional authority under the commerce clause also increased the opportunities for Congress to give away that authority through abdication/delegation.

I do not want to claim too much for this effect of legal doctrine, for even under restrictive readings of congressional powers, the potential reach of federal administrative regulatory programs remained fairly extensive.⁷³ Nonetheless, the effect is likely substantial and correlates well with other features that make delegation likely. First, the pre-New Deal interpretations of the commerce clause, combined with interpretations of the due process clause, did not prevent substantial amounts of regulation (with attendant delegation), but it placed certain sorts of regulation beyond congressional cognizance. Complex divisions of the world into “national” and “local,” as well as “public” and “private” spheres yielded the conclusion that much of the nation’s

69. 295 U.S. 495, 551 (1935).

70. Schoenbrod cites three pre-New Deal cases, claiming that in each the Court struck down statutes “on the ground that they delegated legislative power.” SCHOENBROD, *supra* note 6, at 34-5 (discussing *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W.C. Dawson*, 264 U.S. 219 (1924)). This reading of the cases is to some extent correct, but none of the cases involved delegation to the President or to administrative agencies. Accordingly, they raise concerns that lie outside the scope of this essay.

71. *E.C. Knight*, 156 U.S. at 12. For a thorough review of the cases, see Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 *FORDHAM L. REV.* 105 (1992).

72. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 547-48.

73. See, e.g., *Houston, E. & W. Tex. Ry. Co. v. United States*; *Texas & Pac. Ry. Co. v. United States*, 234 U.S. 342 (1914) (The Shreveport Rate Cases).

economic activity would be off-limits to federal regulation.⁷⁴ As Charles Schultze notes, “[e]ven as late as the middle 1950s the federal government had a major regulatory responsibility in only four areas: antitrust, financial institutions, transportation, and communications.”⁷⁵ Now, these areas of federal regulation have taken a backseat to extensive regulation concerning health, safety, and the environment, subjecting all but the smallest and most local forms of economic activity to extensive legal requirements. With this expanding responsibility comes the need for delegation.

Second, with the rise of new subject matters for regulation came the need to develop new forms of regulation. The nature of the problems addressed by newer areas of regulation differs radically from those contained within the “national, public” sphere of pre-New Deal jurisprudence.

The single most important characteristic of the newer forms of [regulation] is that their success depends on affecting the skills, attitudes, consumption habits, or production patterns of hundreds of millions of individuals, millions of business firms, and thousands of local units of government. . . . The boundaries of the ‘public administration’ problem have leapt far beyond the question of how to effectively organize and run a public institution and now encompass the far more vexing question of how to change some aspect of the behavior of a whole society.⁷⁶

The combination of more opportunities for regulation, coupled with the type of regulation demanded, ensured that delegation would not only be desirable in some cases, but necessary to carry the federal presence into the places to be regulated. Insisting that federal regulation take the form of statutory rules to be enforced by courts with little involvement by agencies — save, perhaps, a prosecutorial function — seems not only improbable, but a recipe for bureaucratizing the courts to a much greater degree than they currently are.

It misses the point to argue that “Congress has enough time to make the laws,” making delegation unnecessary.⁷⁷ Arguments of this sort typically rest on the claim that extensive federal regulation simply is not called for — state regulation and markets will do the job nicely and more efficiently.⁷⁸ Even if this is right — a questionable conclusion, to be sure⁷⁹ — it is not an argument against *delegation*, but instead an argument for pre-New Deal commerce clause jurisprudence. For example, Schoenbrod, who advances these

74. See Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. (forthcoming Fall 2000).

75. CHARLES L. SCHULTZE, *THE PUBLIC USE OF PRIVATE INTEREST* 7 (1977).

76. *Id.* at 12.

77. SCHOENBROD, *supra* note 6, at 135-52.

78. *Id.* at 136-142.

79. See generally Douglas R. Williams, *Cooperative Federalism and the Clean Air Act: A Defense of Uniform Federal Regulation*, 20 ST. LOUIS U. PUB. L. REV. (forthcoming Spring 2001).

arguments against delegation, concedes that “[g]overnment cannot manage industries without delegation.”⁸⁰ But it is management of industries (or at least many of the negative externalities they generate) that is precisely what is required by many of the newer forms of regulation.

Faulting the courts for not applying a vigorous “nondelegation doctrine” fails for want of appropriate principles that will not simultaneously impose a judicial constraint on Congress’s ability fully to exercise its constitutional authority, as interpreted by post-New Deal courts.⁸¹ That is, if we deem it constitutionally appropriate for the federal government to regulate the subject matters it currently does, delegation, often very broad, is the inevitable result.

Consider in this respect, the Court’s decision in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,⁸² commonly known as the *Benzene* case. A plurality of the Court concluded that Occupational Safety and Health Administration (OSHA) had impermissibly interpreted a statute to require the agency to impose strict limits on the extent of toxic chemical exposures — in this case, benzene — experienced by employees without a prior finding that existing exposure levels posed a “significant risk” to the employees’ health. The agency concluded that exposure to benzene was linked to certain forms of cancer, but could not identify a level at which the linkage between exposure and cancer could be definitively ruled out — that is, benzene is a pollutant that exhibits no “threshold” level below which risks to human health can be confidently ruled out. On the agency’s view, once this risk to health had been identified, whether “significant” or otherwise, the statute mandated that the risk be eliminated or reduced to the extent “feasible.” The Court viewed this interpretation of OSHA’s statutory authority as much too expansive.

The Court’s decision in *Benzene* is perhaps sensible, but its reasoning is confounding. The Court opined that if the agency was right about what the statute required, the legislation would grant the agency such sweeping authority over American industry that it would constitute an unconstitutional delegation of legislative power.⁸³ But this is an incorrect, or at least highly novel, reading of the nondelegation doctrine. It shifts the ground of concern from the question whether Congress had resolved the important policy questions when it enacted the statute to the question whether the extent of regulation would too severely disrupt the economic status quo. If the agency

80. *Id.* at 140.

81. See Peter H. Schnuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 792-93 (1999) (Vigorous nondelegation doctrine is “a prescription for judicial supervision of both the substance and forms of legislation and hence of politics and public policy, without the existence of even the possibility of any coherent, principled, or manageable judicial standards.”).

82. 448 U.S. 607 (1980).

83. *Id.* at 646.

was right that the statute mandated the result it reached, the legislation would not be unconstitutional for want of a limiting statutory mandate that effectively constrained the agency's policy choices. It would simply represent a choice by Congress to exercise its commerce powers in an extraordinarily aggressive manner, based on the premise that health risks to American workers should be reduced wherever feasible, regardless of the relationship between the gains in health protection and the costs of achieving such gains. The problem in *Benzene* was not one of delegated "legislative" power, but of delegated "administrative" power to work the legislative will. This is not a problem to which the nondelegation doctrine is responsive; it is a problem — if at all — associated with the scope of Congress's substantive legislative jurisdiction. The Court's invocation of the nondelegation doctrine to substitute its own, far narrower reading of the agency's statutory authority for that offered by the agency masks this, more likely basis for judicial concern about the agency's actions.

Critics of delegation are also strangely unattentive to other ways in which administrative discretion can have significant impacts on policy. We enjoy a common law system in which nice adjustments to legal obligations are made by distinguishing factual predicates. In light of that practice, it is unlikely that a reinvigorated nondelegation doctrine would squeeze discretion out of the system. It is much more likely that the discretion would be shifted from the (usually) highly visible and indirectly accountable (via presidential accountability) agency proceedings to less visible prosecutorial processes and largely unaccountable judicial processes. It is hardly clear that, given the enormous discretion enjoyed by prosecutors⁸⁴ and the courts — particularly on matters of remedy⁸⁵ — that a vigorous nondelegation doctrine would accomplish any of its recognized purposes.

Once the expansive powers of Congress were released from the shackles of limiting judicial interpretation, it is not surprising that the delegation doctrine fell into desuetude. If the only effective limits on the matters to which congressional authority extends were those imposed by electoral constraints, a "substantial effects" linkage to interstate commerce, and a flimsy "rational basis" standard of review,⁸⁶ why should the courts, on the basis of nothing more than a debatable constitutional inference, attempt to contain this power by invoking delegation principles? How were courts to distinguish the question of whether Congress had made sufficiently specific policy choices in

84. See *Heckler v. Chaney*, 470 U.S. 821 (1985).

85. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

86. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis.").

delegating power to agencies from the question of whether the subject matter of the legislation was appropriate for federal intervention? *Benzene* shows that the questions may be quite difficult to keep analytically separate. But even if the delegation doctrine were capable of being confined to an inquiry concerning whether Congress had made sufficiently clear policy choices, how are courts to discern the range of possible policy options, much less whether the legislative choice was “specific”?⁸⁷

Rather than viewing delegation as an evasion of congressional responsibility, broad delegations of authority to administrative institutions might be explained, at least in part, as a responsible congressional choice to extend the reach of federal power to deal with pressing social and economic problems. A charge of “abdication” on the part of Congress for such responses would seem misplaced.

B. The Routinization of Administrative Law and the Ascendance of Administrative Authority.

Aside from broadly interpreting Congress’s constitutional authority, and thus inviting Congress to delegate broadly, the courts (with legislative assistance) have developed a now fairly routinized body of administrative law to review the exercises of discretionary power by the President, when acting through agencies,⁸⁸ as well as exercises of such discretion by agencies pursuant to direct legislative grants of authority. The effects of such review upon Congress’s willingness to delegate broadly are difficult to discern as an empirical matter. Nonetheless, there is some intuitive appeal to Judge Leventhal’s observation in *Ethyl Corp. v. EPA*: “Congress has been willing to delegate its legislative powers broadly — and courts have upheld such delegation — because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory.”⁸⁹

Subject to the fairly recent innovations discussed below, legal theory thus treats administrative action more as implementation than invention. Under highly elastic standards of review such as the Administrative Procedure Act’s “substantial evidence” and “arbitrary and capricious” standards, the courts have encouraged Congress and the public to treat administrative action as subject to the rule of law, and not as policy development and implementation

87. On this view, see *Mistretta v. United States*, 488 U.S. 361, 415-16 (Scalia, J., dissenting) (nondelegation doctrine not susceptible to judicial enforcement); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324-28 (1987).

88. The authority of the courts to review exercises of presidential discretion remains somewhat limited. See *Dalton v. Specter*, 511 U.S. 462 (1994).

89. 541 F.2d 1, 224 (D.C. Cir. 1976).

in which political considerations hold sway. Moreover, Congress has become quite adept at loading up with exacting procedural requirements statutes otherwise containing broad grants of discretion. Such procedural requirements make the exercise of agency power quite cumbersome, and may be an effective means of controlling administrative discretion.

A prime example of this approach is the EPA's authority to regulate chemicals under the Toxic Substances Control Act (TSCA).⁹⁰ Two examples of the agency's attempt to implement this statute are telling. McCubbins and Page offer this anecdote:

Under section 4 of the act, EPA must promulgate test rules for those chemicals that it requires to be tested. Such tests are used to generate information about the health and environmental effects of the new chemical. The chemical manufacturing firms have to pay for the tests. Procedural safeguards were put into TSCA to prevent EPA from requiring tests that were redundant or did not produce useful information. Indeed, in the case of one of EPA's first "priority" chemicals, chloromethane, these procedural requirements were interpreted so strictly by the agency that it spent several hundred thousand dollars and several years writing the test rule The cost of writing a rule requiring testing was several times the cost of performing the test.⁹¹

Under section 6 of the same statute, EPA engaged in a ten-year effort to develop a record sufficient to support a phased ban of asbestos-containing products, only to be met with a judicial conclusion that the agency had not jumped through all the hoops Congress had placed in the path of effective regulation.⁹²

These examples illustrate that broad delegations of substantive authority do not necessarily yield an environment in which agencies enjoy broad, unfettered discretion. They also provide a sense of the effects on agency decision making of the propensity of courts to scrutinize closely agency action for procedural shortcomings. This form of review, what Jerry Mashaw describes as "proceduralized rationality review,"⁹³ is a staple of modern administrative law.⁹⁴ Faced with judicial demands to explain their actions in exacting detail and to respond to comments from the public, it is not unusual for notices of final rulemakings to run to tens and sometimes hundreds of pages in the Federal Register. Agencies have become familiar with judicial demands and have structured their decision making processes in ways that minimize the opportunities for successful judicial challenges. Knowing this, Congress can

90. 15 U.S.C. §§ 2601- 92 (1994).

91. McCubbins & Page, *supra* note 47, at 418.

92. Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1229 (5th Cir. 1991).

93. MASHAW, *supra* note 13, at 178.

94. See, e.g., United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240 (2d Cir. 1977).

structure its delegations in ways that avoid taking sides on controversial issues, but nonetheless impose significant constraints on agencies.⁹⁵

Because the well-developed system of judicial review now functions as both an internal and external check on agency decision making processes, it has largely supplanted the need for a nondelegation doctrine, at least with respect to two of the three functions typically assigned to the doctrine — namely, cabinining administrative discretion and ensuring meaningful judicial review. Indeed, in modern incantations of the nondelegation doctrine, it is these two concerns that have purportedly justified its continued application. In *American Trucking Association, Inc. v. EPA*,⁹⁶ the D.C. Circuit invoked the nondelegation doctrine to hold that EPA's interpretation of the Clean Air Act violated the nondelegation doctrine not because Congress had legislated too broadly, but instead because the agency had failed to impose upon its statutory authority a constraining construction that effectively provided determinate limits on the agency's discretion.⁹⁷ The court acknowledged that this sort of application of the nondelegation doctrine did not ensure that Congress makes important policy choices, but expressed little or no concern with that consequence.⁹⁸

The decision in *American Trucking* is dubious, if for no other reason than that it invokes constitutional law to yield a conclusion that could be supported independently on non-constitutional grounds — namely, a standard application of limiting administrative law principles. Indeed, it seems quite clear that the decision simply substitutes a constitutional howitzer for what could have been accomplished with an administrative law pea-shooter. To expand upon a concept recently advanced by Professor Sunstein — who argues that nondelegation principles inform several canons of construction that deny to agencies decisional authority over certain matters⁹⁹ — we might credibly view our administrative law system as an effective substitute for two of the three

95. On the interplay between broad substantive delegations and procedural requirements, see generally McCubbins & Page, *supra* note 47; Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

96. 175 F.3d 1027 (D.C. Cir. 1999).

97. *Id.* at 1034. For a general discussion of the shift in the nondelegation doctrine from an emphasis on whether Congress has made the important policy choices to an emphasis on controlling administrative discretion, see ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 36-39 (1993). See also *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 758 (D.D.C. 1971) (concluding that legislation did not violate nondelegation doctrine because “however broad the discretion of the Executive at the outset, the standards once developed [by the agency] limit the latitude of subsequent executive action,” thus satisfying “rule of law” concerns associated with the nondelegation doctrine).

98. *Am. Trucking Ass'n*, 175 F.3d at 1038.

99. Sunstein, *supra* note 16, at 316.

functions performed by the nondelegation doctrine. This embryonic notion needs further development, but space or time do not permit it here.

American Trucking's lack of concern with Congress's failure to make the hard policy choices is broadly consistent with the work of the federal courts over the past several decades. These courts have showed considerably more sophistication about notions of accountability and democratic values. This is manifested in the development of doctrine that views agency policymaking neither as illegitimate nor as a matter of especial judicial concern.

The most dramatic example of this doctrinal pathway is the approach to reviewing agency interpretations of law set forth in the Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.¹⁰⁰ This decision has been described as a decision that "dominates modern administrative law."¹⁰¹ *Chevron* holds that in reviewing agency action, courts must defer to agency interpretations of their own authority in the absence of clear legislative direction or unless the agency's view is unreasonable.¹⁰² This is, as Professor Sunstein notes, "an emphatically prodelegation canon, indeed it is the quintessential prodelegation canon."¹⁰³

Remarkably, the *Chevron* Court perceived nothing akin to a delegation problem in declaring that policy decisions are properly entrusted to administrative agencies. In the Court's words:

[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. 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 such 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 in light of everyday realities.¹⁰⁴

Chevron thus underlines the centrality of administrative processes in projecting the course of national regulatory policy, broadly affirming a broad shift in authority from Congress to the Executive branch.¹⁰⁵ Not only does it confirm the legitimacy of delegation, but also de-links such legitimacy from Judge Leventhal's notion that delegation depends almost entirely on the effectiveness of judicial review in cabining agency discretion. A new source of legitimacy — presidential accountability — supplies the necessary comfort to inspire judicial acceptance of broad delegations of power. This sentiment was echoed

100. 467 U.S. 837 (1984).

101. Sunstein, *supra* note 16, at 329.

102. *Chevron*, 467 U.S. at 842-43.

103. Sunstein, *supra* note 16, at 329.

104. *Chevron*, 467 U.S. at 865-66.

105. See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 510 (1989).

in *Sierra Club v. Costle*.¹⁰⁶ There, the court was unconcerned that it was “possible that undisclosed Presidential prodding may direct an outcome . . . different from the outcome that would have obtained in the absence of Presidential involvement,” so long as the outcome could otherwise be defended on the rulemaking record.¹⁰⁷ Put another way, it is entirely legitimate that agency decisions be premised on political considerations, not simply on the application of “neutral” agency expertise in service of clearly articulated policy choices made by Congress.¹⁰⁸

In a like vein, the courts have eagerly expanded the range within which administrative discretion may freely run riot. The chief doctrinal points of departure for this expansion have been newly discovered content in the “committed to agency discretion” exception to the Administrative Procedure Act’s generous provisions for judicial review¹⁰⁹ and “standing” requirements offered up as interpretations of Article III of the Constitution’s requirement that the judicial power extend only to “cases or controversies.”¹¹⁰ Combined, these doctrinal commitments have yielded a small, but significant space within which presidential and agency decisions may be made without fear of any judicial scrutiny.

The maturation of administrative law has thus provided an environment in which courts have made a general peace with broad congressional delegations of authority. For the public, this visible legitimation of delegation and abdication have pushed the basic constitutional issues far into the background. The resulting environment minimizes the costs of delegation for members of Congress, creating incentives for continued adherence to the practice.

C. Restricting Congressional Control

At the same time that courts have become quite tolerant of Congress’s penchant for broad delegations of authority to agencies, they have also been considerably more intolerant of arrangements through which Congress has attempted to retrieve or reassert some of the authority it has delegated. The key decision in this respect is *INS v. Chadha*, in which the Court declared unconstitutional a “legislative veto” provision contained in the Immigration and Nationality Act.¹¹¹ Chief Justice Burger’s opinion for the Court walks a fine line that decisively tilts in favor of delegation. The crux of the opinion

106. 657 F.2d 298 (D.C. Cir. 1981).

107. *Id.* at 408.

108. *Id.* (concluding that courts should not interpret their review powers in a way that would demand that agency rulemakings be converted “into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power”).

109. *See Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Lincoln v. Vigil*, 508 U.S. 182, 184 (1993).

110. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 556 (1992).

111. 462 U.S. 919 (1983).

lies in the Court's conclusion that the legislative veto exercised by the House in that case "was *essentially legislative in purpose and effect*."¹¹² In other words, the veto was an exercise of lawmaking power, the procedures for which — bicameral approval and presentment to the President — are prescribed in Article I of the Constitution. Because the veto did not follow these prescribed procedures, it is unconstitutional. The tension between this conclusion and the regulatory program to which it is addressed is revealed clearly by Justice White's dissent:

If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as prohibiting Congress from also reserving a check on legislative power for itself. Absent the veto, the agencies receiving delegations of legislative or quasi-legislative power may issue regulations having the force of law without bicameral approval and without the President's signature. It is thus not apparent why the reservation of a veto over the exercise of that legislative power must be subject to a more exacting test.¹¹³

The rather peculiar formalism at work in *Chadha* - namely, that a House decision to veto an order granting relief from deportation is "legislative," while the order itself, made by the Immigration and Naturalization Service, is not "legislative" in the same sense - illustrates the extent to which delegation is now viewed by the courts as a normal incident of the regulatory process.

D. *Legal Theory and Congressional Delegation: A Summary*

It would be too strong to conclude that the pockets of jurisprudence described above explain delegation or bear some tight causal relation to the practice. My point is a more modest one. Generous judicial interpretations of congressional power under the commerce clause, the routinization of administrative law and consequent expansion of executive authority, and tight restrictions on some congressional efforts to control administrative behavior all create an environment in which the expectation is that Congress will delegate broadly, with little or no questioning of its constitutional authority to do so. As Cynthia Farina has argued,

The commitment to pervasive intervention in the economic and social order that has vastly increased the level of extant federal power, the implementation of this commitment through broad delegations of power to entities outside Congress . . . , and the structural and customary factors that favor the President in any struggle for control of the regulatory bureaucracy have coalesced to create a persistent and decided tilt toward presidential dominance of large sections of domestic policy.¹¹⁴

112. *Id.* at 952.

113. *Id.* at 986-87 (White, J., dissenting).

114. Farina, *supra* note 105, at 517.

We may add to these observations Dr. Fisher's important points about presidential dominance of military affairs. The result is a governing system in which what the President and the executive branch deem to be appropriate policy will often trump congressional views to the contrary. In the next part, I briefly speculate about the implications of this state of affairs for deliberative democratic governance.

IV. ABDICATION, DELEGATION AND DELIBERATIVE DEMOCRACY

As noted above, both Dr. Fisher, in his discussion of abdication, and critics of delegation make strong claims that the practices that they respectively address subvert democratic governance. Much of what I've said in the previous sections casts serious doubts on such claims, but in this Part, I will address these claims directly. My conclusion is that Dr. Fisher is more nearly right than critics of delegation, although confident conclusions on these issues are largely elusive.

My own viewpoint is that pinning the wisdom of governing practices on some criteria of legitimacy, such as "democracy," are largely meaningless outside the content and effect of particular programs.¹¹⁵ For as Professor Kahan has observed, "democracy" is an essentially contested concept, meaning very different things to different people — disputes of meanings that cannot be resolved by resort to logical argumentation.¹¹⁶ I thus agree with his conclusion that a more productive approach to questions of delegation should replace rhetorical appeals to "democratic self-rule" or other catchy soundbites. On this view, we should "ask[] not which conception of democracy and corresponding position on delegation are 'best' in the abstract, but which make the most sense in a particular regulatory setting, given the values and interests at stake there" — in other words, "whether delegation is desirable is decided locally, not globally."¹¹⁷ Indeed, arguments from democracy often function as conversation stoppers, used to preclude inquiry into the actual functioning of particular incidents of the general practices under discussion.

With these cautionary opening positions, I will now proceed to violate them by pitching my views on delegation at a fairly high level of abstraction. My point here is not to be conclusive, but to provide a framework in which more particularized inquiry may proceed. My broad conclusions are that congressional delegation of routine regulatory programs is, at worst, neutral from the standpoint of deliberative democracy, but that congressional

115. For a more extended discussion of this view, focusing on environmental regulation, see Douglas R. Williams, *Environmental Law and Democratic Legitimacy*, 4 DUKE ENVTL. L. & POL'Y F. 1 (1994).

116. Kahan, *supra* note 24, at 796.

117. *Id.* at 804.

abdication of war and budgetary authority are in derogation of deliberative democratic processes.

These conclusions are based largely on the work of Jerry Mashaw, who has put forward a most convincing case in favor of broad congressional delegations of policymaking authority to administrative agencies.¹¹⁸ Before proceeding to the affirmative case for delegation, however, it is useful first to consider the negative case against attempts to preclude delegation through judicially-imposed constraint.

Assume that Congress were constrained to act within the confines of a vigorous nondelegation doctrine. How would public programs likely function in such an environment? Would “discretion” over how statutory programs are to be implemented be eliminated or substantially reduced, thus ensuring that congressional choices are actually respected and implemented? It is doubtful. As Mashaw argues:

Squeezing discretion out of a statutory-administrative system is . . . so difficult that one is tempted to posit a “Law of Conservation of Administrative Discretion.” According to that law, the amount of discretion in an administrative system is always constant. Elimination of discretion at one choice point merely causes the discretion that had been exercised there to migrate elsewhere in the system.¹¹⁹

We may go farther. The places within the system to which discretion may migrate under a regime informed by strong nondelegation rules are likely to be the least visible, and thus, the most difficult to oversee and the most immune from public scrutiny. For example, imagine the leanest possible administrative system: administration is limited to prosecutorial functions — civil and criminal enforcement of the rules Congress enacts — and private enforcement predominates. Who gets prosecuted and the terms on which disputes are resolved are likely to be subject to the unstructured discretion of prosecutors and private parties. Many disputes may never be publicly resolved, but settled on terms known only to the disputants. The actual functioning of the programs Congress enacts may thus be radically different in practice than in the statute books. And even in disputes that are resolved by the courts, how can we be sure that courts will, in applying statutory mandates, adhere to the purposes and policies Congress has presumably selected? Even assuming that “interpretation” of statutes is not a practice inherently informed by the views of the interpreter — a most curious idea — it is nonetheless crystal clear that remedies for statutory violations are largely discretionary with the courts,¹²⁰

118. See generally MASHAW, *supra* note 13, at 131-157; MASHAW, *Prodelegation*, *supra* note 18.

119. MASHAW, *supra* note 13, at 154.

120. See *Amoco Prod. Co. v. Village of Gambell*, Alaska, 480 U.S. 531, 543 (1987); *Romero-Barcelo*, 456 U.S. at 313.

yielding an overall regulatory system that is virtually suffused with discretion. And these matters are largely invisible to both Congress and the electorate.

Assume counterfactually that all possible discretion could be eliminated through precisely worded statutory mandates addressed both to administrators and the courts. Would the result comport with basic democratic aspirations? Hardly. The likely result would be “wonderfully wooden administrative behavior,” which, “on that ground alone [would] be highly objectionable.”¹²¹ An important, and largely uncontested (I think) value associated both with rule-of-law notions and deliberative democratic rule is the sense that like cases be treated alike and that relevant differences in context should yield up different legal outcomes. The basic notion here is that “justice” is largely a contextual matter, requiring nuanced attention to and deliberation about the manner in which legal outcomes are likely to comport with the overall purposes of the governing legal mandates. This approach is suffused with discretion and informs our basic commitment to a “common law” method of dispute resolution, which invites arguments through which prior outcomes can be distinguished and harmonized by appeals to more general — but certainly less determinate — principles.

Of course, critics of delegation may be more comfortable in a regime where judicial discretion supplants administrative discretion to the greatest extent possible. *Prima facie*, however, if this is an integral part of the case against delegation, it is hard to connect that case with anything that looks like “democracy.” Judges are, after all, the least accountable political actors in our system of governance.

The affirmative case for delegation from the perspective of deliberative democracy emphasizes several key points. First, the administrative law system with its norms of public participation and provision for meaningful judicial review provide opportunities for decision makers to adjust the demands of regulatory programs to better fit the actual, “on-the-ground” circumstances to which they are applied, even as these circumstances vary across space and time. A strong form of nondelegation would preclude such nice adjustments, for “the high transaction costs of specific legislation will give an enormous advantage to the status quo, and the status quo will be susceptible to change [or adjustment] only by a statute of the same kind.”¹²²

Second, while administrators are not directly accountable to the public, the president — who is constitutionally charged with the duty to see that laws are faithfully executed¹²³ — is directly accountable to the electorate. Schoenbrod, acknowledging this, rests his “delegation is anti-democratic” argument on the notion that legislators are more accountable for the policy decisions they make

121. MASHAW, *supra* note 13, at 154.

122. *Id.* at 153.

123. U.S. CONST. art. II, § 3.

than is the President for decisions made by administrative agencies. He states that “accountability through the president matters less than accountability through Congress and, whatever the potential worth of presidential accountability might be, delegation diminishes its value.”¹²⁴ This is so, the argument goes, because the president’s responsibility for any one particular agency policy would be “diluted by the electorate’s concern about activities in other areas such as national defense, foreign affairs, law enforcement, and so on.”¹²⁵ By contrast, because legislators are voted in from districts in which “there are likely to be a limited number of issues of particular local interest,”¹²⁶ public attention will be more focused on legislative activity.

There are number of reasons to question this logic. First, it is precisely on issues “of particular local interest” that legislators are unlikely to delegate, preferring instead to push for the favored position in order to gain credit.¹²⁷ Delegation is most likely the product of intense conflict among constituencies — a circumstance in which a delegation allows legislators to blame agencies for adverse constituent effects, while at the same time claiming credit for delivering the goods to benefited constituencies.

Second, and somewhat in tension with the first point, it is not clear why constituents, particularly those that are politically active and engaged, will not understand some forms of delegation for what they are — shirking of responsibility to make the “hard policy choices.” If voters can be duped by delegations in the manner anti-delegation scholars suggest, it is not apparent why we would want more “democracy,” for that would simply ensure that decisions are being made by individuals who probably don’t understand what it is they are supporting. A more generous view of the voting public’s political wisdom would suggest that, in terms of democratic values, delegations are basically neutral. Many voters who would prefer legislated “rule” statutes may be willing to settle for a broad delegation to an agency if the alternative is no legislation at all. Similarly, those who would prefer no legislation as an alternative to a legislated rule statute will presumably make their preferences known at the ballot box.

Third, the conclusion Schoenbrod reaches about presidential accountability might with equal force be applied to Congress. If the electorate is only concerned about a limited number of issues of particular local interest, they are most unlikely to pay any attention to what their representatives do with respect to other issues. We may expect that issues of “particular local concern” will vary from district to district and from state to state. Thus, representatives will

124. SCHOENBROD, *supra* note 6, at 106.

125. *Id.* at 105-06.

126. *Id.* at 106.

127. *See generally* Aranson et al., *supra* note 22 (stating that legislative delegation is unlikely in matters of particular local interest).

advance a variety of legislative proposals to effectively address these issues. If Schoenbrod is right, we may expect that members of Congress can cast their votes for legislation important to the nation as a whole, but of no “particular local interest,” without fear of electoral accountability. It is not clear why this advances a stronger form of democratic self-rule than does broad delegations to agencies whose decisions of national importance must be defended by the President to a national constituency.

Finally, Schoenbrod’s logic ignores the debilitating effects of congressional action that is responsive only to issues of particular local concern. This would be a Congress who is concerned mostly about, and will be judged only on, its ability to deliver the goods to local constituencies. Schoenbrod’s nondelegation argument may, thus, be a recipe for pork barrel politics. As Mashaw puts it:

Assume . . . the voter chooses a representative for that representative’s effectiveness in supplying governmental goods and services to the local district, including the voter. The representative is a good representative or a bad representative depending upon his or her ability to provide the district with at least its fair of governmental largesse. In this view, the congressperson’s position on various issues of national interest is of modest, if any, importance. The only question is, Does he or she “bring home the bacon.”¹²⁸

If this is right, nondelegation may result in a Congress that is particularly responsive to powerful local interests, but unresponsive to the electorate as a whole. One recalls President Roosevelt’s remarks in vetoing the Walter-Logan bill, an administrative procedure act that would have severely constrained administrative power:

Wherever a continuing series of controversies exist between a powerful and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversy in an administrative tribunal.¹²⁹

All this is not to say that Schoenbrod is wrong to claim that there are dangers associated with delegation. But even if we think congressional involvement in making policy is critical to effective democratic rule, his delegation-is-anti-democratic argument fails to consider seriously congressional influence on the choices agencies make in implementing their delegated powers. Congress’s policy preferences may effectively control bureaucratic behavior, even if those preferences are not formally expressed in statutes. Through oversight, Congress may wield significant and continuing

128. MASHAW, *supra* note 13, at 152.

129. Veto Message, Walter-Logan Bill, *reprinted in* 86 CONG. REC. 13, 942-3 (1940) (quoted in George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1627 (1996)).

influence over administrative policy long after its formal legislative powers have been exercised. The effectiveness of such oversight is an empirical issue. Studies of congressional influence over administrative behavior have yielded mixed results.¹³⁰

The studies that suggest strong congressional influence over administrative policy do raise a possible problem with broad delegations, but it is not clear that it is a problem of democratic accountability. In arguing for the effectiveness of congressional oversight of agencies, the focus of study is typically on the influence of individual members or committees, not the Congress as an institution.¹³¹ The delegation problem, then, is not one involving open-ended authority on the part of the President and agencies to make national policy. Instead, it may serve as a technique through which members of Congress, through “fire alarm” oversight, respond in a more particular fashion to concerns expressed by their constituents than would be possible if Congress, as an institution, were to attempt to do so.¹³² In these circumstances, matters of “particular local concern” are addressed quite directly by legislators’ actions, but the results may be ones that the public as a whole would reject.

Matters are a bit different on questions of wars and budgets. The phenomenon addressed by Dr. Fisher clearly does not implicate many of the critical saving features that are often advanced in support of broad delegations. Chief among these omissions is the utter lack of structure associated with presidential decision making on matters of war and budgets. In this area, there is virtually no opportunity for public participation and there is, of course, no serious judicial demand for justification and explanation of the choices presidents make on these matters. Presidents do, of course, typically take their cases for wars and budgets to the people, but the actual decisional processes

130. See generally David Epstein & Sharon O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 954-60 (1999) (reviewing literature on congressional influence on agencies); Peter H. Aranson, et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 51-52 (1982) (same). For specific studies, see Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 271 (John E. Chubb & Paul E. Peterson, eds. 1989); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983); Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, in CONGRESS: STRUCTURE & POLICY 426 (Mathew D. McCubbins & Terry Sullivan, eds. 1987) (hereinafter “*Fire Alarms*”); James B. Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 KAN. L. REV. 277 (1975).

131. See, e.g., McCubbins & Schwartz, *Fire Alarms*, *supra* note 130, at 437 (arguing that “congress” effectively oversees administrative agencies through a “decentralized, incentive-based control mechanism” through which individual members exert pressure in response to “fire alarms” - complaints by interest groups or constituents).

132. See Aranson et al., *supra* note 22, at 55-62.

are shrouded in secrecy, with presidents enjoying a virtual monopoly of information on matters of war and a battery of dubious studies to support the most rosy projections associated with specific budget choices.

The temptation for presidents to place their own electoral interests and desire for “immortal fame” above public interests in these two areas of governance are notorious to the point of satire — witness, the popularized and utterly cynical view of presidential warmaking represented by Hollywood in the movie *Wag the Dog*. Likewise, presidential elections of late have become contests for fiscal responsibility, with largely unsubstantiated claims that we can enjoy massive tax cuts without feeling any pinch to the domestic programs of critical importance to the electorate as a whole.

CONCLUSION

Congressional power in the modern age has waned to a considerable degree, causing us to reevaluate the constitutional structure of our governing institutions. The phenomenon is much broader than the case for abdication advanced by Dr. Fisher as to war and budgetary powers. At the same time, we should not quickly conclude that current arrangements present us with a constitutional crisis of large proportions. Routine exercises of legislative power to create public programs the content of which is largely administrative in origin is not self-evidently a bad thing, nor is it necessarily inconsistent with our basic democratic aspirations. Yes, there are dangers attending this practice, but governance to be effective and consistent with democratic aspirations depends critically on vigilant and discerning scrutiny by the electorate of our leaders’ actions. If delegation is inconsistent with our aspirations for government, we should insist that the practice be halted by voting the rascals out. There is, however, no reason to believe that the current administrative state is not as responsive, or perhaps even more responsive, to public demand than a regime of strict nondelegation would be.

On war and budgetary matters, things may be quite different. I agree with Dr. Fisher that current congressional behavior in these matters is cause for concern. Congress must meet its constitutional responsibilities, and in wars and budgets, its actions have fallen considerably short of that responsibility. Let us hope that Dr. Fisher’s pleas for reform will make a lasting contribution to our democratic form of government.

