

THE ONCE AND FUTURE LEGISLATURE: RESTORING CONGRESS'S POLICYMAKING ROLE

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Abstract

A century-old question has recently resurfaced as a major controversy: How much detail must Congress provide to agencies when it delegates power? Some think that Congress is incapable of providing detailed instructions to agencies and that Congress merely gives agencies the green light to act, but the agencies should then determine all the important details. This research report challenges that perspective, analyzing in depth the statutory delegations involving major regulations issued over two years (2014 and 2018) and concluding that Congress provides at least reasonably detailed instructions roughly half the time. When Congress does not give much detail about how to regulate, it often gives agencies clear directions for how to determine the details. This research report also argues that Congress should be expected to meet that higher bar and that if the Supreme Court decides to ratchet up the nondelegation rule and require more of Congress (as many believe it might), Congress is up to the task. Also, by providing more detailed directions to agencies, Congress can help to cool the partisan passions that have enveloped the administrative state in recent years.

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Introduction

Just about every American kid who grew up in the '70s, '80s, or '90s fondly remembers the popular *Schoolhouse Rock* series, which served up a bit of edutainment alongside the beloved Saturday morning cartoons. Probably the most famous segment was called “I’m Just a Bill” and featured a walking, talking, singing stack of papers pining for the remote but glorious day when he would graduate from bill to law.

Generation Z has proven more selective in its viewing habits. Though “I’m Just a Bill” is available on-demand on YouTube, it doesn’t command anywhere close to the near-universal recognition it once enjoyed. Perhaps that’s just as well.

Even in *Schoolhouse Rock*’s heyday, the era of disco and bellbottoms, most of the real lawmaking didn’t take place “here on Capitol Hill.” It took place in the dozens of federal agencies that did most of the hard work of taking vague statutory language and translating it into hundreds of thousands of pages of regulatory text.

In fact, detailed statutory delegations to agencies have become rare enough that some commentators have questioned whether Congress is even capable of writing laws that provide anything other than vague directives to agencies. They point out that Congress employs, at most, a few thousand staffers (in addition to the elected members), whereas agencies employ more than 2 million. They argue that 535 politicians with widely varied professional backgrounds are not well positioned to delve into the nitty-gritty of policymaking and that it is far better to leave this work to the highly trained experts who staff the executive branch.

This research report challenges that view. It demonstrates that Congress not only can but historically has passed detailed laws that provide clear directions to agencies. Using an empirical approach, it looks at the statutes invoked in major regulatory actions issued by federal agencies over two separate years. It assesses the statutes cited by those regulations to determine how detailed the statute is in each case.

There are limits to how specific Congress can or should be. With rare exceptions, Congress does not set standards that would require technical factfinding to establish. One would almost never see a statute saying, for instance, that lead concentration in drinking water cannot exceed 15 µg/L.

But one often sees statutes that do far more than merely give agencies the green light to go forth and regulate. One might, for instance, see a statute directing an agency to establish a reasonable lead concentration for drinking water that accounts for compliance costs while still protecting public health. And one often sees statutes that define the process the agency should follow to establish that standard. For example, the statute might direct the agency to convene an advisory

committee of drinking water experts, water treatment firms, and community advocacy groups to inform its conclusions.

Members of Congress may prefer not to speak even with that level of detail. It is easier and safer to take credit for solving a problem without giving the agency even the basic outline of how to solve it. But that dynamic may be changing.

In recent years, the US Supreme Court has demanded more of Congress. It has limited agencies' ability to infer broad regulatory powers from vague statutes and interpreted open-ended language to limit agencies' powers. And in his dissenting opinion in *Gundy v. United States*, which three of his colleagues joined, Justice Neil Gorsuch suggested that the nondelegation doctrine, which provides that Congress cannot give away its legislative powers, may soon make a comeback.¹ His opinion discussed the possibility of a stricter interpretation that would require Congress to set a clear, measurable standard but allow agencies to "fill up the details."² Though Congress often fails to meet that bar, it has proven fully capable of doing so in the past, and would benefit from doing so in the future.

This research report will explain how Congress can meet or exceed Justice Gorsuch's standard, pointing to Congress's own prior work for inspiration. Members of Congress may not relish the prospect of being held responsible when their legislative efforts fail, but Congress as an institution will benefit when it reclaims its role as the primary policymaking body. This, in turn, will remove pressure on both the agencies and the federal courts, which have been forced to take on new, ill-suited roles in the vacuum left by an absentee Congress.

Understanding the Nondelegation Doctrine

If *Schoolhouse Rock* failed to capture the complexity of US government, its producers are not to blame. From elementary school through doctoral programs, Americans are taught that their government consists of three separate branches. Congress passes laws, the president enforces them, and the federal courts ensure that laws adhere to the Constitution.³

1 *Gundy v. United States*, 588 U.S. 128, 179 (2019) (Gorsuch, J., dissenting).

2 *Gundy v. United States*, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting).

3 School House Rock, "Three-Ring Government," November 1, 2010, by t bro, YouTube, 3 min., 7 sec., <https://www.youtube.com/watch?v=-EISWIY9bG8>.

Figure 1. The Branches of US Government



The complexity arises when one considers what it means to “legislate” or to “enforce” a law. Though the Constitution is almost completely silent on the role of administrative agencies, it speaks of the “principal Officer” and “other Officers” who are responsible for running the “executive Departments.”⁴ As executive officials, these officers are tasked with enforcing, not drafting, the law. But enforcing entails a certain amount of discretion. How much discretion can these officers exercise until they, not Congress, are actually writing the laws?

To consider this question, one can imagine a fantasy scenario: a factory in the Midwest has discovered a new and apparently environmentally friendly energy source: silver kryptonite. Like all forms of kryptonite, it is harmless to human beings and other terrestrial lifeforms. The only organisms affected by its use are those who hail from the planet Krypton—the most famous of which, of course, is Superman.

Unlike either green or red kryptonite, which cause Superman excruciating pain or render him almost useless, silver kryptonite causes Superman only symptoms like those caused by smoking a joint.⁵ So far these symptoms have not posed any problems. Clark Kent (Superman’s secret identity) may have taken to wearing linen tunics and playing dulcimer concerts in the park by day, but he seems every bit as athletic—and way more chill—than before. But after seeing him frequenting the McDonald’s drive-through at 2:00 a.m., some residents have begun to worry about Superman’s ability to protect the world.

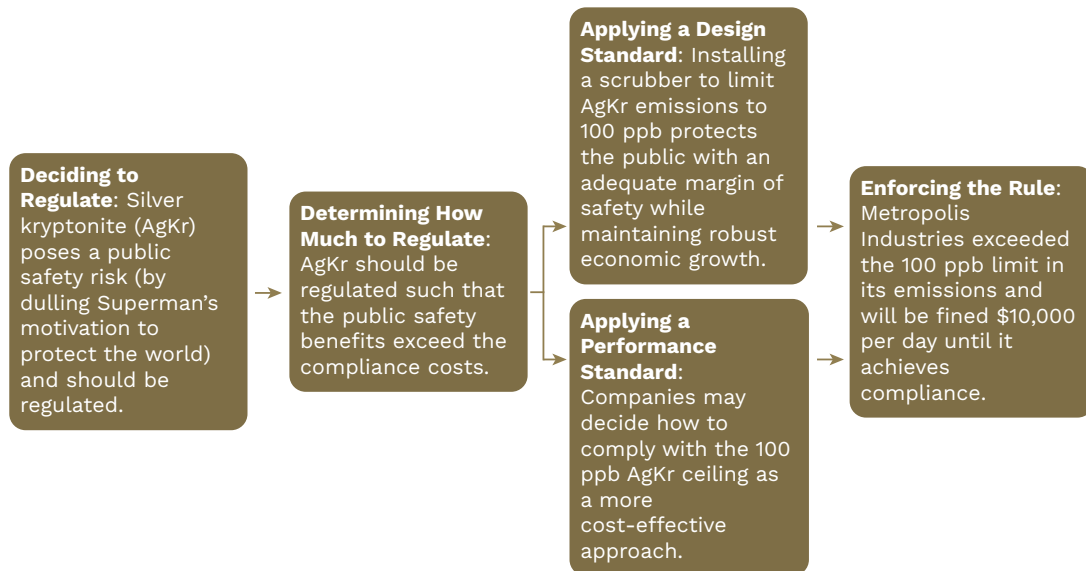
Fearing Lex Luthor (Superman’s nemesis) is biding his time, the residents write a letter to their congressman, who immediately drafts a bill to regulate silver kryptonite. But lacking any real understanding of Kryptonian mineralogy, he and his like-minded colleagues would prefer to hand off the problem to the Environmental Protection Agency (EPA).

Figure 2 shows the likely steps in the fantasy legislative and enforcement processes.

4 U.S. Const., Art. 2, § 2.

5 “Kryptonite,” DC Database, accessed September 10, 2025, https://dc.fandom.com/wiki/Kryptonite#Silver_Kryptonite.

Figure 2. The Hypothetical Process of Regulating Silver Kryptonite



Note: ppb = parts per billion. For a comparison of performance standards and design standards, see Patrick A. McLaughlin et al., “Performance Standards vs. Design Standards: Facilitating a Shift toward Best Practices” (working paper, Mercatus Center at George Mason University, Arlington, VA, June 26, 2019).

Some of these steps are legislative and some are executive. The first step, deciding to regulate, is clearly legislative. EPA cannot act absent affirmative permission from Congress. And the last step, enforcing the rule, is clearly executive. Applying a rule to a fact pattern is the very core of regulatory agencies’ role.

People disagree about the in-between steps, though. This research report argues later that the second step, determining how much to regulate, is best undertaken by Congress, whereas applying the standard (the third step) could legitimately be undertaken by either Congress or an agency (i.e., that step could fairly be characterized as either legislative or executive).

Some argue, however, that only the first step is exclusively available to Congress. For instance, they argue it would be constitutional if Congress were to create a super-agency to solve all of society’s problems.⁶

Leaving the fantasy scenario, the Supreme Court seems not to have gone quite that far. As the next section explains, applying what has come to be known as the nondelegation doctrine, the Court has indicated that certain powers are inherently legislative and cannot be undertaken by agencies.

⁶ Eric A. Posner and Adrian Vermeule, “Interring the Nondelegation Doctrine,” *University of Chicago Law Review* 69, no. 4 (2002): 1723.

Unfortunately, the Court has been far from clear on where the dividing line lies. The boundary between legislating and executing presumably lies somewhere within the second step in Figure 2: Congress must do more than give agencies the green light, but it need not detail how the agency must act. To use the Court's own terminology, Congress must provide an "intelligible principle" to guide agencies' exercise of discretion.⁷ Determining what exactly counts as an intelligible principle is, unfortunately, a challenging and contested enterprise.

What the Law Says about Nondelegation: The Constitution, Caselaw, and the Future

Constitutional law casebooks barely cover the nondelegation doctrine. Only two Supreme Court decisions have ever struck down a law on nondelegation grounds, and both occurred in 1935. To paraphrase professor Cass Sunstein, the nondelegation doctrine has had one good year and (so far) 236 bad ones.⁸

But saying that the nondelegation doctrine has had only one good year oversimplifies matters. The mere threat of a statute failing on nondelegation grounds may be motivation enough for Congress to delegate more narrowly. And the nondelegation doctrine has stood behind several interpretive canons (and other approaches to statutory interpretation) that limit agencies' ability to wrest expansive powers out of broad delegations of legislative power.⁹

Moreover, the Court's skepticism of broad delegations seems to be growing. One of the most important decisions in this vein, *West Virginia v. EPA*, was issued in 2022.¹⁰ And in 2019, Justice Gorsuch wrote a dissent in *Gundy v. United States* suggesting that he and at least three other justices were willing to resurrect a more expansive nondelegation doctrine. Since that time, the Court's lineup has shifted, and as many as six justices may be willing to strengthen the nondelegation doctrine in the way Justice Gorsuch describes.

The Constitution

The US Constitution does not contain any nondelegation clause, but its overall structure shows that Congress intended the legislative and executive branches to play distinct roles.

Article I, Section 7 sets forth a detailed process requiring every bill to pass both houses of Congress and be signed by the president (or, if vetoed, be re-passed

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

8 Cass R. Sunstein, "Nondelegation Canons," *University of Chicago Law Review* 67, no. (2000): 322.

9 Sunstein, "Nondelegation Canons," 14–22.

10 *West Virginia v. EPA*, 597 U.S. 697 (2022).

by a two-thirds majority in each house). Article II vests the “executive Power” in the president.

In theory, Congress could pass a statute transferring all lawmaking power to the president or an executive agency. But doing so would seem incompatible with Constitution’s elaborate process for enacting laws.

The Framers saw the legislature as the most powerful branch of government.¹¹ They never imagined that Congress would delegate so much of its authority. Their distrust of centralized power suggests that they would oppose any arrangement that massively empowered one branch at another’s expense.

Indeed, the Framers diffused legislative power by creating a bicameral Congress and giving the president a role in signing laws. They would have shuddered at the notion of effectively concentrating the legislative and executive powers in a single branch, even if Congress blessed the arrangement.¹²

One cannot know exactly how the Framers would have reacted to a nondelegation doctrine policed by the federal courts, but they likely would have welcomed a remedy for a scheme circumventing the intricate lawmaking process they designed.

Nondelegation Caselaw: The First 144 Years

During its first 144 years, the Supreme Court at times acknowledged limitations on Congress’s power to delegate. In *Wayman v. Southard*, Chief Justice John Marshall stated that Congress cannot delegate powers that “are strictly and exclusively legislative.”¹³ But the case concerned Congress’s ability to regulate federal court proceedings, not the division of power between the legislative and executive branches.

Much later, the Court addressed Congress’s ability to delegate powers to the president. In *Field v. Clark* (1890) and *J.W. Hampton, Jr. & Co. v. United States* (1928),¹⁴ it declared that Congress cannot delegate legislative powers to the executive branch.

Yet both cases involved activities that would qualify as routine executive functions by modern standards. In both *Field* and *Hampton*, Congress made the president responsible for determining whether foreign nations had imposed reciprocally unequal tariffs and, if so, imposing appropriate tariffs on such nations’ exports.

11 *The Federalist Papers* No. 51 (James Madison).

12 Though Congress could also pass another statute to undo this arrangement, any such statute would need to be signed by the president or passed by a two-thirds majority of both chambers of Congress. Since the sitting president would likely not want to relinquish such extraordinary powers, and since members of Congress from the president’s party might prefer that he retain that role (rather than reclaiming it for themselves), it may prove formidable to change course.

13 *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 96 (1825).

14 *Field v. Clark*, 143 U.S. 649 (1892); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

The executive branch was making law in the sense that its determination governed what standard would apply, but Congress created the framework.

Though hard cases might make bad law, one would be tempted to say the same of easy cases after reading these opinions. The Court did not have to grapple with the outer boundaries of nominally executive actions that nearly qualified as legislative, so its decisions offer limited future guidance.

Writing for a unanimous Court in *Hampton*, Chief Justice William Taft stated that reviewing courts should apply a test based on “common sense” and “the inherent necessities of governmental coordination.”¹⁵ The key question to ask is whether Congress has “[a]id] down by legislative act an intelligible principle” an executive officer must apply.¹⁶

Despite its vagueness, the intelligible principle test remains the Court’s fundamental standard for assessing delegations. Perhaps its vagueness is a virtue, as the intelligibility of a principle is in the eye of the beholder. Over the past century, the Court has not established a clearer standard. The intelligible principle test lives on, but Supreme Court justices and commentators have expressed clear discomfort with its malleability.

1935

Shortly after the Court decided *Hampton*, the United States entered the Great Depression. President Herbert Hoover showed a limited willingness to call upon the federal government to attempt to jump-start the economy. His successor, President Franklin D. Roosevelt, immediately and massively expanded the federal regulatory apparatus, trying anything to remedy America’s economic malaise.¹⁷

The New Deal saw a host of laws far exceeding the targeted delegation seen in cases like *Field* and *Hampton*. By testing the full extent of its power to delegate, Congress virtually ensured that at least some of its laws would receive deep skepticism from the Supreme Court. The Court finally decided that Congress had gone too far, but the Court could only demarcate the outer limits of the nondelegation doctrine.

Two key cases arose in 1935 and concerned the National Industrial Recovery Act (NIRA), a law that granted President Roosevelt sweeping powers to regulate industry to stimulate economic growth. The first case, *Panama Refining Co. v. Ryan*,¹⁸ involved a NIRA provision authorizing the president to ban petroleum product sales that violated a valid state regulation. NIRA gave the president no directions on what the ensuing federal regulations might cover.

¹⁵ J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

¹⁶ J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

¹⁷ Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* (New York: HarperCollins, 2007).

¹⁸ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

After reciting the facts of cases where the Court had allowed delegation, the *Panama Refining* majority summarily concluded that, in the present case, “Congress has declared no policy, has established no standard, has laid down no rule.”¹⁹ Given the completely open-ended statutory delegation, it is hard to argue with that conclusion. But the case provides little insight into how the Court might react to a less extreme delegation.

Later in 1935, in *A.L.A. Schechter Poultry Corp. v. United States*,²⁰ the Court confronted another section of NIRA. This provision authorized the president to approve “codes of fair competition” written by trade or industry groups if he found that the codes were not inequitable and did not have a significant anticompetitive effect. Violating such a code was a criminal offense punishable by up to a \$500 daily fine.

In response to this legislation, President Roosevelt adopted the Fair Poultry Code for the New York Metropolitan Area. Among other things, the code imposed a 40-hour work week, set a minimum wage of \$0.50 per hour, and prohibited selection of individual chickens from a larger coop. Schechter Poultry was convicted of violating each provision, and it appealed its conviction all the way to the Supreme Court.

In his opinion for the Court, Chief Justice Charles Hughes suggested that the delegation at issue was even more egregious than that in *Panama Refining*. The statute in *Panama Refining* at least limited itself to the sale of petroleum products, whereas the president could presumably bless a “code of fair competition” covering anything under the sun. NIRA also failed to define what Congress perceived as “fair competition.”²¹

Worse, NIRA largely delegated the code decisions to private parties, who used the opportunity to one-up their competitors. Established poultry dealers didn’t want to compete with smaller firms such as the Schechter family’s and welcomed NIRA as an opportunity to shut down the competition.²²

The extreme facts of both cases limit their value as precedent. Both involved delegations directly to the president (not an agency staffed by subject-matter experts) and affected wide swaths of the economy. Furthermore, the *Schechter* opinion favorably cites other cases involving less-sweeping delegations accompanied by equally vague instructions, including statutes directing agencies to promote “the public convenience and necessity” or to act “in the public interest.” These are hardly models of detailed guidance to the executive, but they were apparently clear enough for the *Schechter* Court.²³

19 *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

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

21 *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531 (1935).

22 Shlaes, *The Forgotten Man*, 219–40.

23 *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 540 (1935).

Though *Panama Refining* and *Schechter Poultry* could have heralded a new era in which the Court aggressively policed the boundaries between “legislative” and “executive” powers, it was not to be. Shortly after these decisions, the Court backed off its aggressive approach to striking down New Deal legislation, possibly in reaction to President Roosevelt’s threats to pack the Court by adding new justices. In any event, the Court did not need to strain when it distinguished *Panama Refining* and *Schechter Poultry* in later cases: those decisions would remind later Congresses that the Court might again step in if a statutory delegation went too far.

The Next 90 Years

Since *Panama* and *Schechter*, the Court has continued to nod to its ability to strike down an egregious delegation, and it has never overturned either decision, but it has yet to find another delegation it cannot stomach.

Yakus v. United States was the most notable major nondelegation case in the decade following *Panama Refining* and *Schechter Poultry*.²⁴ Though the relevant provision of the Emergency Price Control Act was sweeping, authorizing the price administrator to set price controls,²⁵ it gave the agency far more direction than NIRA’s provisions gave in the earlier cases. It set a base period against which to judge prices, and it listed factors to guide the administrator’s determination.²⁶

Later decisions continued this trend. By the end of the century, even stalwart separation-of-powers advocates acknowledged that some intermingling of legislative and executive powers was inevitable. In *Mistretta v. United States* (1989),²⁷ Justice Antonin Scalia wrote in dissent that “no statute can be entirely precise, and . . . some judgments, even some judgments involving policy considerations, must be left to officers executing the law.” He further acknowledged that “the debate over unconstitutional delegation becomes a debate not over a point of principle, but a question of degree.”²⁸ In that case, he would have found a constitutional violation since he saw the function being performed (the Sentencing Commission’s setting of sentencing guidelines) as purely legislative, but he seemed to take no issue with the caselaw blessing exceedingly broad delegations from the preceding decades.

24 *Yakus v. United States*, 321 U.S. 414 (1944).

25 Though the position no longer exists, the price administrator was appointed by the president and led the Office of Price Administration. Under the Emergency Price Control Act, the price administrator was responsible for issuing regulations or orders fixing maximum prices for commodities and rents. *Yakus v. United States*, 321 U.S. 419 (1944).

26 *Yakus v. United States*, 321 U.S. 419, 426 (1944).

27 *Mistretta v. United States*, 488 U.S. 361 (1989).

28 *Mistretta v. United States*, 488 U.S. 361, 415 (Scalia, J., dissenting).

Nondelegation-Adjacent Caselaw

For fans of the nondelegation doctrine, the discussion up to this point has been pretty depressing. Even in its so-called “good year” of 1935, it prevented only two extreme, unconstrained delegations of power.

But focusing exclusively on cases that invoked the nondelegation doctrine paints a misleading picture. The Court’s caselaw has clearly been animated by nondelegation principles since 1935, especially in the past decade or so.

Many later cases reflect the principle of constitutional avoidance: If a court can construe an ambiguous statute to avoid a constitutional problem, it should. Of course, if only the most extreme delegations such as those seen in *Panama Refining* and *Schechter Poultry* violate the Constitution, perhaps the courts need not interpret laws all that narrowly to avoid constitutional questions. But constitutional avoidance may still favor providing a “zone of safety” by cabining otherwise expansive statutory language.

In the Court’s most prominent recent case involving nondelegation, *Gundy v. United States*,²⁹ Justice Elena Kagan’s majority opinion arguably used this approach to avoid a nondelegation problem. She conceded at the outset that a law directing the attorney general to determine whether someone convicted of a sex crime before the Sex Offender Registration and Notification Act had to register based on a past conviction, which is how the challenger characterized the law, would pose constitutional problems. But she carefully parsed the statute and determined that it did no such thing. It merely authorized the attorney general to determine when such registration must occur. Congress had already answered the “whether” question in the affirmative.

Another prominent context in which the Court has applied the principle of constitutional avoidance is through the so-called major questions doctrine. The Court first articulated this principle in *FDA v. Brown & Williamson Tobacco Corp.* (2000),³⁰ but it was most famously described by Justice Scalia in *Whitman v. American Trucking Association* (2001), in which he wrote that Congress “does not . . . hide elephants in mouseholes.”³¹ Congress, in other words, does not delegate (or will not be found to have delegated) sweeping regulatory powers by vague statutory language.

29 *Gundy v. United States*, 588 U.S. 128 (2019).

30 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

31 *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001). In the case itself, Justice Scalia, writing for the majority, determined that a statute directing EPA to set pollutant limits at a level “requisite to protect the public health” did not effectuate an unconstitutional delegation of legislative power. *Whitman v. American Trucking Association*, 531 U.S. 457, 476 (2001). In so concluding, the Court overturned a decision of the United States Court of Appeals for the District of Columbia Circuit.

A Supreme Court opinion from 2022, *West Virginia v. EPA*, fleshed out the major questions standard. Any time Congress wishes to delegate power in a politically sensitive or economically important area, it must clearly articulate its intent. In that case, the Court struck down EPA's ambitious effort to regulate greenhouse gas emissions using an obscure and rarely invoked provision of the Clean Air Act.³²

Though the major questions doctrine and certain other interpretive canons (e.g., presumption against extraterritoriality, presumption against preemption of state law) require a narrow reading of certain statutory grants of power, nondelegation principles can influence even run-of-the-mill statutory interpretation cases.

Since its 1983 decision in *Motor Vehicle Manufacturers Association v. State Farm*,³³ the Court has read the vague terms “arbitrary” and “capricious” in the Administrative Procedure Act as an invitation to courts to strike down any agency action they deemed poorly reasoned or unsupported by compelling evidence. Following that decision, lower federal courts have read similarly vague language, including statutory directives to adopt “reasonable” regulations or to “consider” regulatory “costs,” as imposing a cost-benefit balancing standard on regulatory agencies.³⁴

This line of cases culminated in the Court's 2015 decision in *Michigan v. EPA*.³⁵ The Court had waffled in the past on whether ambiguous statutory language prohibited,³⁶ authorized,³⁷ or required the agency to consider a proposed rule's economic benefits and costs. *Michigan v. EPA* strongly suggested that, in the future, ambiguous language would be interpreted as allowing or even requiring agencies to consider economic effects.³⁸

Justice Scalia's majority opinion interpreted the statutory language “appropriate and necessary” as affirmatively requiring some consideration of economic costs. Though Justice Kagan would have decided the case differently, her dissent arguably insists even more explicitly that economically unfavorable regulations are subject to being overturned. “Unless Congress provides otherwise,” she wrote, “an agency acts unreasonably in establishing ‘a standard-setting process that

32 *West Virginia v. EPA*, 597 U.S. 697 (2022).

33 *Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29 (1983).

34 Reeve Bull and Jerry Ellig, “Judicial Review of Regulatory Impact Analysis: Why Not the Best?,” *Administrative Law Review* 69, no. 4 (2017): 725.

35 *Michigan v. EPA*, 576 U.S. 743 (2015).

36 In *Whitman v. American Trucking Association*, the Court interpreted the language “requisite to protect the public health” with an “adequate margin of safety” as prohibiting the agency from relying on evidence concerning the regulation's economic effects. *Whitman v. American Trucking Association*, 531 U.S. 457, 471 (2001).

37 In *Entergy Corp. v. Riverkeeper, Inc.*, the Court interpreted the language “best technology available for minimizing adverse environmental impact” as permitting EPA to rely on cost-benefit analysis in promulgating a regulation. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 226–27 (2009).

38 *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015).

ignore[s] economic considerations.” She further stated that “cost is almost always a relevant—and usually, a highly important—factor in regulation.”³⁹

Most of the justices have now, at least in principle, signed onto the notion that a statute should be read as mandating cost-benefit analysis unless it explicitly says otherwise. Agencies therefore proceed at their peril when they ignore economic evidence or adopt regulations whose economic costs dwarf the economic benefits.⁴⁰

None of these cases refer to the nondelegation doctrine. Nor do they even present the underlying issue as anything other than routine statutory interpretation. But as Justice Rehnquist argued in 1980 in *Industrial Union Department v. American Petroleum Institute* (usually called “the benzene case”), there is a clear connection between the two. If the courts cannot read meaningful constraints into vague statutory language, the agency is more likely to run afoul of the nondelegation doctrine.⁴¹

Another Good Year?

The Court’s increasingly aggressive approach to vindicating nondelegation principles indicates that it may soon prove willing to revive the official doctrine from its decades-long slumber. Justices Gorsuch, John Roberts, and Clarence Thomas expressed a willingness to do so in *Gundy v. United States*, and Justice Samuel Alito expressed “support” for “reconsider[ing] the approach we have taken for the past 84 years.”⁴²

In a case with more compelling facts, Justice Alito might sign onto a standard like that articulated by Justice Gorsuch.⁴³ The addition of Justices Brett Kavanaugh and Amy Coney Barrett has not yet resulted in Justice Gorsuch’s approach picking up another vote. In *Federal Communications Commission v. Consumers’ Research*, the Court upheld a delegation to the FCC as “sufficiently guided and constrained” by Congress, over the dissent of Justices Gorsuch, Thomas, and Alito.

How might the nondelegation doctrine change if the Gorsuch position prevails? Dissenting opinions need not offer a fully developed alternative to the majority

39 *Michigan v. EPA*, 576 U.S. 743, 769 (2015) (Kagan, J., dissenting). Justice Kagan concluded that EPA had considered costs at multiple points throughout the rulemaking process. That EPA did not do so at the initial stage should not have been fatal to its rulemaking. She therefore dissented from the Court’s judgment, even as she acknowledged that an agency’s failure to grapple with the economic implications of a rule almost certainly qualifies as arbitrary and capricious.

40 Justice Kagan again is the most definitive on this point, writing, “One would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs for a few dollars in health or environmental benefits.” *Michigan v. EPA*, 576 U.S. 752 (2015).

41 *Indus. Union Dept. v. Am. Petroleum Inst.*, 448 U.S. 607, 675–76 (1980) (Rehnquist, J., concurring in the judgment).

42 *Gundy v. United States*, 588 U.S. 128,148 (2019) (Alito, J., concurring in the judgment).

43 *Fed. Comm’n Comm’n v. Consumers’ Rsch.*, 606 U.S. ---- 145 S.Ct. 2482 (2025).

approach. Justice Gorsuch's *Gundy* dissent is especially detailed (and nearly twice as long as the majority opinion), but it does not necessarily provide a standard to supplement or replace the intelligible principle test. It does, however, articulate the key questions that a court should ask when assessing a delegation:

- “Does the statute assign to the executive only the responsibility to make factual findings?”
- “Does it set forth the facts the executive must consider and the criteria against which to measure them?”
- “[M]ost importantly, did Congress, and not the Executive Branch, make the policy judgments?”⁴⁴

Throughout his dissent, Justice Gorsuch emphasizes that agencies do not run afoul of the Constitution when they “fill up the details.” Rather, Congress violates the nondelegation doctrine when it turns the policy decision over to the executive branch.

Applying Justice Gorsuch's standard to the earlier silver kryptonite hypothetical, Congress cannot merely provide EPA permission to regulate, and it cannot authorize an unenforceable standard such as acting in the public interest. But Congress also need not provide detailed instructions that would require technical expertise to develop. It is enough to point to the types of facts the agency should consider and to provide a way to measure the agency's adherence to Congress's policy goals in assessing those facts. As shown in Figure 2, Congress is responsible for steps 1 and 2, but it can turn over steps 3 and 4 to the agency.

In practice, Congress will need to provide at least some direction to agencies on how to balance the tradeoffs involved in a regulatory intervention. To put it in economic terms, Congress must broadly outline how to evaluate trade-offs and conduct the regulatory cost-benefit analysis.

It is important not to overstate the case. Like any other body of specialized knowledge, economics can be highly esoteric and require extensive training to apply effectively. Regulatory impact analyses can run into the hundreds of pages and feature dense jargon that is utterly incomprehensible to anyone other than PhD economists. Asking Congress to speak at that level of detail would be both unrealistic and unwise.

But Congress is perfectly capable of making the sort of basic economic decisions that people who operate in the modern economy confront every day. Anyone who has ever shopped at a department store understands, for instance, that stocking up on fall fashion items may eat into the budget for next spring or that what is trendy this year may be passe the next or that cramming oneself into skinny jeans may provide a fleeting frisson of perceived sex appeal but prove far less prudent than merely settling for Dockers.

44 *Gundy v. United States*, 588 U.S. 128,166 (2019) (Gorsuch, J., dissenting).

By the same token, Congressional principals can provide high-level guidance to their agents in the executive branch. Doing so requires them to grapple with the underlying trade-offs. Curtailing silver kryptonite use may be unwise if the alternative is plutonium. Regulation may prove unnecessary if DC Comics keeps churning out kryptonite-immune superheroes. Superman's biggest fans may bask in the warm glow of self-righteousness if they criminalize all future use of silver kryptonite, but simply limiting atmospheric kryptonite emissions may prove just as effective.

Ideally, Congress would set a clear standard ("projected monetary benefits of silver kryptonite regulation must exceed monetary costs") and set forth the factors EPA must consider (loss of life and property damage from alien invasion, health effects of non-kryptonite energy sources, likelihood that Superman actually enjoys low levels of atmospheric silver krypton), but even if it does not, directing EPA to set a reasonable standard or to consider the costs of its actions may be sufficient, especially in a post-*Michigan v. EPA* world in which courts can read a cost-benefit balancing standard into such vague language.

Whatever Congress's theoretical capabilities, the true test of its capacity to meet the Gorsuch test is whether it has done so in practice. The next section turns to that question.

Analysis of Level of Detail in Statutory Delegations

Popular wisdom holds that Congress either cannot or will not provide clear direction to regulatory agencies when delegating power. One can empirically test whether that belief is true.

Research Design

This research analyzes in detail a representative sample of statutory delegations. Since thousands of statutory provisions are invoked in the roughly 3,000 to 4,000 federal regulations issued per year, reviewing each one is unrealistic. Therefore, this research is limited to statutes cited in a sample of rules.

That sample contains so-called major rules. Major rules are defined under the Congressional Review Act as those that (a) have an annual economic impact exceeding \$100 million, (b) result in a major increase in costs or prices, or (c) have an adverse effect on the competitiveness of US firms.⁴⁵ Roughly 50 to 100 such rules are issued every year.

The sample is further narrowed by the date each rule was issued while being careful to select from an appropriate year. Any given year may involve unique rulemaking activity that is atypical when considered across an expanded timeframe. Therefore, the sample contains midterm years. The first year

⁴⁵ Congressional Review Act, 5 U.S.C. § 804(2).

of a president's term is often characterized by efforts to undo the prior administration's work (at least after elections involving a shift in the party in power), and the final year frequently involves initiatives to lock in policy preferences and tie the hands of the incoming administration.

Thus, the sample contains rules from two separate years, one during a Democratic administration and another during a Republican administration, which ensures representation of policy concerns of both the Left and Right. Priorities in a left-leaning administration (e.g., environmental regulation, constraints on law enforcement) often differ from those in a right-leaning administration (e.g., stricter border control, pro-business reforms).

Ultimately, the sample includes 2014, which was the second year of President Barack Obama's second term, and 2018, which was the second year of President Donald Trump's first term. Using [regulations.gov](https://www.regulations.gov), I identified every major rule issued during those two years.

Analyzing the sample entails ranking the statutory provisions that agencies cite when issuing their rules, which requires identifying the types of instructions that Congress provides to agencies in statutes. Browsing a handful of statutes from 2014 and 2018 reveals 23 metrics for assessing statutory delegations of power.

Of these 23 metrics, six relate to Congress's substantive instructions to agencies, and the first three of those consider the scope of the agency's regulatory power:

- *Goals*. Does the statute explicitly articulate a goal that can be measured objectively?
- *Coverage*. Does the statute set a measurable threshold as to what activity is and is not covered?
- *Stringency*. Does the statute place a measurable limitation on how stringent the regulation can be?

For each of these substantive metrics, a statute can provide either a high, medium, or low level of detail. Those thresholds are defined as follows:

- *High*. A high level of detail involves a quantifiable standard. For instance, a statute might say, "limit carbon dioxide emissions to ensure an atmospheric concentration of 450 ppm or less," "businesses with annual revenues of \$1 million or more are covered," or "fuel efficiency standards cannot exceed 60 miles per gallon."
- *Medium*. A medium level of detail involves a nonquantifiable standard that nevertheless places a qualitative restriction on the agency's activity. For instance, a statute might say "restrict carbon emissions to protect against unreasonable risks to public health," "small businesses are exempt from compliance," or "fuel efficiency standards must be technologically feasible."

- *Low.* A low level of detail involves nearly carte blanche delegation of power to the agency. Though the statute at issue may refer to “protecting public health” or regulating “in the public interest,” it essentially places no restrictions on the agency’s ability to regulate.⁴⁶

The three remaining substantive metrics use a binary (yes/no) determination:

- *Retroactive applicability.* Does the statutory delegation apply to conduct that occurred before the law was passed?
- *Sunset provision.* Does the statutory delegation expire on or after a specific date?
- *Geographic scope.* Does the statutory delegation apply only to specific areas (e.g., ozone nonattainment areas)?

The remaining 17 metrics assess the procedural instructions that Congress gives agencies when delegating power. Even if Congress chooses not to provide clear directions on how stringently an agency must regulate or on the activities a regulation must cover, it can still constrain the agency’s discretion by requiring procedural steps when adopting a regulation. These steps might include consulting with an advisory committee, considering a specific type of data, undertaking specific rule-adoption procedures (including so-called formal rulemaking or hybrid rulemaking), or consulting with another agency or a stakeholder group.

Though an agency is ultimately free to make whatever substantive decision it chooses after jumping through these hoops, procedural requirements are an effective way for Congress to convey its preferences to regulatory agencies. First, by directing an agency to consider a type of study or consult with a specific group of stakeholders, Congress is signaling the type of information that it considers relevant to addressing the regulatory problem. For example, if Congress directs an agency to include factory owners in an advisory committee formed to provide input on proposed emissions limits, it is indicating that it considers the regulation’s impact on industry to be an important consideration.

Second, procedural limitations can ensure that the agency follows a deliberative process. This is especially true with respect to so-called formal rulemaking, in which the agency must hold a series of hearings presided over by an administrative law judge rather than merely undertaking the standard notice-and-comment process. Imposing consultative or investigatory requirements sends a clear message that Congress wants the agency to take the time necessary to get

⁴⁶ From the perspective of agency litigation, the low-detail standard fails to impose any justiciable standard for assessing whether the agency’s decision runs afoul of the “arbitrary or capricious” standard under the Administrative Procedure Act (5 U.S.C. § 706(2)(A)). As noted earlier, courts have read vague statutory instructions, such as a requirement that the agency behave reasonably, as limiting the agency from imposing outsized costs on the regulated community. A standard such as regulating in the public interest imposes no such limitation. A court can set aside such a rule only if it finds some procedural error or adjudges the underlying statute to be unconstitutional.

the policy right rather than acting quickly (even if the underlying problem remains unaddressed in the interim).

Finally, procedural constraints can sometimes morph into substantive limitations depending on how the rulemaking process plays out. The information an agency relies on in crafting a rule becomes part of the administrative record, and a court reviewing a challenge to an agency rule will consider that record when deciding if the agency's action is arbitrary or capricious and thereby subject to being overturned on judicial review. The Administrative Procedure Act requires that the agency consider the "relevant matter presented." Evidence that the agency ignored relevant information makes its final rule susceptible to challenge. Congress can therefore require the agency to consider a certain aspect of the regulatory problem by mandating that it consult sources or individuals who are likely to provide evidence relating to that aspect of the problem.

Findings

Congress does not provide extensive substantive detail when delegating power to agencies.⁴⁷ Well over 90 percent of the provisions specifying goals, coverage, or stringency fall into the medium or low categories.

However, Congress appears eminently capable of providing at least some substantive detail. For those three substantive criteria, roughly half of statutory provisions qualified as providing a high or medium level of detail. Roughly the other half provided a low level of detail.

Table 1 shows the level of detail at which Congress speaks across the three different substantive criteria that involve a high, medium, or low ranking:

Table 1. Level of Detail in Statutory Delegations by Type of Provision

	High Detail	Medium Detail	Low Detail
Specification of Goal	4.7%	47.4%	47.9%
Specification of Coverage	7.9%	44.2%	47.9%
Specification of Stringency	7.4%	28.8%	63.7%

Source: Author's calculations.

These results support several conclusions. First, when attempting to articulate the goal of a regulatory intervention or its coverage, Congress provides at least an intermediate level of detail more than half of the time. When attempting to specify how stringent a regulation will be, it speaks with at least an intermediate

⁴⁷ See the appendix for more detail on how the statutory provisions were assessed and categorized.

level of detail slightly more than a third of the time. People who accuse Congress of regularly abdicating its lawmaking powers by setting agencies loose with vague marching orders such as “regulate in the public interest” have a point. However, the results also show that Congress is eminently capable of providing greater detail if it chooses to do so. Those who contend that Congress could not function if it were required to give agencies more specific guidance have not spent much time reading statutes.

If Congress can be reasonably specific one-third to one-half the time, it is undoubtedly capable of doing it the rest of the time. That it regularly fails to do so is evidence not of inability but of unwillingness.

Some statutory subjects are certainly easier for Congress to provide agencies with detailed guidance on. For example, education statutes may be less complex than environmental ones.

But the complexity of the underlying subject does not necessarily correlate with the complexity of establishing broad goals or rubrics. For example, Congress is no better positioned to determine how many hours second-graders should spend on the history of Rhode Island—1 hour? 10 hours?—than it is to decide the proper atmospheric concentration of NO_x. It can, however, establish a methodology for answering both. For example, students should spend enough time studying the history of each state to ensure familiarity with its unique role in US history (without spending so much time on any one state that other important subjects are overlooked). And atmospheric NO_x should be reduced to the lowest possible level at which the benefits of each additional unit of reduction still exceeds the costs.

For the remaining three substantive limitations and 17 procedural provisions, one would not expect Congress to impose such requirements anywhere close to 100 percent of the time. For example, Congress is not shirking its duty by declining to require an advisory committee. Rather, an advisory committee may not always be appropriate.

Table 2. Shows how often Congress invokes the three binary substantive limitations on agency rulemaking discretion.

Table 2. Frequency with Which Congress Invokes Binary Substantive Limitations on Agency Rulemaking Discretion

Limitation	Frequency
Retroactive Applicability	0.0%
Sunset Provision	4.8%
Geographic Scope	7.2%

Source: Author's calculations.

Retroactive applicability and geographic scope are unlikely to be invoked frequently. Statutes are often clear on whether they apply only to future conduct or extend backward to cover past conduct; and, since Congress enacts laws for the entire nation, it rarely wishes to limit a law to a state or region.

Sunset provisions, by contrast, could be applied by Congress more often. Many laws cited in the regulations this research reviews are nearly 100 years old. Laws passed when automobile or airplane traffic were novelties and when personal computers did not exist likely need changes to make sense in the present. If laws expire, or sunset, after 5, 10, or 20 years, then future legislators will need to update or renew them.

Though opponents of sunseting argue that allowing laws to expire will create uncertainty and perhaps chaos, several jurisdictions have implemented sunseting regimes without incident. The State of Idaho took an aggressive approach, allowing all of its regulations to expire and then selectively re-implementing those that were still needed. As a result, Idaho is the least-regulated state in the Union.⁴⁸

That roughly 5 percent of the statutes analyzed include a sunset provision suggests that Congress is capable of inserting sunseting language. That it seldom chooses to is evidence not of incapacity, but of apathy. Sunset provisions are becoming increasingly popular in the states, and Congress may elect to deploy this attractive mechanism for ensuring that statutory interventions remain relevant and up to date.

Similarly, Congress deploys almost all the 17 procedural requirements on occasion but does not invoke any of them anywhere close to half the time. Table 3 shows how often each of the requirements appeared in the statutory provisions analyzed.

⁴⁸ Alex J. Adams and Reeve Bull, "Regulatory Modernization: Lessons from Idaho and Virginia" (white paper, Regulatory Transparency Project, Washington, DC, May 10, 2024).

Table 3. Frequency with Which Congress Deploys Procedural Requirements for Agency Rulemakings

Requirement	Frequency
Requirement to consider specific data	10.8%
Requirement to solicit public input (generally)	13.2%
Requirement to solicit a specific type of public input	8.4%
Requirement to undertake notice and comment	8.4%
Requirement to use an advisory committee	7.2%
Committee membership specified	4.8%
Committee timeframe specified	3.6%
Requirement to consult with expert(s)	3.6%
Expert's role specified	2.4%
Requirement to use formal rulemaking	0.0%
Requirement to use hybrid rulemaking	4.8%
Requirement to convene a public hearing	7.2%
Specification of who in the agency approves a regulation	3.6%
Requirement to consult with another agency	20.5%
Requirement to collaborate with private-sector entity in formulating regulation	8.4%
Requirement to report to Congress	9.6%
Specification of timeframe in which regulation should be issued	33.7%
Requirement to review regulation within a specified timeframe	9.6%
Requirement to engage in public disclosure of some aspect of regulatory process	12%
Requirement to issue a public report on the regulatory process	21.7%
Specification of process for judicial review	9.6%
Specification of standard of review	4.8%
Specification of reviewing court	4.8%

Source: Author's calculations.

A few patterns stand out for the procedural requirements. First, as with the substantive requirements, one would not expect Congress to include these in all or even most statutory delegations. For example, an advisory committee requirement makes sense only if the agency could benefit from stakeholder input. If the regulation were not to lend itself to that approach, Congress would be wasting the agency's and the public's time and money by mandating it.

Second, certain procedural requirements are much more common than others. For instance, Congress specifies the timeframe for issuing a rule about a third of the time and asks an agency to consult with sister agencies about a fifth of the time. By contrast, Congress never imposed a formal rulemaking requirement in the provisions analyzed. It seldom specified which agency official must approve a rule or required the use of an advisory committee.

Third, and most important, Congress imposed each procedural regulation other than formal rulemaking at least twice in the sample of provisions analyzed. It is clearly capable of specifying which procedures agencies should follow.

Congress seems reluctant to require some procedures. It directed agencies to collaborate with the private sector in formulating a rule in only 8.4 percent of the statutes reviewed.⁴⁹ It was more likely to require the agency to consider input from another agency (20.5 percent of statutes reviewed) than from private parties (13.2 percent of statutes reviewed).

This finding suggests that Congress is reluctant to require input from regulated parties who may push an agency to adopt a different approach than the one the agency prefers. However, although allowing for outside input often slows down the rulemaking process, the input can be extraordinarily valuable in identifying issues the rulemaking agencies may otherwise overlook.

Congress was also much more likely to direct an agency to report on certain aspects of the regulatory process (21.7 percent of statutes reviewed) than to obtain input from an advisory committee (7.2 percent of statutes reviewed). Similarly, it was uncommon for Congress to direct an agency to consider a specific type of data when formulating a regulation (10.8 percent).

These infrequently used procedural requirements seem like lost opportunities. Congress may not feel it has the expertise to require a specific outcome (e.g., improve energy efficiency by 20 percent), but it should be able to identify the types of experts agencies should consult, and it should often be aware of the type of data the agency should consider as it formulates a regulation.

Again, Congress has provided these types of details in several instances. Its failure to do so more broadly reflects a lack of willingness, not ability.

Most Detailed Statute

As explored earlier, Congress tends to give agencies limited detail when directing them to regulate, but it often provides some direction on how an agency should proceed, and it occasionally provides detailed instructions. If Congress can speak at the highest level of detail in some statutes, then it can do so in others.

⁴⁹ The Administrative Procedure Act already requires private-sector input through the notice-and-comment process. Nevertheless, there is value in Congress's specifying the type of input it wishes the agency to receive, rather than relying on an open-ended procedure in which anyone can comment on any aspect of the rule.

Consider a statute instructing the US Department of Energy (DOE) to set energy conservation standards. Congress directs the agency to achieve the “maximum improvement in energy efficiency” that the agency determines is “technologically feasible and economically justified.”⁵⁰ The relevant statutory section goes on to define “economically justified” as requiring the agency to determine that the “benefits of the standard exceed its burden.” It also outlines specific factors for the agency to consider, including the following:

- The economic impact on manufacturers and consumers.
- The savings in operating costs vs. increase in product price.
- The total projected energy or water savings.
- Reduced product utility resulting from the standard.
- The need for national energy and water conservation.

Congress could have been even more specific. It could have, for instance, required DOE first to provide concrete and specific evidence that consumers cannot select the optimum product for their needs absent the standard or that the monetized benefits exceed the monetized costs by a factor of two or more, but it at least provided a detailed roadmap to both the agency promulgating a regulation and a court reviewing the regulation.

Applying this standard, the regulation would be subject to challenge on judicial review if any of the following proved true:

- The agency failed to conduct an economic analysis of the projected benefits and costs.
- The agency ignored relevant economic information submitted during notice and comment.
- The agency adopted a standard in which the monetized costs exceed the monetized benefits.
- The agency failed to consider that some energy-efficient products may be too expensive for consumers.
- The agency failed to consider that water- or energy-saving standards might render a product less valuable even as they improve its efficiency. For instance, if an “energy saver” toaster oven fails to cook frozen foods to a safe temperature, its low operating costs may not justify the health hazards it creates.

A statutory provision on emissions for nonroad engines and vehicles provides a similarly detailed roadmap for the promulgating agency. First, it requires EPA to make a threshold determination before deciding to regulate: Emissions of carbon monoxide, nitrogen oxides, and volatile organic compounds from nonroad engines must cause significant contributions to ozone or carbon monoxide concentration

50 42 U.S.C. § 6295(o).

in more than one area in which national ambient air quality standards (NAAQS) for those two compounds are not being met.

If this threshold condition is satisfied, then EPA must promulgate standards that achieve the “greatest degree of emission reduction achievable,” taking into account economic cost, noise, energy, and safety. The EPA administrator should act only upon finding an “unreasonable risk to public health, welfare, or safety.”⁵¹

This statute sets a more amorphous standard than that governing DOE in the first cited statute. It does not, for instance, stipulate that economic benefits must exceed economic costs. But it does provide enough detail to guide the EPA administrator. If the threshold condition is not met, then the administrator lacks the authority to issue regulations. If the threshold condition is satisfied, then the administrator must consider the costs of any EPA-promulgated rule as well as any countervailing risks associated with public safety or noise generation. And the administrator should not act without finding that the risk is unreasonable.

A reviewing court would have a harder time striking down a regulation applying this standard than it would a regulation applying the standard articulated under the first statute cited. It nevertheless could set aside a manifestly unreasonable agency action. For example, if EPA disregarded relevant evidence regarding economic costs, its rule would be susceptible to challenge. A reviewing court might also find that a \$1 billion remedy for a \$10 million risk is unreasonable.

More detailed statutes are not always better, of course. In some cases, Congress ties agencies’ hands by speaking with too much detail. For example, the Resource Conservation and Recovery Act specifies the actual design standards for landfills and other waste facilities, requiring “the installation of two or more liners and a leachate collection system above (in the case of a landfill) and between such liners.”⁵²

In this case, the ordering of the components proved impracticable. EPA had to supplement the statutory design, further escalating costs. It would have been preferable had Congress merely tasked EPA with implementing a “system sufficient to prevent any leak posing an unreasonable risk to public health.”

Congress almost never dictates design standards or otherwise provides detailed implementation formulas, outside of cases involving grant formulas or other allocations of public funds.⁵³ The far more significant problem is Congress’s frequent failure even to define the problem the agency should solve or to list criteria the agency should consider when evaluating solutions.

51 42 U.S.C. § 7547.

52 42 U.S.C. § 6924(o)(1)(A)(i).

53 7 U.S.C. § 1531 dictates the degree of crop loss that qualifies a farmer for assistance from the Department of Agriculture. 20 U.S.C. § 1002(a)(2) sets quantifiable criteria for determining whether foreign higher education institutions are to be treated as equivalent to domestic institutions for purposes of student assistance.

The statutory provisions cited earlier are models in that respect. They acknowledge the agency's greater expertise in matters such as setting energy efficiency or emissions standards and do not demand an unreasonable result (e.g., "adopt the most advanced energy efficiency standard that has proven attainable in a laboratory setting"). They do clarify which factors the agency should consider and limit the agency's reach. A standard whose economic costs outstrip its economic benefits is likely to fail a judicial challenge in both cases.

Discussion

As the analysis of this sample of statutes shows, Congress is eminently capable of giving agencies detailed guidance. That it may prefer not to, or that doing so may be politically challenging, does not justify allowing it to abdicate its constitutional role.

The findings also show that Justice Gorsuch's standard is realistic. Congress must not only decide to act, it must also set measurable standards by which courts can judge an agency's adherence to its wishes.

Such standards are often expressed (albeit vaguely) in economic terms: Congress must provide direction on how to weigh the regulatory benefits against the costs. Possible standards include the following:

- Regulatory costs cannot be so high that the economy collapses, creating public health and safety risks greater than the one the agency is addressing.
- Regulatory costs cannot be so high as to bankrupt the industry.
- Regulatory costs must be reasonably proportionate to regulatory benefits.
- Monetized regulatory benefits must exceed monetized regulatory costs.
- Regulatory benefits must be substantially larger than regulatory costs.
- Regulatory costs cannot be so high as to pose a hardship for small businesses.
- Regulatory costs cannot be so high as to pose a hardship for any industry player.

As the findings show, Congress never embraces one of these standards explicitly, but it sometimes uses terms like "reasonable" or "feasible," or directs an agency to "consider costs" (and, less frequently, "benefits"), which courts have interpreted to impose some form of cost-benefit balancing standard. This sort of language, though perhaps not ideal, falls well within the standard that Justice Gorsuch articulates in *Gundy*.

If Congress were to begin adhering to such a drafting standard, it would require additional resources. It is no harder to draft a law telling agencies to impose a reasonable standard than one serving the public interest. Yet members of Congress would likely choose statutory language more carefully if they knew that courts would closely parse it to determine their intentions for the regulating agency's discretion. Members of Congress would need to spend more time

choosing their words and negotiating preferred phrasing among legislators who might prefer differing levels of regulation.

Congress could also likely draw upon executive branch resources—specifically, the millions of civil servants staffing federal agencies. Many agency experts serve several months or years on Capitol Hill as part of a detail. This arrangement would both supplement congressional resources and provide for better dialogue between the legislative and executive branches.

Congress might need a modest increase in budget to hire additional staff for the additional drafting work. However, the return on investment would likely be high. Commentators have estimated that regulatory restrictions cost the US economy up to \$4 trillion annually.⁵⁴ Spending millions to create better regulations up front will yield dividends on the back end.

Why the Benefits of a Stricter Nondelegation Standard Would Outweigh the Costs

This research report has shown that Congress is capable of providing greater detail to agencies, but should the Supreme Court require it to? Perhaps the status quo is acceptable. Indeed, in a period of intense partisan gridlock, enhancing the nondelegation doctrine might paralyze the legislature. Though enhancing the nondelegation doctrine has real costs, the benefits are larger still. This section will explore those benefits.

Healthier Incentives

The Framers believed that the legislative branch was, by its nature, the most powerful arm of government. To dilute its power, they split Congress in two and assigned the president a legislative role.

They did not anticipate that the interests of individual members of Congress might diverge from Congress's institutional interests. To be fair, the Framers would have needed to foresee the rise of the massive regulatory state to have understood this risk. It only makes sense for Congress to delegate away most of its powers if citizens will blame another institution when those powers are misused.

As former professor (now judge) Neomi Rao shows, the regulatory state serves precisely this role. Perversely, individual members of Congress can enhance their power by supporting broad delegations of authority to executive agencies. When agencies succeed, legislators can point to the laws they passed and claim credit for solving problems, even if the regulators did the heavy lifting. When

⁵⁴ Bentley Coffey et al., “The Cumulative Cost of Regulations” (Mercatus Working Paper, Mercatus Center at George Mason University, Arlington, VA, April 26, 2016).

agencies fail, legislators can argue that the regulators grossly misinterpreted the underlying statute.⁵⁵

Best of all, when agencies overzealously enforce their regulations, legislators can use their influence to provide targeted relief to well-connected constituents. Though these constituents may prefer that Congress simply pass a new law to rein in the agencies in, that outcome is seldom practicable. As a result, legislators can solicit campaign contributions by portraying themselves as the only thing standing between voters back home and out-of-control regulators inside the Beltway.

The Court could change this dynamic by adopting a nondelegation standard modeled on Justice Gorsuch's *Gundy* dissent. Senators and representatives would lose the opportunity to throw up their hands in resignation. An updated standard would not require them to go toe-to-toe with regulatory experts in legislatively rewriting burdensome regulations, but it would expect them to elucidate their intentions to guide agencies in adopting policies.

Democratic Accountability and Division of Labor

Proposing an updated nondelegation standard assumes that changing the incentive structure is in the nation's best interest and requires explaining why Congress is better positioned than the administrative state to wear the policymaking mantle.

If one believes in government "of the people, by the people, for the people," then it is critical that lawmakers be connected to the voting citizenry. Members of Congress are elected. Agency officials are not. If a member of Congress angers her constituents, they may vote her out of office. Agency bureaucrats lack this accountability mechanism.

Bureaucrats are not completely insulated from the democratic process. As then-professor (now Justice) Kagan has argued, the head of the executive branch, the president, is elected. The leaders of regulatory agencies are appointed by the president and confirmed by the Senate, and the president can remove an out-of-line agency head from office. Agency leaders thus have strong incentives to ensure that their agencies' policy goals align with the administration's.⁵⁶

Though "presidential administration" brings more accountability to the regulatory state than would exist if the government were run by philosopher-kings, it is easy to overstate the importance of this check on regulatory power. Agency staff run into the millions, whereas the president maintains a staff of a few hundred. Agencies pass thousands of rules per year, of which the president's regulatory oversight body, the Office of Information and Regulatory Affairs, reviews but a sliver.

55 Neomi Rao, "Administrative Collusion: How Delegation Diminishes the Collective Congress," *New York University Law Review* 90, no. 5 (2015): 1463.

56 Elena Kagan, "Presidential Administration," *Harvard Law Review* 114 (2001): 2245.

Moreover, even when political officials do attempt to hold agency staff to account, the career bureaucrats have a major advantage. Political appointees typically hold office for a few months or years, whereas agency officials have often spent decades on the job. They know all the ins and outs of the regulatory process and can easily convince political leadership to fall in line. Or they can just wait out stubborn appointees.

A counterargument is that the regulatory state is more democratically accountable than Congress. The Administrative Procedure Act mandates public participation in rulemaking through notice and comment.⁵⁷ It then requires agencies to engage with the public comments they receive.⁵⁸ On some level, this counterargument makes sense: National elections occur only every two years, and voters must select candidates based on the overall package of policy positions they favor. By contrast, notice-and-comment rulemaking allows voters to comment on every rule issued and to state their individual positions. Agencies are legally bound to consider all “relevant” comments.⁵⁹

The problem with this theory is that only a miniscule portion of the population is aware of notice-and-comment rulemaking, and a far smaller portion has the technical expertise to write a persuasive comment. Rulemaking is not a plebiscite. Agencies should ignore comments saying nothing more than “I love this rule” or “I hate this rule” because the population of individuals who cares enough to write a comment is likely to be wildly unrepresentative of the overall electorate.⁶⁰

Others have argued that agencies do not put much stock in public comments, comparing the process to Kabuki theater. By the time an agency has finished writing a notice of proposed rulemaking, it has usually already made up its mind. The notice-and-comment process is often a distracting exercise in defending a predetermined outcome, not a public debate decided by agency officials.⁶¹

Democratic accountability suffers when power is removed from Congress and placed in the regulatory state.

Federalism

The Framers intended that each branch of government play a distinct role, despite some overlap between their functions. Members of Congress may prefer to shirk their policymaking role, and agency officials may be eager to take it up in their

57 5 U.S.C. § 553.

58 Peter M. Shane, *Democracy’s Chief Executive: Interpreting the Constitution and Defining the Future of the Presidency* (Oakland, CA: University of California Press, 2022), 171.

59 5 U.S.C. § 553(c).

60 Reeve Bull, “Making the Administrative State ‘Safe for Democracy’: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking,” *Administrative Law Review* 65, no. 3 (2013): 634.

61 E. Donald Elliott, “Re-Inventing Rulemaking,” *Duke Law Journal* 41, no. 6 (1992): 1492–93.

stead, but the system breaks down when that happens. Congress diminishes as an institution. The president loses control of the sprawling regulatory leviathan he nominally oversees. Career bureaucrats are attacked as usurpers who manipulate the policymaking process to support their hyperpartisan goals and enhance their personal power. The public ultimately loses confidence in the entire system.

Still, as noted earlier, one might be tempted to defend the status quo on the grounds that it is the only way that the federal government can continue to function. Even if restoring a healthier balance of power eventually cools partisan tempers, the federal government will likely remain bitterly divided for the foreseeable future, and if agency bureaucrats can no longer wring expansive powers out of old, vague statutes, Congress is unlikely to assign them new powers anytime soon.

Yet federal intervention is not the only viable approach to solving society's problems. In the United States' highly centralized system of government, it is easy to forget that the state governments, not the federal government, were the primary policymakers for most of the nation's history. The Framers considered vertical separation of powers between the federal and state governments (as well as local governments and the people) every bit as important as horizontal separation of powers among the three branches.

From this perspective, polarization and even paralysis at the national level seem far less foreboding. If legislators cannot forge consensus on a problem at a national level, it is often better left to the states. State-level policymaking allows for greater tailoring, experimentation, and competition among decisionmakers, increasing the probability that citizens can find a "policy package" they like. And, to paraphrase Justice Louis Brandeis, it allows 50 "laboratories of democracy" to test different approaches.⁶²

Conclusion

Writing good laws is hard work. It is impossible to predict the future, and ideas that make sense in theory do not always work out in practice. Lawmaking also involves trade-offs: one might rob Peter to pay Paul, or one may have to disappoint them both in the short term to do something better for everyone in the long term.

Given this dynamic, it is no wonder that members of Congress avoid making these tough decisions whenever possible. If Congress can just pass a vague law that says the equivalent of, "this silver kryptonite is a real problem; EPA can figure out how to fix it," why would it not? Congress gets to take credit for legislating a solution, and if the implementation goes awry, it can just blame the agency—or, better yet, be the hero when it forces the agency to back off of top campaign donors.

62 Reeve T. Bull, "Uber and the Future of Regulation," *Regulatory Review*, April 26, 2018.

This scenario may be ideal for certain members of Congress, but it does not work well for anyone else. Citizens have essentially no say in the process: unelected bureaucrats make virtually all the important decisions, and the decision-making is so complex that almost no one can understand it. Agency officials, meanwhile, are forced to deal with the fallout when something goes wrong. Judges struggle to review agency decisions because the underlying statutes give them no standard to apply. And Congress has come to resemble a stadium packed with superfans who cheer on their team and trash talk the opponents but spend no time on the field.

Fortunately, this does not have to be the case. The Supreme Court could solve the problem by ramping up the nondelegation standard it applies. And it does not have to demand that Congress displace agency officials. Everyone agrees that executive branch officials will need to fill in the details of statutory delegations, plying their specialized expertise to determine the technically optimal way to carry out congressional intent.

However, Congress needs to do more than direct agencies to regulate in the “public interest”: It needs to articulate a clear goal, tell the agencies what sources to consider in meeting that goal, and provide a metric for assessing whether the agencies have reached it.

Those who contend that Congress is incapable of speaking beyond the highest generalities overlook decades of legislative activity involving countless statutes that contain at least moderately detailed instructions to agencies. Congress only sets agencies loose with little to no substantive direction about half the time, and it often provides clear instructions on how agencies should go about finding the answer, even as it leaves them great leeway in deciding what that answer is.

As the Supreme Court considers whether to ratchet up the nondelegation standard, it should be confident that doing so would not create an institutional crisis in which Congress is tasked with responsibilities it is capable of discharging. Members of Congress, much like people in general, will take the path of least resistance if it is available; but when that path is blocked, Congress has proven itself capable of navigating the more grueling but rewarding alternative route.

In an era in which a curious young visitor to Capitol Hill is likely to encounter only endless oversight hearings and omnibus legislation that is longer than the phonebook and far less interesting, perhaps our old friend bill is poised to make a comeback.

Returning to the balance of power the Framers envisioned between the executive and legislative branches will likely take decades, but restoring Congress’s role as the chief lawmaking body is worth the effort.

Appendix

The research process detailed here characterized statutory provisions across 23 metrics and compiled the results.

Statutory Coding

The 23 metrics were organized in an Excel spreadsheet to facilitate coding. The first three substantive metrics were broken up into three columns each (i.e., one each for a high, medium, or low ranking). The three remaining substantive metrics were broken up into two columns each. The first column was checked if the substantive requirement was invoked (e.g., the statute included a geographic limitation). The second column was checked if it was not invoked (e.g., the statute did not include a geographic limitation).

The 17 procedural metrics received at least one column each. Certain metrics needed multiple columns to capture the possible permutations. For instance, for the advisory committees metric, the study looked at not only whether a provision created such a committee, but also whether it spoke about who should sit on the committee or how long the committee should exist. The advisory committee metric therefore included three columns: creating a committee, speaking about its composition, and speaking about its lifespan. Four of the 17 metrics included such multielement entries.

The spreadsheet's rows included the individual statutory provisions cited in the regulations (with some entries including multiple sections and others consisting of a single section). At the initial stage, no effort was made to organize the individual statutory provisions into overall statutes (e.g., the Clean Air Act, which includes numerous separate sections).

After creating the spreadsheet, the two coders (both law students) went through it row by row and checked off the box in the relevant column when a provision included the metric of interest. For most provisions, few metrics would be implicated. For example, a provision directing an agency to create an advisory committee would not also direct the agency to issue a report to Congress, and it would not announce a substantive standard for assessing the regulation the agency issues, since the provision limits itself to procedure.

To test the consistency of results, each coder reviewed the entire set of provisions independently. The coders did not compare work during the coding process, though the coders and I would hold periodic calls to answer any questions that arose. We intentionally kept those discussions general rather than referring to specific statutory provisions to avoid biasing the coding results of any given provision.

Once the coders had completed their work, they compared their results to eliminate any errors. In a handful of instances, one coder or the other realized that he or she had erroneously classified a certain statutory provision. However, each coder explicitly avoided reclassifying provisions simply because the other coder had graded it differently.

Finally, once the spreadsheet was complete, two additional research analysts (one a recent law school graduate, another a nonlawyer working in litigation) grouped the provisions by statute. For example, every Clean Air Act provision was combined in its own sheet within the broader spreadsheet.

This recombination was important for conducting the statistical analysis. For the substantive provisions that received a high, medium, or low detail ranking, the research analysts calculated overall percentages for which substantive provisions fell into each of those three categories category.⁶³ Knowing which provisions appeared in which statutes was not important since one statute may have multiple substantive provisions.

For the three binary substantive provisions and the procedural provisions, associating the provisions with the relevant statute was more significant because a single statute would not typically have multiple iterations of the same procedural requirement. For instance, if Congress intends that an agency convene an advisory committee, Congress would direct the agency to do so once in the relevant statute. The statute may have dozens of other provisions, meaning the advisory committee portion would represent a small percentage of the total. To avoid the false impression that advisory committees are exceedingly uncommon because they appear in only a miniscule percentage of the provisions cited, this research report focuses on the percentage of statutes that impose an advisory committee requirement (or any other such procedural requirement).⁶⁴

63 Most statutory provisions did not include substantive direction to agencies, and they were not counted in this calculation.

64 To make this point less abstract, one can imagine a sample of 10 statutes, each of which has 100 sections. Each of these statutes contains precisely one section creating an advisory committee. If the number of sections creating advisory committees (10) were divided by the total number of statutory sections (1,000), one would get the impression that advisory committees are required only 1 percent of the time. But they are actually required 100 percent of the time in this hypothetical sample of statutes, given that every single statute includes an advisory committee requirement.