POWERS WITHOUT POWER

GAME THEORY AND THE NONDELEGATION PRINCIPLE[*]

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The nondelegation principle is a constitutional prohibition on Congress's ability to delegate its legislative powers to others. The settled requirement is that an empowering statute must contain an "intelligible principle" to guide and constrain delegated lawmaking authority. This much about the nondelegation principle is obvious, but little else. The Supreme Court has never clearly explained the constitutional basis for the nondelegation principle, nor seriously justified its intelligible-principle test, which today appears all but impossible to fail. And while many theories of nondelegation have been put forth in the academic literature, few are consistent with the modern prevalence of legislative delegation, and none justify the Court's intelligible principle test. This paper attempts to fill that void. Using a novel approach to nondelegation—seeking the principle through the lens of non-cooperative game theory—this paper derives an intuitive theory of nondelegation with attractive properties. The theory is general enough to encompass important aspects of many existing theories of the nondelegation principle. It also explains, and partially justifies, the much maligned intelligible principle test.

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1 INTRODUCTION

In 1935, the Dust Bowl was in full swing. Droughts ravaged the Great Plains. Massive dust storms blackened the sky from Texas to Canada. This was five years into the Great Depression and about 20 percent of the U.S. work force was unemployed. Europe was spiraling into violence. Hitler led German rearmament in violation of the Treaty of Versailles as Mussolini invaded Ethiopia. And in two successive opinions, the Supreme Court invalidated parts of FDR's New Deal legislation as unconstitutional delegations of legislative power.

Panama Refining Co. v. Ryan[1] and *A.L.A. Schechter Poultry Corp. v. United States*[2] concerned portions of the National Industrial Recovery Act authorizing the President to regulate the interstate transportation of oil and to dictate "codes of fair competition" for specific industries. The Court found these authorizations defective because the lawmaking authority they conveyed was not sufficiently fettered by Congressional statement: "Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which [the President may enact laws under the statute]."[3] In the language of nondelegation cases, the provisions lacked an *intelligible principle* to guide and cabin the exercise of delegated lawmaking authority.

But these cases stand as famous exceptions to the nondelegation rule. The Court has never since invalidated any statute on nondelegation grounds; nor had it done so before.[4] To the confusion of lower courts and frustration of scholars, sweeping grants of embarrassingly legislative powers have been consistently upheld against nondelegation

[1] 293 U.S. 388 (1935).
[2] 295 U.S. 495 (1935).
[3] *Panama Refining Co.,* 293 U.S. at 430.
[4] One special-case exception is *Carter v. Carter Coal Co.*, involving the delegation of lawmaking powers to "private persons whose interests may be and often are adverse to the interest of [those they would regulate]." 298 U.S. 238, 311 (1936). The Court rejected this scheme as "legislative delegation in its most obnoxious form." *Id.*

challenges,[5] often with less of an intelligible principle to guide their exercise than the stricken NIRA provisions afforded.

It is hard to claim that this leniency is wrong, however, since there has never been any widely accepted view of what the nondelegation principle demands. The Constitution contains no *nondelegation clause*, and the Supreme Court has never seriously attempted to justify this principle. Over the decades, nondelegation arguments have been put forth on separation of powers grounds, on the basis of concepts in the law of agency, and on normative considerations about political accountability and the legislative process. But all these diverse theories share two properties in common. First, they cannot reconcile the nondelegation principle with the existence of the modern administrative state; at least, not without hollowing the nondelegation limitation, or radically changing the structure of the federal government. Second, they all reject the Court's intelligible-principle test: as Alexander and Prakash put it, "[W]e know of no scholar who adopts the view that what distinguishes constitutional grants of discretion from unconstitutional delegations of legislative power is the presence or absence of an intelligible principle."[6]

This paper takes a novel approach to the nondelegation principle: looking for the basis and boundaries of this constitutional prohibition through the lens of non-cooperative game theory. This approach differs from the literature in three ways. First, in considering the delegation of "legislative power," it abandons historic attempts to define the meaning of *legislative* power, and instead seeks to define the meaning of legislative *power*. Second, it takes seriously the easily overlooked language in nondelegation opinions about connection between nondelegation and governmental coordination. Third, it emphasizes the constitutional-structure implications of the repeated-play principal-agent game at the heart of the legislative delegation problem.

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[5] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (enumerating broad delegations of rulemaking authority upheld on nondelegation challenges); Clinton v. City of New York, 524 U.S. 417, 471–73 (1998) (Breyer, J., dissenting) (detailing historic hesitancy to invalidate statutes on nondelegation grounds).

[6] Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1044 (2007).

The result is a simple and intuitive theory of the nondelegation principle—and one that is derived from constitutional structure alone. This theory of nondelegation is consistent with broad delegations of legislative authority, so long as Congress and the agent are able to solve inherent agency problems through the flexibility of their repeated-interaction relationship. Intuitively, if the agent's equilibrium strategy is to obey the will of Congress, then the delegation of legislative *powers* poses no problem because the agent lacks the *power* to deviate from the will of Congress. On the other hand, this principle restricts the scope of permissible delegations when Congress and the relevant agent cannot be expected to solve these agency problems—perhaps when sweeping new grants of policymaking discretion are being conveyed at a time of worldwide social and economic crisis, for example.

This theory of the nondelegation principle has two particularly appealing properties. First, it combines attractive parts of many existing theories of nondelegation into a single framework. Much prior work on nondelegation can be seen as special cases of the proposed theory. Second, this theory of nondelegation provides at least a partial defense of the Supreme Court's intelligible principle test. A context-dependent version of the intelligible principle test follows from the theory, corresponding with the language of governmental coordination in many nondelegation cases. In rough terms, the *bite* of this intelligible principle test rises when Congress would have difficulty monitoring and responding to exercises of rulemaking authority, and falls as Congress's ability to monitor and respond to rulemaking improves.

The remainder of this paper proceeds as follows. The next section briefly recaps the nondelegation caselaw and literature. After that, the paper provides an informal game-theory framework for the legislative delegation game. This framework supports a novel theory of the nondelegation principle, based on the flexible interaction of Congress and its agents over time. A subsequent section expands upon this general theory of nondelegation, showing how it relates to existing theories and Supreme Court doctrine. The paper concludes with a defense of this game-theoretic approach to constitutional interpretation, as well as a discussion of the theory's limitations.

2 NONDELEGATION AS IT STANDS

Suppose that Congress enacts a statute giving rulemaking authority to an independent or executive agency. The statute falls within Congress's enumerated powers and satisfies the usual constitutional requirements of bicameralism, presentment, etc.[7] The delegation is non-exclusive in the horizontal sense that nothing prevents Congress from vesting parallel authority in another agent,[8] and also in the vertical sense that Congress always retains superior authority to rule on anything within the delegated subject matter.[9] For present purposes, Congress's base power to delegate at least *some* rulemaking authority can be assumed to flow from the necessary and proper clause,[10] or can be taken as given under the weight of existing caselaw.[11]

When—if ever—would such a delegation of lawmaking power run afoul of the nondelegation principle? The doctrinal answer is easy: the delegation is unconstitutional if the empowering statute lacks an intelligible principle to guide rulemaking discretion. But exactly what this test requires, and why, is far less clear.

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[7] U.S. CONST., art. I, §§ 7–8.

[8] *See, e.g.*, Alexander & Prakash, *supra* note 6, at 1040 ("[N]othing prevents Congress from granting two or more entities rulemaking power over the same area.").

[9] *See, e.g.*, *id.* ("Congress retains the ability to enact statutes itself. Any statute subsequently enacted by Congress would trump any inconsistent rules made under the auspices of a delegation."); *see also* R. Douglas Arnold, *Political Control of Administrative Officials*, 3 J. L. ECON. & ORG. 279, 280–81 (1987) (discussing ways that Congress may legislatively and non-legislatively modify earlier grants of authority).

[10] U.S. CONST., art. I, § 8, c. 18; *cf.* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 345–51 (2002) (carefully discussing the limitations of the *sweeping clause* as broader authority to delegate legislative power).

[11] *See, e.g.*, Yakus v. United States, 321 U.S. 414, 424 (1944) ("The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action…"); Loving v. United States, 517 U.S. 748, 758 (1996) ("This Court established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself.").

2.1 *The Intelligible Principle Requirement*

For better or worse, the history and modern demands of the constitutional nondelegation doctrine are fairly straightforward. The Supreme Court's struggle with congressional delegation of lawmaking authority dates back to at least the mid-nineteenth century.[12] Notwithstanding a few early attempts at distinguishing important matters of policy from less important matters,[13] or at determining whether an act of Congress conveyed legislative authority to another entity in any "real" or "just" sense of the term,[14] the test of congressional delegations of lawmaking authority rapidly converged on the search for an intelligible principle.

The leading authority for the intelligible principle requirement is the 1928 case of *J.W. Hampton, Jr., & Co. v. United States*.[15] Then Chief Justice Taft explained the test as follows: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized [to make substantive law] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[16] To

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[12] The case usually cited as the earliest expression of the legislative nondelegation principle is *Cargo of the Brig Aurora v. United States*, 11 U.S. 382 (1813), in which counsel for the appellant argued (without citation) that "Congress could not transfer the legislative power to the President." *Id.* at 386. But the Court was not required to explore this argument in any detail, as the challenged act was a simple application of conditional legislation. *See also* Wayman v. Southard, 23 U.S. 1, 42–49 (1825); Marshall Field & Co. v. Clark, 143 U.S. 649 (1892); Cincinnati, W. & Z.R. Co. v. Clinton County Com'rs, 1 Ohio St. 77 (Ohio 1852).

[13] *E.g. Wayman*, 23 U.S. at 43 ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.").

[14] *E.g.* Buttfield v. Stranahan, 192 U.S. 470, 496 (1904) ("[The statute] does not, *in any real sense*, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and [left] to executive officials the duty of bringing about the result pointed out by the statute.") (emphasis added); Union Bridge Co. v. United States, 204 U.S. 364, 385 (1907) ("*In no substantial, just sense* does it confer upon that officer, as the head of an executive department, powers strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the courts.") (emphasis added).

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

[16] *Id.* at 409.

summarize, delegations of rulemaking authority conveyed to an agent under the limits of an intelligible principle are allowed; those without the limits of an intelligible principle are prohibited.[17]

But what is the measure of an intelligible principle? To how fine a degree must Congress direct the conduct of the agent if the delegation is to escape invalidation? As far as the practical mechanics of the test were concerned, *J.W. Hampton, Jr., & Co.* rather vaguely suggests that "the extent and character of [the conveyance] must be fixed according to common sense and the inherent necessities of the governmental co-ordination."[18] This contextual concern with government coordination is less prevalent in scholarship on the nondelegation doctrine than it is in nondelegation cases themselves, which often discuss the principle in the context of "cooperative ventures" between coordinate branches of government in joint process of lawmaking.[19]

If it explains the different way the test has been applied by the Court, then concern with context and governmental coordination may be the better part of the intelligible principle test. This is because—while *J.W. Hampton, Jr., & Co.* is consistently cited for the language of the nondelegation test—the practical requirements and bite of the test appear to have varied substantially between applications.

In *Panama Refining Co.* and *Schechter Poultry*, for example, the requirement of an intelligible principle seemed to demand that Congress determine for itself the substantive policy of delegated rulemaking as well as the standards and procedures by which it would be implemented.[20] The agency's only role was to "fill in the blanks" left by Congress.[21] This high demand for Congressional specificity and subordi-

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[17] *See* Alexander & Prakash, *supra* note 6, at 1043–45 (providing a similar summary, as well as serious criticism of the intelligible principle requirement).

[18] *J.W. Hampton, Jr., & Co.,* 276 U.S. at 405–06.

[19] Mistretta v. United States, 488 U.S. 361, 372 (1989) (recognizing concern with common sense and the necessity of governmental co-ordination as "a passage now enshrined in our jurisprudence" on the nondelegation principle's "approach to such cooperative ventures" between Congress and its coordinate Branches).

[20] *E.g. supra* note 3 and accompanying text.

[21] *See* Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 675 (1980) (Rhenquist J., concurring) (interpreting *Panama Refining Co.* and *Schechter Poultry* as asking Congress to "lay down the general policy and standards

nation of agency discretion is functionally reminiscent of earlier judicial efforts to separate important subject matters, which Congress had to decide for itself, from less important matters which it could validly delegate.[22]

In other cases, the Court's focus has turned less upon the significance of Congress's own policy contribution than upon a tribunal's ability to judge conformance with the will of Congress. An intelligible principle exists if "a court could ascertain whether the will of Congress has been obeyed"[23] when an agent enacts laws under the statute. The apparent reasoning is that judicial review completes the delegation scheme by ensuring that the agent does not exceed the scope of its authority.[24] This more forgiving application of the intelligible principle test does not require the Court to weigh Congress's substantive contribution to lawmaking. Rather, and framed in the negative, legislative delegation is only invalid if the authorizing statute is devoid of any judicially cognizable expression of Congress's will.[25]

Finally, in many cases the intelligible principle test is discussed in terms that provide little confidence it has any bite at all. For example, in *Whitman v. American Trucking Association*, the Court noted that it has "almost never felt qualified to second-guess Congress regarding

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that animate the law," so that the agent need only "refine those standards, 'fill in the blanks,' or apply the standards to particular cases").

[22] *See supra* note 13.

[23] Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 214 (1989) (emphasis added).

[24] *E.g.* Touby v. United States, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) ("[J]udicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds."); *accord* Ethyl Corp. v. Envtl. Prot. Agency, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) ("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 … ") (citations omitted).

[25] *E.g.* Yakus v. United States, 321 U.S. 414, 426 ("Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in [invalidating the statute]."); *Skinner*, 490 U.S. at 214 ("[S]o long as Congress provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of Congress has been obeyed, no delegation of legislative authority … has occurred.") (citations and internal quotation marks omitted).

the permissible degree of policy judgment that can be left to those executing or applying the law."[26] Pragmatism[27] and the difficulty of the problem are easy and well-worn explanations for judicial reluctance to enforce nondelegation too rigorously.[28] But these concerns are not specific to any given set of facts. And apparent comfort with an extremely lenient version of the intelligible principle requirement begs questions about not just the limits of the test,[29] but whether any serious nondelegation prohibition exists at all.

2.2 *Possible Bases for the Nondelegation Principle*

Assuming there is a constitutional ban on delegations of legislative power, where does it come from? Nothing in the text of the Constitution speaks to the delegation of legislative powers.[30] Early cases skirted the issue by simply asserting that legislative powers could not be delegated. An example is the claim of *Marshall Field & Co. v. Clark* (without citing any authority): "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[31] And while subsequent cases have hinted at vari-

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[26] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

[27] *Mistretta*, 488 U.S. at 372 ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.").

[28] Wayman v. Southard, 23 U.S. 1, 46 (1825) (Marshall, C.J.) ("[T]he maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.").

[29] *See* Lawson, *supra* note 10 at 328–29 (observing that the Court "has steadfastly found intelligible principles where less discerning readers find gibberish").

[30] *Cf. id.* at 335–43 (describing why lack of an express nondelegation clause is not evidence against the principle as a matter of constitutional interpretation).

[31] Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892); *see also* Wayman, 23 U.S. at 42 (stating, in dicta and without citation, that "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.").

ous possible bases for the principle, the Court has never spoken expressly, or with a single voice, on this issue.

In this vacuum, three broad candidate theories are often suggested as potential bases for the nondelegation principle. The first is a separation of powers argument, sometimes tied to the Article I vesting clause. The second derives nondelegation from background principles in the law of agency. The third argues for nondelegation on the basis of a variety of normative concerns, such as the potential for delegation to reduce Congressional accountability or to result in lower quality lawmaking. All of these theories have their strengths, but—as explained in some detail below—none corresponds well with the existence of the modern administrative state, nor with the test by which the Court has historically reviewed nondelegation challenges.

2.2.1 SEPARATION OF POWERS PRINCIPLES

The separation of powers theory arrives at the nondelegation principle by interpreting the vesting of legislative powers in Congress as an exclusive grant. The textual version of the theory studies the first word in the Article I vesting clause: "*All* legislative Powers herein granted shall be vested in a Congress of the United States."[32] Read as an exclusive grant, the Article I vesting clause prohibits the exercise of the legislative powers by anyone other than Congress, thus establishing the nondelegation principle.[33] The same argument may be inferred from the broader structure of a constitution that expressly separates executive, legislative, and judicial functions among the so-named branches of

[32] U.S. CONST., art. I, § 1 (emphasis added).

[33] *E.g.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (Scalia, J.) ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted ... in a Congress of the United States.' This text permits no delegation of those powers…"); *but cf. id.* at 489 (Stevens, J., concurring) ("In Article I, the Framers vested 'All legislative Powers' in the Congress … just as in Article II they vested the 'executive Power' in the President, Art. II … Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others.").

government.[34] Or it may be inferred from background separation-of-powers principles in popular framing-era political theories.[35]

No matter how the separation of powers theory is drawn, the implied nondelegation principle always boils down to the definition of *legislative* power. A statute delegating the exercise of legislative powers is invalid; a statute merely authorizing executory rulemaking is not. But legislative power is not defined in the Constitution,[36] so getting to a functional expression of the nondelegation principle requires taking a stance on what it means to exercise *legislative* power.

And different definitions of legislative power result in profoundly different nondelegation principles. Lawson, for example, draws the line between legislation and execution on roughly the importance of the delegated responsibility.[37] The implied nondelegation principle is

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[34] *E.g. Mistretta*, 488 U.S. at 371–72 ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.… we long have insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch.") (citations omitted).

[35] *E.g. id.* at 419–20 (Scalia, J., dissenting) ("As John Locke put it almost 300 years ago, '[t]he power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.'") (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 87 (R. Cox ed. 1982)); *cf.* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1320–23 (2003) (discussing the relevance and interpretation of Locke's commentary).

[36] *See* Lawson, *supra* note 11, at 1238 n.45 (noting that even the framers of the Constitution recognized that "legislative power" was not self-defining). *See generally* William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474 (1989); *cf. Whitman*, 531 U.S. at 488–89 (Stevens, J., concurring) (arguing that the exercise of broad rulemaking authority is not meaningfully different than the exercise of legislative powers).

[37] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1237–1242 (1994). Note that Lawson's argument on this point is far more subtle and careful than this short summary suggests. *See also* Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally, 337 F. Supp. 737, 745 (D.D.C. 1971) ("There is no analytical difference, no difference in kind, between the legislative function—of prescribing rules for the future—that is exercised by the legislature or by the agency implementing the authority conferred by the legislature. The problem is one of limits.").

this: "Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them" and what remains may be validly delegated to an agent as necessary and proper.[38] By contrast, Posner and Vermeule argue that the legislative powers are simply the *de jure* powers of the members of Congress, such as the power to vote on proposed legislation. And by this standard, any delegation of authority short of the full transfer of the *de jure* powers of a congress-person is simply a permissible conveyance of executory authority under the nondelegation principle.[39]

In sum, even within the separation of powers theory, there are different interpretations of what the principle requires. But only Posner and Vermeule's trivial version of the nondelegation principle accounts for the modern administrative state. And neither version draws the nondelegation distinction on the presence or absence of a potentially weak intelligible principle in the authorizing statute.[40]

2.2.2 COMMON LAW PRINCIPLES IN AGENCY

The law-of-agency approach to nondelegation infers the principle not from the text or explicit structure of the Constitution, but from background concepts in the common law of agency. Central to this argument is the maxim *delegata potestas non potest delegari* (delegated authority cannot be further delegated).[41] The derivation of a nondelegation principle from this agency-law concept is nicely summarized in an old state-law case:

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[38] *Id.* at 1239.

[39] Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002). Posner and Vermeule's argument is, again, more nuanced and sophisticated than this short summary suggests.

[40] *See* Alexander & Prakash, *supra* note 6 at 1044 (arguing that "an intelligible principle that barely (if at all) cabins rulemaking discretion" cannot plausible define the boundary of the legislative power); *see also* David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1229 (1985) (commenting on the practical weakness of the "intelligible principle" constraint).

[41] *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 405–06 (1928) ("The well-known maxim 'Delegata potestas non potest delegari,' … is well understood and has had wider application in the construction of our federal and state Constitutions than it has in private law.").

> That a power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another, is a general and admitted rule. Legislatures stand in this relation to the people whom they represent. Hence it is a cardinal principle of representative government, that the legislature cannot delegate the power to make laws to any other body or authority.[42]

But as Farina notes, the *delegata potestas* maxim was never the end of common law analysis on the fitness of an agent to further delegate authority.[43] For example, an agent may generally delegate responsibility for incidental, mechanical, or ministerial acts to a subagent.[44] And the *delegata potestas* maxim also allows for further delegation by either express assent of the principal,[45] or implied assent in the event of substantially changed conditions.[46]

Thus the law-of-agency derivation of the nondelegation principle admits at least two potential versions of the prohibition. One form is similar to Lawson's nondelegation prohibition: important exercises of rulemaking authority must come from Congress; only incidental or

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[42] *Appeal of Locke*, 72 Pa. 491, 494 (Pa. 1873).

[43] Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 91–93 (2010) (noting that the *delegata potestas* maxim "only begins the analysis" as other common law rules allowed the delegation of power over incidental and necessary matters where reasonable or with the principal's concent). *See generally* RESTATEMENT (FIRST) OF AGENCY §§ 34–35, 77–80 (1933).

[44] *E.g.* RESTATEMENT (FIRST) OF AGENCY § 78 (1933) ("Unless otherwise agreed, authority to conduct a transaction does not include authority to delegate to another the performance of acts incidental thereto which involve discretion or the agent's special skill; *such authority, however, includes authority to delegate to a subagent the performance of incidental mechanical and ministerial acts*.") (emphasis added).

[45] *E.g. Warner v. Martin*, 52 U.S. 209, 223 (1850) (interpreting the *delegata potestas* maxim to mean the agent "cannot depute the [delegated] power to a clerk or under agent, notwithstanding any usage of trade, *unless by express assent of the principal*") (emphasis added).

[46] *See* Farina, *supra* note 43 at 93 (noting that under substantially changed circumstances, assent to the agent's necessary exercise of expanded authority may be "reasonably inferred if the principal is aware of the change and its effect and is in a position to change his orders if he desires such change.").

mechanical rulemaking may be delegated.[47] The other is a more forgiving interpretation, closer to Posner and Vermeule's nondelegation principle:[48] Congress may delegate its legislative powers whenever the public is aware of the circumstances motivating the need to delegate, and manifests no disapproval to acts of delegation.[49]

Again, even within the law-of-agency theory, different interpretations of the nondelegation principle are possible. Again, only a trivial version of the nondelegation principle squares with the prevalence of delegation in the modern administrative state. And again, no version of the law-of-agency nondelegation principle corresponds with the doctrinal search for an intelligible principle.[50]

2.2.3 NORMATIVE FUNCTIONAL CONCERNS

Finally, the legislative nondelegation principle may be derived from a number of related functional, political, and normative concerns about the process of legislation and policymaking. Arguments in this camp are varied, but examples include concern about democratic accountability when Congress is not directly responsible for acts of policy making,[51] concern about potential drift in agency policymaking as a result of congressional inattention and agency capture,[52] and concern about

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[47] *Cf. supra* notes 37–38 and accompanying text.
[48] *Cf. supra* note 39.
[49] *See* Farina, *supra* note 43 at 93–95. Farina's actual argument is a good deal more sophisticated than this abbreviated account conveys.
[50] *See supra* note 40.
[51] *E.g.* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 125–34 (1980); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 8–12 (1993); *see also* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2141–42 (2004).
[52] *See* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 114–15 (2000) (summarizing the literature and providing prominent citations); *see also* Merrill, *supra* note 51, at 2142–45. On capture theory, see generally Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039 (1997).

lack of sufficient checks and balances when substantive rulemaking discretion is vested in federal agencies.[53]

Few of these concerns are necessarily unique to policymaking enabled by acts of legislative delegation, and one may question whether prohibiting legislative delegation would really serve to achieve better policy results.[54] But if these types of normative concerns are valid, and if they have constitutional weight, then they would appear to endorse applying the nondelegation principle as a strict bar to the delegation of lawmaking discretion.[55] To satisfy the underlying concerns, Congress must act on its own, at least in determining the most important and salient features of law.

As before, the requirement of this principle is inconsistent with the prevalence of delegation in the modern administrative state. And as before, the implied nondelegation principle bears no relation to the doctrinal requirement of a potentially weak intelligible principle in the authorizing statute.[56]

3 A GAME-THEORETIC APPROACH TO NONDELEGATION

The thesis of this paper is that non-cooperative game theory can get us closer to a robust, internally coherent legislative nondelegation principle than any single theory in the literature to date. The use of game

[53] *See* Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 817, 819, 820–22 (1999); Merrill, *supra* note 51, at 2147–49; Alexand & Prakash, *supra* note 6, at 1049–54 (noting that delegation circumvents various Article I, Section 7 requirements); *see also* Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 247–49 (1986) (discussing law and economics insights into the role of bicameralism in shaping the outcome of legislation).

[54] *See* George I. Lovell, *That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine*, 17 CONST. COMMENT. 79 (2000); Merrill, *supra* note 51, at 2151–58 (summarizing various "pro-delegation" arguments).

[55] *See, e.g.*, Peter H. Aranson, Ernest Gellhorn, & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 7 (1982) ("We thus propose to deprive the legislature of its ability to shift responsibility and to create lotteries in private benefits through regulation").

[56] Compare the functional and normative concerns expressed in this camp, e.g. *supra* notes 51-53 and accompanying text, with the types of conveyances held constitutionally valid by presence of an intelligible principle, *supra* note 5.

theory is informal in this argument. The purpose of the project is not to provide a formal proof of any result, but rather to use the analytic scaffolding of a non-cooperative game to construct a general theory of nondelegation.

To explain the approach, non-cooperative game theory is a mathematic framework used to study the behavior of intelligent actors with interdependent preferences. The term *non-cooperative* is a bit misleading: this framework is often used to describe the cooperative interactions of actors with some interests in common, others in opposition.[57] Two people bargaining over the terms of a contract are an example: each has a common interest in entering into a beneficial contract, and a private interest in making the terms of the contract as privately beneficial as possible. The Constitution generates many such interactions through its maintenance of tension between the branches of government,[58] and its simultaneous requirement that these branches cooperate if they are to effect even the most basic functions of government.[59]

That constitutional scheme is well reflected in Congressional delegations of legislative powers. By definition, these delegations require coordination between Congress and an agency, both of whom share some interests in common, but others is opposition. Non-cooperative game theory is well suited to this context, and has in fact been applied to the study of standard (non-constitutional) delegations of policy discretion for decades. As the remainder of this section illustrates, the

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[57] *See* DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 355 (1990) (discussing the frequent study of cooperation in the non-cooperative framework).

[58] *See e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 602 (1984) ("The governmental structure [the framers] created embodies both separated powers and interlocking responsibilities … Maintaining conditions that would sustain the resulting tension between executive and legislature was to be the central constraint on any proposed structure for government."); *id.* at 604 ("The Framers expected the branches to battle each other to acquire and to defend power. To prevent the supremacy of one branch over any other in these battles, powers were mixed; each branch was granted important power over the same area of activity.").

[59] *See* RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 33 (1960) ("The constitutional convention of 1787 is supposed to have created a government of 'separated powers.' It did nothing of the sort. Rather, it created a government of separated institutions sharing powers.").

current stock of game theoretic models and concepts can be combined to motivate a general theory of the nondelegation principle.

3.1 *The Structure and Problem of Legislative Delegation*

The basic structure of a Congressional delegation of legislative powers is that of an agency relationship in the economic sense of the term. Ross provides a clinical definition of this type of relationship:

> We will say that an agency relationship has arisen between two (or more) parties when one, designated as the agent, acts for, on behalf of, or as representative for the other, designated the principal, in a particular domain of decision problems.[60]

In the canonical legislative delegation situation, a federal agency acts as the agent of Congress, exercising the legislative powers on behalf of Congress within a statutorily defined subject-matter domain.

The action space of the parties in a delegation-of-powers situation also follows canonical lines. Congress, as the principal, specifies the subject-matter domain in which the agency can act, the rules that will constrain agency action within that domain (if any), and any other terms of the relationship, such as the agency's budget or other forms of compensation that may be conditioned on any information observable to the principal. The agency, as the agent of Congress, may enact any law contained in the set of legislative powers delegated to it by Congress, subject to any constraints placed upon it by statute.

The most interesting, and most realistic, delegation-of-legislative-powers situations also involve a disparity of information between Congress and the agency.[61] This may owe to resource limitations on the ability of Congress to monitor the actions of the agency, to specialization or subject-matter expertise of the agency, or to any other influ-

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[60] Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 AM. ECON. REV. 134, 134 (1973).

[61] Cf. *id.* ("The problems of agency are really most interesting when seen as involving choice under uncertainty…").

ence that confers Congress less outcome-relevant information than the agency. But while many such tensions may limit Congress's ability to monitor the agency, it seems reasonable to expect that Congress would still able to observe at least a noisy signal—an imperfect view—of the agency's actions. For example, even if Congress cannot directly observe what actions the agency takes, it may still observe something about how these actions affect the world. In the more abstract terms of game-theoretic modeling, Congress observes the combined result of the agency's actions and the random state of nature.

Finally, the most interesting situation also involves independent decision-makers with different private incentives. To keep things simple, assume—heroically—that both Congress and the agency have well defined preferences, and act to achieve their most preferred ends.[62] These technical assumptions are not critical to the following analysis, but provide a simple basis for translating general game theory concepts to the present setting. It is not necessary to take a stand on the specifics of these preferences. For present purposes, it suffices to say that Congress and the agency should not generally be expected to have identical preferences about the actions that the agency may take in exercising its delegated authority.

In even this very simple model of the delegation of legislative powers, the difficulty of the problem facing Congress is impressive. The agency has no general incentive to enact Congress's preferred choice of laws. Once given legislative powers, an unfettered agency would enact whatever laws it itself deemed optimal. So Congress is tasked with structuring a delegation relationship that incentivizes the agency to act according to Congress's lawmaking preferences. That is, it must satisfy an inherent *incentive compatibility* constraint when delegating legislative powers to the agency.[63] And it must also satisfy any participation

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[62] Technically, I assume that both Congress and the agency have state-independent von Neumann-Morgenstern utility functions and act as expected utility maximizers. Much has been written about the complexity of defining preferences for aggregate bodies such as Congress or a federal agency. This paper does not engage that debate. Rather, well-defined preferences are assumed for simplicity of analysis.

[63] *See* Arnold, *supra* note 9, at 279 ("Although [legislators] delegate [rulemaking] authority out of necessity, they generally seek ways to monitor and control how bu-

and budgetary constraints that apply: it cannot be so restrictive in the delegation that the agency would simply abdicate responsibility altogether, nor so burdensome in monitoring the agency's actions that it wastes the efficiency-gain of the delegation.[64]

Models of Congress's ability to delegate lawmaking discretion in any simple arrangement with the agency are not enthusiastic about its ability to retain control of the resulting law in these circumstances. Absent flexibility over more than the discretion it affords the agency, and maybe some coarse *ex post* override of the agency's action, Congress faces a well-explored trade-off.[65] By passing specific legislation and limiting agency lawmaking discretion, Congress retains control of the law, but sacrifices the efficiency or expertise that it could achieve with agency assistance. If instead Congress enacts general legislation that affords wide latitude to the agency, then Congress gains the advantage of agency assistance, but does so at the cost of relinquishing control over ultimate lawmaking outcomes to the agency.[66]

3.2 *Control through Relationship Flexibility*

Fortunately, this does not end the analysis. An important qualification in the above description of the legislative delegation tradeoff is that it describes *simple* arrangements between Congress and the agency. Nothing requires that Congress delegate legislative powers in such a simple arrangement, and Congress can use flexibility to its advantage in solving agency problems. Importantly, this flexibility does not need

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reaucrats exercise this authority. *Their aim is to ensure that administrative decisions remain as close as possible to those which they would otherwise make themselves*.") (emphasis added).

[64] *See* ROGER B. MYERSON, GAME THEORY: ANALYSIS OF CONFLICT ch. 6 (1991) (providing a rigorous introduction to contracting problems, including the general need to satisfy incentive compatibility and participation constraints).

[65] *See, e.g.*, David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994); Sean Gailmard, *Expertise, Subversion, and Bureaucratic Discretion*, 18 J. L. ECON. & ORG. 536 (2002).

[66] *See* Sean Gailmard, *Accountability and Principal-Agent Models*, in OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 90 (Mark Bovens, Robert E. Goodin, and Thomas Schillemans, eds. 2014) (describing a family of the principal-agent models of legislative delegation with this tradeoff in the principal's problem).

to come from the authorizing statute; it can arise organically from the dynamic relationship between Congress and the agency over time.

This is because delegations of legislative powers usually create or empower agencies that will continue to enact laws—and interact with Congress—long into the foreseeable future. In each of its sessions, Congress has an opportunity to modify its delegation of powers to any such agency; in doing so, it may consider not just the current actions of the agency (how it believes the agency is operating today), but also the entire history of these actions over time (what it knows of previous law-making exercises, what it has heard from constituents, what it has learns from public comments, etc). Put another way, the previous discussion of an act of legislative delegation can be thought of as only one single interaction in an (approximately) infinite series of interactions between Congress and the agency. This has big implications for analysis of the agency relationship.

A powerful set of results in the game theory literature on repeated games is commonly referred to as the *folk theorem*.[67] In rough terms, the folk theorem provides that in any infinitely repeated game with sufficiently patient actors, any outcome affording each actor at least as much as would obtain in the worst equilibrium outcome of a single stage of the game is supportable as an equilibrium of the repeated game.[68] Put another way, outcomes that would not be possible in any single stage of the game may become possible when strategies are expanded to cover an infinite repetition of interaction.

In the specific context of the legislative delegation relationship, the infinite repetition of interaction provides two sources of additional flexibility for Congress.[69] First, Congress's ability to observe entire histories of play may allow it to monitor the agency more accurately, or at less cost, than would be possible if play were not repeated. Second,

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[67] This name owes to uncertainty over the initial authority for this type of theorem, which was generally known through informal oral conversations between folk in the game-theory community before it was rigorously formalized in any publication.

[68] *See, e.g.*, Drew Fudenberg & Eric Maskin, *The Folk Theorem in Repeated Games with Discounting or with Incomplete Information*, 54 ECONOMETRICA 533 (1986).

[69] *See, e.g.*, Roy Radner, *Repeated Principal-Agent Games with Discounting*, 53 ECONOMETRICA 1173 (1985).

Congress's ability to condition future actions on the entire history of play affords it a robust way to punish or reward agency lawmaking. And, to reiterate an earlier point, this punishment or reward strategy may be implicit in the relationship—it does not need to be reflected textually in the empowering statute.

The additional flexibility provided by repeated interaction can be substantial. In the general principal-agent context, Radner has shown that infinite-repetition of a game can allow a principal to get arbitrarily close to the ideal (first-best) outcome, even when this would not be possible in any single interaction of the game.[70] This is a special case of a more general version of the folk theorem, applicable to a wide class of games with imperfect information:[71] if all else fails, strategic flexibility through infinitely repeated play often allow actors in a game to reach (or at least approximate) efficient outcomes.

In the context of delegations of legislative powers, this means that Congress may have greater control over agency lawmaking discretion than initially appears. Exactly how would this occur? There are many ways to achieve a given outcome under folk-theorm reasoning, but the basic strategy usually involves long-term punishments to offset short-term incentives. For example, even if Congress could not structure an incentive compatible agency relationship in any single stage of the delegation game, it might achieve the same result in an infinite repetition of the game by granting the agency broad discretion, subject to an understanding that it would slash the agency's authority and budget if lawmaking was ever found to have deviated from Congressional preferences. If both Congress and the agency are sufficiently patient, this and a corresponding agency strategy of enacting Congress's choice of laws may dictate equilibrium play in the infinitely repeated game.

Long-term dynamic flexibility in the agency relationship is thus a potentially important tool for Congress. And it can both compliment

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[70] *Id.; see also* Roy Radner, *Monitoring Cooperative Agreements in a Repeated Principal-Agent Relationship*, 49 ECONOMETRICA 1127 (1981).

[71] *See* Drew Fudenberg, David Levine, & Eric Maskin, *The Folk Theorem with Imperfect Public Information*, 62 ECONOMETRICA 997 (1994); Juan F. Escobar & Juuso Toikka, *Efficiency in Games with Markovian Private Information*, 81 ECONOMETRICA 1887 (2013).

and combine with other tools available to Congress for monitoring and disciplining agency conduct in a legislative delegation setting.[72] For example, Congress can legislatively override specific agency rules, or it can reduce or even revoke grants of legislative authority.[73] It can exploit the appropriations process to punish agencies.[74] It can employ committee inquiries to publicly expose and critique agency behavior.[75] And it can empower multiple agencies with parallel authority, to generate competition between them for authority, and to give it greater access to information.[76] In short, the ongoing relationship inherent in most legislative delegation situations affords Congress many levers for exercising potentially strong control over agency lawmaking.

But this is only a claim that Congress *can* structure an incentive compatible relationship with an agency, not that it *will* be able to do so in any given application. The main issue in any agency relationship is the degree of noise in the information available to the principal. Even with the full flexibility of infinite repetition, the principal's ability to improve upon the result of a single interaction of the game contracts with reductions in the quality of information it receives.[77] The plausibility of Congress retaining control over delegated lawmaking is thus a question of the noise it faces and, what Congress is able to do about it.

3.3 *Noisy Interaction: Example & Application*

What does it mean to say that legislative control depends on what Congress is able to do about the noise it faces in monitoring agency

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[72] *See* Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. 243 (1987); Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Polcy: Administrative Arrangements and the Political Control of Agencies,* 75 VA. L. REV. 431 (1989); Arnold, *supra* note 9.

[73] *See supra* notes 8–9 and accompanying text (discussing Congress's ability to override agency rulemaking, and modify or retract agency authority); Posner & Vermeule, *supra* note 39 at 1752 (citing examples)

[74] *See* Arnold, *supra* note 63, at 280.

[75] *Id.*

[76] See Kreps, *supra* note 57, at 610–11 (providing an introduction and survey of important works on multiple principals and agents models).

[77] *See* Fudenberg, Levine, & Maskin, *supra* note 71, at 1034.

lawmaking? The language of game theory is not as instructive on this point as a concrete example. And a surprisingly good example is the modern antitrust understanding of how price-setting collusion works. Similarities to the legislative-delegation game are immediate.

Cartels face a coordination problem similar to the principal-agent relationship: all members of a cartel benefit from an agreement to raise prices, but each member individually benefits from cheating on the agreement by dropping their own price.[78] As in the case of legislative delegation, a single instance of interaction between cartel members is generally not enough to support higher-than-competitive pricing. But also as in the case of legislative delegation, antitrust scholars have found that infinite repetition of interaction can allow cartel members to deter cheating through credible punishment strategies. Finally, as in the case of legislative delegation, collusion can be maintained even when the actions of each cartel member are not directly observable.[79]

Yet successful collusion is not a sure thing. Markets are rarely stable, and the innocent effects of random changes in demand or costs can be difficult to distinguish from the effects of secret cheating on the cartel price. Monitoring can be costly, and lags between cheating and detection can make cheating on the agreed price more attractive.[80] As Stigler notes, "The detection of secret price-cutting will of course be as difficult as interested people can make it."[81] In short, the difficulty of collusion rises with the noisiness of the available information.

So cartels generally work best when they can mitigate the amount of noise in the system. This may be achieved by subjecting themselves to regular audits, or by dividing a market geographically so that defection is more easily detected.[82] It might also be achieved by strategically

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[78] *See, e.g.*, George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 46 (1964) ("Let us assume that the collusion has been effected, and a price structure agreed upon. It is a well-established proposition that if any member of the agreement can secretly violate it, he will gain larger profits than by conforming to it.").

[79] Edward J. Green & Robert H. Porter, *Noncooperative Collusion under Imperfect Price Information*, 52 ECONOMETRICA 87 (1984).

[80] *Cf.* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION, 241 (1988) (discussing the existence and effect of detection lags).

[81] Stigler, *supra* note 78, at 47.

[82] *See* Stigler, *supra* note 78, at 46–47.

limiting the short-term value of cheating with capacity constraints or meeting-competition clauses that make it more difficult for any given cartelist to profit by cheating on the cartel.[83] The ability of a cartel to mitigate information problems is thus limited only by the resources and imagination of the cartel members.

The lessons of noisy price-fixing translate neatly to the problem of coordination in legislative delegation. Congress's ability to cabin the agency's exercise of policymaking discretion falls as the noisiness of the information environment increases. But Congress can take steps to mitigate even very noisy information conditions. For example, Congress may employ dedicated oversight committees to monitor agency rulemaking.[84] It may adopt administrative rules and procedures—such as public notice and comment requirements—that reduce the short-term value of agency deviations at the same time that it increases the information available to Congress.[85] And it may rely on credible information-disclosure procedures imposed upon, or adopted by, the agency to gain better insight into the agency's lawmaking behavior.[86]

But as noted previously, the point here is not to claim that Congress can always overcome the difficulties of noisy information in mitigating the agencies problems in a delegation relationship. The point is simply that—along with the ability of interested parties and watchdog groups to inform Congress of agency behavior—these measures may suffice to reduce noisy information to a point where agency problems could be overcome in certain delegation situations. This possibility opens the door to a new theory of the nondelegation principle.

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[83] *See* Ian Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 7 COLUM. L. REV. 304 (1987).

[84] Arnold, *supra* note 9, at 280–82; McCubbins, Noll, & Weingast (1987, 1989), *supra* note 72.

[85] *See* McCubbins, Noll, & Weingast, *Administrative Procedures*, *supra* note 72, at 246 ("[L]egal constraints … enable political officials to overcome certain informational inequalities between themselves and administrative officers. By requiring agencies to collect and disseminate politically relevant information, Congress and the president make the threat of sanctions a more efficacious control device.").

[86] *Cf.* Paul G. Mahoney, Mandatory Disclosure as a Solution to Agency Problems, 62 U. CHI. L. REV. 1047 (1995) (suggesting a similar strategy in a securities context).

3.4 *Implications for a General Nondelegation Principle*

Though presented in abstract terms, this game-theoretic description of how Congress and an agency interact in the scope of a delegation of lawmaking authority has concrete implications for understanding the nondelegation principle. The framework motivates two propositions about the power to control law in a legislative-delegation relationship. First, if Congress cannot make a delegation of lawmaking authority incentive compatible with its own interests, then broad delegations of lawmaking authority transfer control over law to the agency. Second, if Congress can make a delegation of lawmaking authority incentive-compatible with its own interests, then the agency may be constrained to enact no more than the laws that Congress would itself enact if it had the time and resources to do so.

Put another way, Congress can constrain an agency's ability to exercise lawmaking discretion in either of two ways. One way is to legislate specifically, conferring textually limited lawmaking authority to the agency. The other way is to legislate broadly—ostensibly transferring wide discretion to the agency—but constrain the agency's conduct by structuring the relationship in a way that makes it incentive compatible for the agency to nevertheless enact Congress's preferred laws.

This comports with a common-sense maxim, which turns out to be the foundation for a general theory of non-delegation: legal authority to promulgate laws is no guarantee of the practical ability to control what laws are enacted. Or as Neustadt has noted in another context, a grant of *powers*, is no guarantee of *power*.[87] If Congress delegates lawmaking powers in a way that solves inherent agency problems in that delegation, then it may transfer embarrassingly *legislative* powers to an agency, without giving the agency any actual *power* to legislate at all. Such a delegation is functionally and fundamentally an exercise of legislative power by Congress, not the agency, and thus raises no concern on nondelegation grounds.

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[87] Richard E. Neustadt, Presidential Power and the Modern Presidents 10–11 (1991) ("In [the preceding] words of a President, spoken on the job, one finds the essence of the problem now before us: 'powers' are no guarantee of power; clerkship is no guarantee of leadership").

But what if Congress cannot delegate lawmaking powers in a way that avoids transferring ultimate legislative power to the agency? More concretely, what if available information is too noisy for relationship-based controls to work? In this context, the delegation of legislative powers may indeed raise constitutional concerns. It is not necessary to take a firm stance on the basis of this concern: it could derive from separation-of-powers arguments, from agency considerations, from normative considerations, or from structural inferences based on the design of the constitution.[88] The point is that, in this context, general legislation vesting an agency with broad lawmaking discretion may well constitute an impermissible transference of legislative *power* to the empowered agency.

4 A GENERAL NONDELEGATION PRINCIPLE

The previous section outlines the basic structure of a general nondelegation principle. Delegations of legislative powers are constitutionally permissible when Congress and the agency can solve inherent agency problems in their infinitely repeated delegation game; but otherwise broad delegations of lawmaking power may be invalid. This section expands upon that outline, showing how the suggested nondelegation principle generalizes existing theories of nondelegation and motivates a context-sensitive form of the Court's intelligible principle test.

4.1 *A Generalized Theory of Nondelegation*

An exciting property of this general theory of nondelegation is that it subsumes important aspects of many existing theories of the principle. Separation-of-powers and agency-law theories of the non-delegation principle can be cast as special cases of this more general framework. Normative functional arguments for nondelegation have weaker connections to this general theory.

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[88] *See generally*, CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1983).

4.1.1 SEPARATION OF POWERS PRINCIPLES

The general theory of nondelegation generalizes separation-of-powers theories in a simple but fundamental way. When Congress and the agency can solve inherent agency problems in their infinitely repeated interactions, the delegation of legislative powers entails no transfer of legislative *power* to the agency. Any delegation of lawmaking authority valid under the general theory of nondelegation should thus be valid under a separation-of-powers theory as well: if no power is transferred, then obviously no *legislative* power has been transferred either.

Another way to approach the relationship between this general theory of nondelegation and separation-of-powers theories is to compare the prohibited acts under both approaches. Even the quite different separation-of-powers versions of nondelegation proposed by Lawson and Posner-and-Vermeule can be cast as reflecting, or being contained within, this more general theory of nondelegation.

For example, Lawson's version of the nondelegation principle prohibits delegations of lawmaking authority that ask the agency to make decisions of too much substantive importance. Under the general theory, if agency problems can be mitigated in the delegation relationship, the delegated subject matter is immaterial; but if agency problems cannot be mitigated, then there is still room for delegations to remain constitutionally valid. Lawson's importance criteria provides one possible way to draw this line. As a special case of the general principle, it would suggest that a delegation may still be valid, even if agency problems dominate the relationship, when the delegation confers no important decision-making authority to the agency.

The general version of the nondelegation principle also supplies a possible hook for circularity in Lawson's version of the nondelegation principle: Lawson's principle requires that Congress must make the decisions "sufficiently important to the statutory scheme … that Congress must make them."[89] In the general nondelegation framework, this idea is not so circular. Congress would only need to make important

[89] Lawson, *supra* note 36 at 1239.

decisions when it cannot solve the inherent agency problems in its repeat-interaction relationship with the agency.

Posner and Vermeule's quite different separation-of-powers theory would prohibit only those delegations rising to a transference of the *de jure* powers of members of Congress.[90] But even this much more permissive theory of nondelegation can be cast as a conceptual agreement with the general nondelegation principle. To see why, note that members of Congress are busy people with support staffs that assist them in exercising many—if not all—of their *de jure* powers. But while no one would argue that these staffers are not agents of the Congress people whose *de jure* powers they are helping to exercise, their discretion in exercising expressly legislative responsibilities somehow engenders no nondelegation concern at all.

The general theory of nondelegation provides a simple explanation for this apparent paradox. The reason Congressional staffers raise no concern is that these agents are in such close and continuous contact with their principals that the relationships exhibit few agency problems. Thus, Congressional staffers do not have actual power to influence legislative outcomes. But on this reasoning, delegations of legislative authority to closely controlled agencies should similarly raise no constitutional concerns on nondelegation grounds. Comfort with the responsibilities of Congressional staff should imply comfort with the broader premise of the general theory of nondelegation as well, with the outer bounds of that comfort described by the general theory's focus on whether agency problems can be plausibly contained.

4.1.2 COMMON LAW PRINCIPLES IN AGENCY

The general nondelegation principle also has much in common with the law-of-agency approach. Both theories are basically premised on taking seriously the agency relationship at the heart of a delegation of legislative powers. And the general nondelegation principle can even be cast as an application of the *delegata potestas* maxim.[91] This is be-

[90] Posner & Vermeule, *supra* note 39, at 1726.
[91] *See supra* note 41–42.

cause, if Congress can solve the agency problems inherent in a legislative delegation relationship, then Congress retains ultimate discretion over the legislative output of the agency. In this situation, the agency's actual authority can be fairly viewed as limited to mechanical or ministerial acts, which even the *delegata potestas* maxim generally allows agents to delegate to subagents.[92] Any delegation of legislative powers valid under the general nondelegation principle should thus be valid under the law-of-agency approach as well.

Another sense in which the general nondelegation principle covers the law-of-agency approach is in the timing of analysis. As Farina notes, the common law of agency allows for changes in an agent's actual authority to delegate responsibility over time:

> When a principal engages an agent to act [over an extended period of time], the scope of actual authority cannot be static or the course of external events might leave the agent unable to achieve the goals of the principal. The general rule, therefore, is that *authorization is interpreted as of the time it is acted upon*….[93]

The validity of delegations of legislative powers is similarly dynamic under the general theory of nondelegation. Here too, the validity of a given delegation is assessed under the conditions of the time it is acted upon. But because it casts the entire relationship between Congress and an agency as a series of related individual delegations, the general theory of nondelegation may actually be more flexible than even the law-of-agency theory. Under the general nondelegation principle, the exact same delegation of legislative powers may be valid at one time and invalid at another, when taking into account the different circumstances and environmental noise at each point in time.

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[92] *See supra* note 44.

[93] Farina, *supra* note 43 at 93 (internal citations and quotation marks omitted) (emphasis added).

4.1.3 NORMATIVE FUNCTIONAL CONCERNS

The number and variety of normative and functional arguments that have been provided to support a nondelegation principle complicates any simple contrast between this class of arguments and the general theory of nondelegation. In broad terms, the general theory appears to have weaker connections with these normative versions of the principle than it does with either the separation-of-powers or agency-law versions. But important connections still remain.

For example, under what might be the most common normative nondelegation argument, the primary concern with delegations of legislative powers is that delegations reduce Congressional accountability for the laws ultimately promulgated under these schemes. There are potential problems with this argument,[94] not the least being that Congress is always accountable for the decision to delegate authority in the first instance.[95] But placed in the best possible light, this normative argument might be that voters may not hold the current Congress responsible for the delegations of previous Congresses, which—for some reason—may also be difficult for the current Congress to unwind.

But that final qualifier gives away the connection between accountability arguments and the general theory of nondelegation. On at least two separate grounds, the general theory validates exactly those delegations of legislative powers for which the current Congress is *most* likely to be held accountable for the laws enacted under the delegation relationship. First, the general nondelegation principle requires Congress to be in a position where it ultimately exercises actual legislative power over agency lawmaking. If voters understand this, then they should find no difficulty holding Congress accountable for any laws promulgated by the agency. Second, Congress's ability to exercise control through repeat interactions with an agency creates many opportunities for voters to hold Congress accountable these actions or inac-

[94] *See, e.g.*, Lovell, *supra* note 54, at 89–95 (strongly criticizing the validity of several examples of these arguments).

[95] *See, e.g.*, Posner & Vermeule, *supra* note 39, at 1748 ("The problem with this argument is that Congress is accountable when it delegates power — it is accountable for its decision to delegate power to the agency.").

tions. For example, voters can certainly hold Congress accountable for its decision to fund a previously empowered agency, just as voters can hold Congress accountable for failing to revoke legislative authority from a previously empowered agency.[96]

4.2 *A Context-Sensitive Intelligible Principle Test*

Even a form of the Court's much maligned intelligible principle test is supported by this general theory of nondelegation. The test is simply a restatement of the general principle, and depends on the same factors of information noisiness and the elimination of agency problems. This context-dependent version of the intelligible principle requirement is best explained in two cases.

In the first case, the information environment is sufficiently transparent that Congress and the relevant agency can solve the agency problems in their repeated-interaction delegation game. Even broad delegations of legislative powers are acceptable in this setting, as it will not usually be necessary for Congress to constrain the agency through the text of the authorizing statute. Repeated interactions with the agency afford Congress strong control over lawmaking. To the extent that an intelligible principle is demanded of Congress at all, the requirement is weak and easily satisfied.

In the second case, the information environment is so noisy that Congress and the agency cannot be expected to solve the inherent agency problems, even with the flexibility of infinitely repeated interaction. Broad delegations of legislative powers would give the agency actual lawmaking power in this setting. To retain legislative power, Congress must legislate specifically, leaving only narrow and textually constrained lawmaking discretion to the agency. Residual discretion would then be at the subordinate level of mechanical application, or simple gap-filling. Put another way, Congress can delegate, in this setting, only if it satisfies a biting intelligible principle requirement.

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[96] *See, e.g.*, Lovell, *supra* note 54, at 90 (arguing that it is no easier to hold Congress accountable for acts of general legislation than it is to hold it accountable for particular components of appropriations bills).

Since situations between these two extremes are also possible, this context-dependent intelligible-principle test would probably need to be applied on a sliding scale. But even at the coarse level of grouping applications as either requiring a strict or lenient intelligible principle, this context-dependent intelligible principle test has intriguing power to explain the outcomes of actual nondelegation cases. Consider the following stylized examples.

No statute was invalidated on nondelegation grounds for decades following the formation of the United States. This is not to say that important federal agencies were not rapidly formed and delegated substantial authority—they were.[97] But the conditions of these delegations were different from the modern experience.[98] Most delegations of authority were economically and logistically small, and involved subject matters of general accessibility.[99] Straus summarizes the eighteenth-century model using almost the very language of the general theory of the nondelegation principle:

> The minimalist federal government outlined in Philadelphia in 1787 envisioned a handful of cabinet departments to conduct the scanty business of government …. The eighteenth-century model relied heavily on the controls of politics over and among the branches of government to keep it within reach of the people, to subdue the risks of tyranny.[100]

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[97] *See* Posner & Vermeule, *supra* note 39, at 1735–36 (listing early delegations of ostensibly legislative power).

[98] Barry D. Karl, *Executive Reorganization and Presidential Power*, 1977 SUP.CT. REV. 1, 11 ("Although much can be said about the colonial experience with monarchy, royal governors, and the like, the conditions of national life at the beginning and through much of the nineteenth century simply did not raise the issues of management on the dynamic and shifting scale that follows the Civil War.").

[99] *See, e.g.*, *id.* at 12 ("Of the earlier departments — State, Treasure, War, the Attorney General's, and the Post Office — only the last had significant patronage to distribute.").

[100] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 582 (1984).

In terms of the general theory of nondelegation, this framing-era information environment could have had low enough noise—relative to the powers conferred—that Congress would have been able to mitigate the agency problems inherent in these delegations of authority. According to the context-dependent test, only a weak intelligible principle would be required to satisfy the nondelegation principle in these conditions. In fact, the obviousness of Congress's control over agency lawmaking in this information environment may help to explain why so little concern was raised about nondelegation in the framing era.[101]

The first hints of contemporary federal agencies did not appear until 1848, with the creation of the Department of the Interior,[102] or more plausibly 1887, with the creation of the Interstate Commerce Commission.[103] Today, the Federal Government consists of massive agencies with large staffs, huge budgets, and specialized subject matters.[104]

But while the modern administrative state would seem a situation ripe with informational noise and agency problems, it may not be so. As already noted, there are many procedural and informational constraints on agency lawmaking. For example, Congressional oversight committees monitor agency rulemaking.[105] Extensive rulemaking procedures require notice and public comment periods, slowing lawmaking and increasing transparency into agency actions.[106] And, especially with benefit of modern communication channels, interested parties and agency watchdog groups are well equipped to reduce both noise and lags in the transmission of information to Congress.

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[101] *Cf.* James O. Freedman, *Review: Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 308 (1975–1976) ("The Constitution does not speak to [legislative delegation] explicitly, perhaps because the Framers did not consider the question a serious one. Apparently the only reference to legislative delegation in the records of the Constitutional Convention is Madison's motion that the President be given power 'to execute such other power… as may from time to time be delegated by the national legislature.' The motion was defeated as unnecessary.").

[102] *See* Karl, *supra* note 98, at 12.

[103] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 319 (2d ed. 2002).

[104] *See generally* Straus, *supra* note 100.

[105] *See supra* note 84 and accompanying text.

[106] *See supra* note 85 and accompanying text.

Judged in light of these systemic checks on agency action, and the rapid availability of information from distributed monitoring sources, one might again conclude that this information environment has low enough noise that Congress may be able to mitigate the agency problems inherent in its delegations of legislative authority. If so, then the demands of the context-dependent intelligible-principle test could today be very weak again.[107]

But what about *Panama Refining Co.*[108] and *Schechter Poultry*,[109] two cases in which the intelligible principle test appeared anything but toothless? In the framework of the general theory of nondelegation, one might say that these cases were decided in a noisy information environment—especially relative to the broad powers being delegated in the relevant statues. The country, and the world, was in a state of turmoil. And these delegations were hastily drafted provisions in a statute aimed at expanding the scope of the federal government in unprecedented ways.[110] If the Court judged, in this context, that Congress may have been unable to adequately mitigate agency problems in its relationships with these agents, then the context-dependent intelligible principle requirement would have permitted only narrow and textually constrained delegations of lawmaking discretion—exactly what these cases appear to have contemplated.

Though intriguing, this is but a stylized example. The history of the Court's intelligible principle test is too devoid of theory to claim that the general nondelegation principle consciously motivates the caselaw. But neither must the intelligible principle test be assumed a riot of pure doctrine.[111] The Court has long struggled to fit concepts of gov-

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[107] *Cf. supra* notes 5, 26–29 (discussing the apparent weakness of the modern intelligible principle requirement).

[108] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

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

[110] *Cf.* Merrill, *supra* note 51, at 2103 ("Only in 1935, when confronted with two hastily drafted provisions of the National Industrial Recovery Act, did the Court actually strike down federal legislation as an unconstitutional delegation of legislative power.")

[111] *Cf.* GRANT GILMORE, DEATH OF CONTRACT 1 (2d ed. 1995) at 98 (describing Christopher Langdell's influential approach to contract law as a "riot of pure doctrine," made possible by the absence of any prior "general theory of Contract").

ernmental coordination into its test.[112] Just as courts have long struggled to understand how the availability of judicial review[113] and procedural process requirements[114] fit within the nondelegation framework. (They both work to reduce the noisiness of information about agency actions in the general theory of nondelegation.) The general theory fills these holes, at least partially synthesizing and rationalizing decades of otherwise seemingly schizophrenic opinions.

5 CONCLUSION

This paper derives a simple, intuitive, and general theory of the nondelegation principle from concepts in non-cooperative game theory and the basic structure of the Constitution. The general theory of the nondelegation principle permits Congress to delegate broad legislative powers when it is likely to be able to solve the inherent agency problems in its relationship with the empowered agency; otherwise, it prohibits all delegations except those made with rigorous legislative specificity and constrains on agency lawmaking. Intuitively, Congress may delegate legislative *powers*, so long as the delegation does not constitute a transfer of actual legislative *power*.

This theory of the nondelegation principle generalizes important parts of many existing theories of nondelegation, and also helps explain the Supreme Court's intelligible principle test. As a corollary, it provides a prescriptive list of the arguments most relevant in a legislative nondelegation challenge. Factors such as the expected durability of relationship between Congress and the agency, the information available to Congress and the public on agency lawmaking, the procedural requirements and hurdles to agency lawmaking, and methods by which Congress may punish or reward the agency for its conduct are all central to the underlying nondelegation inquiry.

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[112] *See supra* notes 18–19 and accompanying text.
[113] *See supra* notes 23–25 and accompanying text.
[114] *See, e.g.*, Aranson, Gellhorn, & Robinson, *supra* note 55 (discussing lower court caselaw that suggests "a careful examination of the total system of substantive and procedural controls that limit the agent's power" may be required in applying the nondelegation principle).

But even if the results of the approach are attractive, are concepts in non-cooperative game theory really a plausible basis for constitutional interpretation? Arguably, yes. The focus of game theory—interactions between actors with different but interdependent incentives—is hardly alien to constitutional theory. The use of game theory in this analysis is simply to take seriously the tension of interests between Congress and various agencies when they cooperate in enacting laws. And constitutional theories based on the necessity of cooperation between independent and differently interested branches of government are neither new nor revisionist.[115]

On the other hand, a fair objection to the proposed general theory of the nondelegation principle is that is not easily reduced to a simple rule or predictable fact pattern. The general theory of nondelegation actually has a fair bit in common with price fixing collusion and theories of coordinated harm from mergers,[116] complicated areas of antitrust law that are likewise fact intensive and resistant to simple categorization. But the objection must be placed in context: even by the standards of constitutional law, the nondelegation principle has long eluded simple summary. Asking a new theory to reduce the principle to a bright-line rule is simply asking too much. And if this general theory of nondelegation helps—even a little—to clarify the complex analysis that nondelegation challenges require, then it has still done something to help improve the common understanding of a long and infamously misunderstand area of constitutional law.

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[115] *See supra* notes 57–59 and accompanying text.

[116] *See supra* notes 78–83 and accompanying text; *cf.* U.S. Federal Trade Commission & U.S. Department of Justice, Antitrust Division, HORIZONTAL MERGER GUIDELINES § 7 (Aug. 19, 2010).