

Delegation, Time, and Congressional Capacity: A Response to Adler and Walker

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In *Delegation and Time*,¹ Jonathan Adler and Chris Walker do an excellent job of introducing us to an important new way of thinking about broad congressional delegations of power. After reviewing the traditional arguments against broad congressional delegations of power rooted in concerns about lack of political accountability they note that broad delegations increasingly raise a serious temporal problem.²

In their words, “broad congressional delegations of authority at one time period become a source of authority for agencies to take action at a later time that was wholly unanticipated by the enacting Congress or could no longer receive legislative support.”³ They also note that this temporal “problem has taken on added significance in the current era of congressional inaction.”⁴ Adler and Walker illustrate this temporal problem well by referring to the efforts of the Federal Communications Commission to use the Communications Act of 1934 to regulate the internet and the efforts of the Environmental Protection Administration to use the Clean Air Act of 1972 to mitigate climate change.⁵ Neither statute was enacted with those applications in mind and neither is well suited to the task.⁶

I agree completely with the concerns that Adler and Walker express. I would expand them to include broad congressional delegations of power to the president that are being applied in ways that Congress never contemplated and would not support today. President Trump’s use of the broad authority granted

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1. Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931 (2020).
2. *Id.* at 1936–37.
3. *Id.* at 1931.
4. *Id.*
5. *Id.* at 1941–45.
6. *See id.*

to the president in the Trade Expansion Act of 1962⁷ and his use of the broad authority granted to the president under the National Emergencies Act of 1976⁸ and over one hundred other “emergency” statutes illustrate Adler and Walker’s temporal concerns particularly well.

President Trump has relied on the Trade Expansion Act as the basis for his imposition of massive tariffs as part of his trade war against many of our trading partners.⁹ He has relied on the Emergencies Act to reallocate funds from other uses to construction of the border wall that Congress has consistently refused to fund.¹⁰ Both of those congressional grants of power have no apparent limit.

The Supreme Court recently rejected challenges to the validity of President Trump’s use of both of those powers.¹¹ Immediately after the Court refused to consider a challenge to the president’s use of the Emergencies Act to fund the border wall, one of the Democratic candidates for president announced that, if elected, he would invoke the Emergencies Act as the basis for spending trillions of dollars and imposing draconian limits on the use of cars and trucks in an effort to mitigate climate change.¹² President Trump responded to the apparent green lights from the Court by increasing the tariffs he imposed on goods from China and directing U.S. companies to cease doing business in China.¹³

Adler and Walker urge Congress to respond to the temporal problem created by broad congressional grants of power by making greater use of sunset provisions in statutes that confer broad power on agencies.¹⁴ In their view, including a sunset provision in a statute that grants broad power to an agency would change congressional incentives in ways that would induce Congress to re-evaluate the powers granted in such a statute and to revise them in ways that both update them and reduce the degree of discretion the agency has to interpret the statute in ways that Congress did not intend.¹⁵ Congressional actions of that type would address effectively both the political legitimacy and the temporal problems that are created by broad congressional

7. 19 U.S.C. § 1862 (2018).

8. 50 U.S.C. § 1621 (2018).

9. *See generally* Am. Inst. for Int’l Steel, Inc. v. United States, 376 F. Supp. 3d 1335 (Ct. Int’l Trade 2019) (showing a divided Court of International Trade upholding the validity of the statute against a challenge to its constitutionality under the non-delegation doctrine), *aff’d*, 806 F. App’x 982 (Fed. Cir. 2020), *cert. denied*, No. 19-1177, 2020 WL 3405872 (U.S. June 22, 2020).

10. *See* Sierra Club v. Trump, 929 F.3d 670, 675–77 (9th Cir.) (affirming district court’s injunction enjoining government from reallocating funds to build wall), *rev’d*, 140 S. Ct. 1 (2019) (staying the injunction in a divided decision).

11. *See* cases cited *supra* notes 9–10.

12. Lisa Friedman, *Bernie Sanders’s ‘Green New Deal’: A \$16 Trillion Climate Plan*, N.Y. TIMES (Aug. 28, 2019), <https://www.nytimes.com/2019/08/22/climate/bernie-sanders-climate-change.html> [<https://perma.cc/FT8P-VL4Q>].

13. Peter Baker & Keith Bradsher, *Trump Asserts He Can Force U.S. Companies to Leave China*, N.Y. TIMES (Aug. 24, 2019), <https://www.nytimes.com/2019/08/24/world/europe/trump-g7-summit.html> [<https://perma.cc/MJ5G-7ATD>].

14. Adler & Walker, *supra* note 1, at 1978–80, 1988–89. Adler and Walker also urge Congress to use its appropriation power with the same purpose and effect. *Id.* at 1981, 1993.

15. *See id.* at 1986.

grants of power to agencies.¹⁶ They refer to environmental regulation and immigration as contexts in which it would be particularly desirable to give Congress the incentive to re-evaluate and revise broad statutory grants of power by making them temporary.¹⁷

I agree with Adler and Walker on two points. First, it is important to change the incentives of members of Congress to encourage them to legislate. Second, it would be desirable if we could devise ways of changing those incentives to the extent required to induce Congress to reconsider and to periodically revise broad grants of power to agencies.

I disagree with them on one important point. I do not believe that adding sunset provisions to statutes that grant broad power to agencies would provide incentives sufficient to induce Congress to reconsider and to revise those statutes. Congress lacks the institutional capability to take those actions. In most circumstances, congressional impotence would create a situation in which broad grants of power to agencies expire and are not replaced with any statute that fills the resulting void in federal power to address important issues like air quality, climate change, immigration or regulation of the internet.

In Part I of this response, I summarize the longstanding reasons why Congress has little choice but to respond to a major problem by delegating broad power to an agency to address the problem. I then describe some of the examples of the costly mistakes that Congress has made when it decided not to confer broad power on an agency but instead to address a regulatory problem by making important decisions itself. In Part II, I describe the changes in the political environment that have created the state of near-complete congressional impotence that exists today and suggest ways in which we might be able to change the incentives of members of Congress to restore some ability to legislate. In Part III, I suggest ways in which courts might be able to reduce the political legitimacy and temporal problems that are created by broad congressional delegations of power to the executive branch.

I. REASONS WHY CONGRESS DELEGATES BROAD POWER

Congress began to delegate power broadly to agencies in 1789 and it has done so on countless occasions since then.¹⁸ The reasons are well known. Congress lacks the expertise, foresight and time required to effectively and intelligently address problems like air quality and regulation of the internet.¹⁹

Regulation of air quality provides a good illustration of the problem. Some institution must make scores of decisions about the permissible level of

16. *See id.* at 1978.

17. *Id.* at 1942, 1978.

18. For a summary of the history of broad delegations of power to agencies, see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021); and Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 131 YALE L.J. (forthcoming 2021).

19. For a description of the reasons why Congress delegates power broadly, see RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 32–46 (6th ed. 2014).

emissions and ambient concentrations of numerous sources of pollutants. That institution must have a good understanding of the effects of various pollutants and of the cost of potentially available emission control methodologies. Moreover, the standards and criteria must be changed regularly to reflect changes in technology and in our understanding of the adverse effects of pollutants at varying concentration levels. Congress lacks the expertise and time required to make those decisions.

The political science literature adds another reason why Congress cannot make many of the decisions that it delegates to agencies. Ken Arrow was awarded the Nobel Prize for explaining why many important decisions cannot be made by majority vote.²⁰ In the common situation in which there are three or more possible outcomes of a policy debate and none of the three has the support of a majority, Arrow proved that it is impossible to resolve the debate through a process of majority voting.²¹ In that common situation, it seems sensible to delegate decision making to an agency that has the expertise relevant to the decision and some degree of political legitimacy attributable to its relationship with the elected president.

The alternative to congressional delegation of broad power to an agency is direct congressional resolution of a policy debate through enactment of a statute that contains clear and explicit commands. On the rare occasions when Congress has chosen that route it has made a mess of the situation. A few examples illustrate the inability of Congress to choose resolutions of policy disputes that are sensible and durable.

The Food Stamp Act. In 1971 Congress amended the Food Stamp Act in an effort to eliminate abuse of the food stamp program by affluent college students.²² The amendment required the Department of Agriculture to deny food stamps to any household that includes anyone who was claimed as a dependent on a tax return that reported income above a disqualifying level.²³ The amendment had the unfortunate effect of rendering ineligible for food stamps a woman who had a monthly income of \$57.50 to support twelve minor dependents because her former husband had declared two of those dependents on his return.²⁴ When confronted with this clearly unfair effect, the Supreme Court held the amendment to be unconstitutional through application of the since discredited and abandoned irrebuttable presumption doctrine.²⁵

The Delaney Clause. In 1958 Congress amended the Food, Drug, and Cosmetic Act in a way that was intended to reduce the risk of getting cancer as

20. Arrow explained his famous impossibility theorem in detail in KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 46–60 (3d ed. 2012).

21. *Id.* at 51–59.

22. The Supreme Court described the amendment and its effects in the opinion in which it held the amendment unconstitutional. *U.S. Dep't of Agric. v. Murry*, 413 U.S. 508, 509, 512–14 (1973).

23. *Id.* at 509 n.1.

24. *Id.* at 509.

25. *Id.* at 514.

a result of ingesting processed food that includes a carcinogen.²⁶ The amendment—often called the Delaney Clause—prohibited the Food and Drug Administration (“FDA”) from approving any pesticide that remains in a processed food if the pesticide “is found to induce cancer when ingested by man or animal.”²⁷ The Delaney Clause seemed to make sense in 1958 when only relatively large quantities of pesticide residue could be detected in processed food and when the only four known causes of cancer in animals also caused cancer in humans.²⁸

By 1988 the Delaney Clause had become nonsensical and counterproductive. By then we had developed the ability to detect pesticide residues in processed food in submicroscopic quantities.²⁹ We also knew that the vast majority of substances that induce cancer in animals in laboratory tests in which animals are force-fed massive quantities of a substance pose no risk of inducing cancer in humans when they are ingested in the quantities in which they are found in the form of pesticide residues in processed food.³⁰ The FDA created a de minimis exception to the Delaney Clause on the basis of solid evidence that it was harming public health.³¹ The Ninth Circuit rejected the de minimis exception on the basis that it was inconsistent with the statute.³² The Delaney Clause is still in the statute but the FDA has been able to avoid its adverse effects on public health by tricking Congress into amending the statute in a way that makes it impossible for the Clause to apply to any pesticide.³³

The Natural Gas Policy Act. In 1978 Congress decided that the delegation of power to the Federal Power Commission in the Natural Gas Act of 1938 to set “just and reasonable” prices for natural gas was unduly broad.³⁴ In the Natural Gas Policy Act (“NGPA”) Congress replaced that broad standard with a specific list of permissible prices applicable to a dozen categories of gas.³⁵ NGPA interacted with market forces to create a combination of bizarre and destructive effects that included a severe gas shortage followed by a massive

26. The Delaney Clause and its unfortunate effects are described in Charles H. Blank, *The Delaney Clause: Technical Naïveté and Scientific Advocacy in the Formulation of Public Health Policies*, 62 CALIF. L. REV. 1084, 1089–96 (1974); and Richard A. Merrill, *Regulating Carcinogens in Food: A Legislator’s Guide to the Food Safety Provisions of the Federal Food, Drug, and Cosmetic Act*, 77 MICH. L. REV. 171, 178–84 (1978).

27. Food Additives Amendment of 1958, Pub. L. No. 85-929, § 409(c)(3)(A), 72 Stat. 1784, 1786 (1958) (codified as amended at 21 U.S.C. § 348(c)(3)(A) (2018)).

28. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 496 (1989).

29. *Id.* at 496–97.

30. Bruce N. Ames & Lois Swirsky Gold, *Too Many Rodent Carcinogens: Mitogenesis Increases Mutagenesis*, 249 SCIENCE 970, 970–71 (1990).

31. Margaret Gilhooley, *Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause*, 40 ADMIN. L. REV. 267, 267–70 (1988).

32. *Les v. Reilly*, 968 F.2d 985, 990 (9th Cir. 1992).

33. KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS 90–91 (2d ed. 2014).

34. See Richard J. Pierce, Jr., *Natural Gas Regulation, Deregulation, and Contracts*, 68 VA. L. REV. 63, 63, 95 n.126 (1982).

35. See *id.* at 87–88.

surplus and a range of prices that varied from 45 cents per MMBTU to 9 dollars per MMBTU.³⁶

The Powerplant and Industrial Fuel Use Act. In 1978, Congress made another ill-fated attempt to make regulatory policy decisions itself. In the Powerplant and Industrial Fuel Use Act (“PIFUA”) Congress required all electric utility and industrial consumers of natural gas who could use coal or oil to convert from natural gas to oil or coal.³⁷ The statute was based on the belief that the nation was experiencing a chronic shortage of natural gas.³⁸ Shortly after the statute was enacted the gas shortage turned into a massive surplus and was replaced by a shortage of oil.³⁹ About the same time, studies found that use of coal was causing thousands of unnecessary deaths a year.⁴⁰ It is hard to imagine a worse mismatch between a policy problem and a regulatory response than the congressional decision to enact PIFUA.

I could add many more examples of bad regulatory policy decisions that Congress has made. I am not aware of any counter-examples of policy decisions that Congress mandated in statutes that have proven to be wise and far-sighted solutions to regulatory problems.

II. THE MODERN CONGRESS HAS NO CAPACITY TO LEGISLATE

The success of the proposal to add sunset provisions to statutes that confer broad authority on agencies depends critically on the ability of Congress to engage in the process of careful re-evaluation of statutes as they approach their sunset date and to enact revised statutes that are more reflective of modern understandings and values. I am not sure it was ever realistic to expect Congress to behave in that manner. I am certain that Congress lacks that capacity today.

The U.S. system of separation of powers, coupled with the procedures required to enact legislation and the Senate cloture rules, have always made it far more difficult for the U.S. Congress to enact legislation than it is for the vast majority of legislative bodies in other countries to enact legislation. Article I requires the House, the Senate and the President to agree on any piece of legislation,⁴¹ plus the cloture rules in the Senate require 60 votes to end debate

36. For descriptions of the NGPA and its effects, see generally Richard J. Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 HARV. L. REV. 345 (1983) (arguing that Congress should deregulate gas pipeline companies); and Pierce, *supra* note 34 (analyzing the anomalous results produced by regulation, phased deregulation, and long-term contracts in the natural gas industry).

37. Richard J. Pierce Jr., *Introduction: Symposium on the Powerplant and Industrial Fuel Use Act of 1978*, 29 U. KAN. L. REV. 297, 297 (1981).

38. *Id.*

39. See Richard J. Pierce, Jr., *Reconstituting the Natural Gas Industry from Wellhead to Burnertip*, 9 ENERGY L.J. 1, 11–16, 33 (1988).

40. See e.g., Douglas W. Dockery, C. Arden Pope III, Xiping Xu, John D. Spengler, James H. Ware, Martha E. Fay, Benjamin G. Ferris, Jr. & Frank E. Speizer, *An Association Between Air Pollution and Mortality in Six U.S. Cities*, 329 NEW ENG. J. MED. 1753, 1753–59 (1993) (finding in an epidemiological study that exposure to small particulate matter emitted from coal-fired generating plants has severe adverse effects on mortality and morbidity).

41. U.S. CONST. art. I, § 7.

and allow a vote on a Bill.⁴² As a result Congress can legislate only on a bipartisan basis. Legislators of both parties must be willing to compromise in order to enact legislation.

Increased political polarity has combined with our methods of choosing candidates for office and leaders of the House and Senate to dramatically decrease the capacity of Congress to legislate. There is broad agreement among scholars that our system of government has developed a major imbalance in the form of a transfer of undue power from the legislative branch to the executive branch.⁴³ The power of the executive has increased dramatically because of the growing impotence of the legislative branch.⁴⁴ Congress is capable of legislating only during the brief periods in which one political party controls the House, the Senate and the Presidency. Even then the proponent of legislation must find a route around the cloture rules if the proponent's party has less than 60 members of the Senate. During all other periods of time legislative gridlock prevails and precludes Congress from enacting any meaningful legislation except on a short-term emergency basis. Congressional impotence creates a void that can only be filled by the executive branch.

Congressional impotence is primarily a function of extreme and growing political polarity.⁴⁵

Historians and political scientists have devoted a lot of time and energy to efforts to understand the complicated roots of that phenomenon.⁴⁶ They have helped us understand why we have become so polarized but they have not yet identified any promising steps we can take to limit the increase in the political polarity of the electorate. That leaves us only with the option of trying to identify changes in our political institutions that have the potential to reduce the adverse effects of political polarity.

42. CONG. RSCH. SERV., RL30360, FILIBUSTERS AND CLOTURE IN THE SENATE 1 (2017), <https://crsreports.congress.gov/product/pdf/RL/RL30360> [<https://perma.cc/PYS2-P2RT>].

43. See generally Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549 (2018) (analyzing presidential control of administrative action and related separation of powers issues); Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137 (2014) (proposing reforms for the executive, legislative, and judicial branches to improve administrative agencies' reasoned implementation of statutory mandates); Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) (analyzing the president's role in administrative agency decisionmaking).

44. See Molly E. Reynolds, *How to Measure a Dysfunctional, Gridlocked Congress*, BROOKINGS (June 28, 2016), <https://www.brookings.edu/blog/fixgov/2016/06/28/how-to-measure-a-dysfunctional-gridlocked-congress> [<https://perma.cc/PD75-VGYW>]; Fred Dews, *3 Charts that Capture the Rise in Congressional Gridlock*, BROOKINGS (May 30, 2014), <https://www.brookings.edu/blog/brookings-now/2014/05/30/3-charts-that-capture-the-rise-in-congressional-gridlock> [<https://perma.cc/N434-FLU7>].

45. See DARRELL M. WEST, DIVIDED POLITICS, DIVIDED NATION: HYPERCONFLICT IN THE TRUMP ERA 167-69 (2019); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 809 (2014).

46. See, e.g., WEST, *supra* note 45, at 167-79; Pildes, *supra* note 45, at 818-28; Adam Hughes & Galen Stocking, *ASPA Conference Roundup: Research on Political Polarization on Social Media and the U.S. Congress*, PEW RSCH. CTR. (Sept. 17, 2018), <https://www.pewresearch.org/fact-tank/2018/09/17/apsa-conference-roundup-research-on-political-polarization-on-social-media-and-the-u-s-congress> [<https://perma.cc/9VEM-SSQJ>].

Without major changes in the composition of our political institutions, the incentives of the members of Congress, and the voting rules of Congress, we will experience increasing adverse effects of the failure of our version of democracy. As statutes become increasingly obsolete, the executive branch will have no choice but to try to stretch the power Congress has delegated to it in ways that put increased stress on the third branch—the judiciary. It is hard to see how judges can play constructive roles when they are regularly forced to choose between allowing the executive branch to exceed the boundaries of its delegated power and creating a situation in which no institution of government is capable of responding to the constantly changing needs of the nation.

There is also broad agreement that the president has increased his personal political power to an undesirable degree.⁴⁷ Traditionally many important executive branch decisions were made by agency heads who were nominated by the president and confirmed by the Senate as officers of the United States because of their expertise in the areas in which they made decisions.⁴⁸ Over time that system of executive branch decision making has been replaced by a system in which many decisions are made by anonymous white house political operatives who have no subject matter expertise and are motivated solely by their desire to aid the president and his supporters.⁴⁹ If left unchecked, increasing political polarity will accelerate the trend to replace the power of agencies headed by officers of the United States with the personal power of the president and anonymous white house aides.

The stakes are high. We must identify ways of encouraging legislators to engage in the kinds of compromises with each other and with the president that are essential to their ability to legislate. The starting point should be the process of nominating candidates for office. Our present method of choosing candidates yields candidates who are not representative of the views of a majority of the members of either political party, while it simultaneously discourages legislators from entering into the bipartisan negotiations that are essential to the compromises that can lead to legislation.⁵⁰

Primaries are low turnout elections.⁵¹ The few voters who choose to participate are the most ideologically extreme members of the party.⁵² As a result Democratic primaries select the candidates who are furthest to the left and Republican primaries select the candidates who are furthest to the right.

47. *E.g.*, Mashaw & Berke, *supra* note 43, at 550–52; Strauss, *supra* note 43, at 696–705.

48. *See* PIERCE ET AL., *supra* note 19, at 32–46.

49. *See* Charles S. Clark, *Vacancy Rate for Top Agency Jobs Continues to Set Records*, GOV'T EXEC. (Aug. 1, 2018), <https://www.govexec.com/management/2018/08/vacancy-rate-top-agency-jobs-continues-set-records/150224> [<https://perma.cc/YQS4-KRW7>]; Anne Joseph O'Connell, *Staffing Federal Agencies: Lessons from 1981-2016*, BROOKINGS (Apr. 17, 2017), <https://www.brookings.edu/research/staffing-federal-agencies-lessons-from-1981-2016> [<https://perma.cc/2PAB-SPPG>]; Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 DUKE L. J. 1645, 1691–95 (2015).

50. *See* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 283–84 (2011).

51. *Id.* at 298–99.

52. *Id.*

Primaries create a legislative body that is more polarized than the electorate. That greatly reduces the likelihood that the members of the House and Senate can reach agreement on a compromise.

The primary process also greatly discourages members from compromising or even attempting to compromise. The vast majority of members represent districts or states that are “safe” in the sense that the candidate chosen by the member’s party is virtually certain to win the general election.⁵³ The only threat to a Senator in a “safe” state or a Congressman in a “safe” district arises as a result of the primary process. If the member compromises or threatens to compromise by moving to the center, she is virtually certain to face a primary challenger who has an excellent chance of defeating the member by running to her left if she is a Democrat or to her right if she is a Republican. The risk of being “primaried” is the only realistic risk that a representative of a “safe” state or district confronts. She knows that risk increases if she moves toward the center to compromise, so her only safe course of action is to avoid all compromises and to take positions that are on the left end of the ideological spectrum if she is a Democrat and on the right end of the ideological spectrum if she is a Republican.⁵⁴

The alternative to party primaries are the methods that both political parties used in the U.S. until the progressive era and that most of the world’s other democracies use to choose candidates for office.⁵⁵ The leaders of the party choose the candidates based on a combination of a correspondence between the potential candidate’s values and the values of the party and an evaluation of the probability that the potential candidate will win the general election.⁵⁶ Since the dominant views of the electorate that participates in the general election are invariably near the right end of ideological spectrum of the members of the Democratic Party and near the left end of the spectrum of the members of the Republican Party, the party leaders have a powerful incentive to nominate centrists. The candidates who win the general election then have

53. Stacey Hunter Hecht & David Schultz, *Introduction: Swing States and Presidential Elections*, in *PRESIDENTIAL SWING STATES: WHY ONLY TEN MATTER* ix, ix–xi, xviii–xix (Stacey Hunter Hecht & David Schultz eds., 2015).

54. Richard J. Pierce, Jr., *Finding a Path Back to Democratic Governance*, *REGUL. REV.* (Feb. 26, 2018), <https://www.theregreview.org/2018/02/26/pierce-path-democratic-governance> [<https://perma.cc/95HG-477S>].

55. There are many good descriptions and analyses of the changes in the nomination process the U.S. made in the 1970s. *E.g.*, ARAM GOUDSOUZIAN, *THE MEN AND THE MOMENT: THE ELECTION OF 1968 AND THE RISE OF PARTISAN POLITICS IN AMERICA* (2019) (discussing the presidential election of 1968, which was the last “Old Politics” campaign); Stephen Gardbaum & Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 *N.Y.U. L. REV.* 647 (2018) (analyzing the historical presidential nomination process in the United States and the current nomination processes in other countries); Elaine C. Kamarck, *Returning Peer Review to the American Presidential Nomination Process*, 93 *N.Y.U. L. REV.* 709 (2018) (analyzing the changes in the U.S. presidential nomination process and proposing a restoration of peer review in the current nomination process); ELAINE C. KAMARCK, *PRIMARY POLITICS: EVERYTHING YOU NEED TO KNOW ABOUT HOW AMERICA NOMINATES ITS PRESIDENTIAL CANDIDATES* (3d ed. 2018) (discussing the evolution of the modern presidential nomination system); Pildes, *supra* note 50, at 287–315 (analyzing the effects of the 1965 Voting Rights Act on the political polarization of the U.S. democracy).

56. See Gardbaum & Pildes, *supra* note 55, at 652.

an incentive to take centrist positions on issues and to compromise with the members of the opposing party so that they can claim success in the legislative process. A House and Senate whose members are nominated through use of a peer-based method are far more likely to be able to make the bipartisan compromises that are essential to the process of enacting legislation.

The second essential step we must take to create conditions in which Congress can enact legislation is to change the rules of the House and Senate that determine who controls the agenda in each. Elimination of the “Hastert Rule” is almost as important to our ability to function as a democracy as elimination of party primaries. The Hastert Rule prohibits the Speaker of the House from bringing any Bill to the floor for a vote unless a majority of the members of the Speaker’s caucus support the Bill.⁵⁷ The Hastert Rule has the effect of giving a minority of the members of the House the power to veto any Bill even if it would get a favorable vote from a majority of the members if it could make it to the floor for a vote. The majority of the members of the caucus (and minority of the members of the House) who have this veto power are always the most far right members of the Republican caucus or the most far left members of the Democratic caucus.

Elimination of the Hastert Rule would be effective only if it is coupled with a new method of selecting the Speaker of the House. Bill Galston and the Problem Solvers Caucus of House members that he advises have proposed a rule that would require a candidate for Speaker to obtain a two-thirds majority of the members of the House to be elected.⁵⁸ That change in the composition of the electorate required to elect the Speaker would create an environment in which the Speaker is likely to be a centrist. The Speaker would then have a completely different set of incentives to determine the agenda of the House by allowing floor votes on Bills that have strong bipartisan support even if they are opposed by a majority of the members of the Speaker’s party.

It is equally important to change the rules governing the process of choosing the person who controls the agenda-setting process in the Senate. At present, the majority leader controls the agenda-setting process.⁵⁹ He regularly uses that control to preclude the Senate from voting on Bills that would be enacted by a majority if they were the subject of a vote if the Bill is opposed by

57. For discussion of the rule and its effects, see Sarah A. Binder, *Are the Days of the Hastert Rule Numbered? Some Caution in Reading the House*, BROOKINGS (Mar. 1, 2013), [https://www.brookings.edu/opinions/are-the-days-of-the-hastert-rule-numbered-some-caution-in-reading-the](https://www.brookings.edu/opinions/are-the-days-of-the-hastert-rule-numbered-some-caution-in-reading-the-house/)

<https://perma.cc/UR4F-FYA8>]; and Tom Davis, *How to Fix Washington, Step One*, THE HILL (Mar. 1, 2018, 3:15 PM), <https://thehill.com/blogs/congress-blog/politics/376308-how-to-fix-washington-step-one> [<https://perma.cc/ALJ8-8TE8>].

58. Carl Hulse, *Can the House Speakership Be Saved? These Lawmakers Have an Idea*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/politics/house-speaker-reform.html> [<https://perma.cc/VH43-3VJP>]; Davis, *supra* note 57; William A. Galston, *To Fix the House, Start with the Speaker*, WALL ST. J. (Feb. 27, 2018, 5:54 PM), <https://www.wsj.com/articles/to-fix-the-house-start-with-the-speaker-1519772075> [<https://perma.cc/UE2G-LKW6>].

59. James Wallner, *What Makes Senate Leaders So Powerful?*, LEGBRANCH (Aug. 1, 2018), <https://www.legbranch.org/2018-8-1-what-makes-senate-leaders-so-powerful> [<https://perma.cc/GW5K-DU7W>].

a majority of Senators who are members of his party.⁶⁰ Thus, for instance, a Bill that would be enacted by a vote of 70 to 30 cannot be the subject of a vote if the 30 opponents are members of the majority leader's party.

We must adopt a change in the Senate rules that increases the likelihood that Bills that have the support of a majority of Senators will be the subject of a vote. A change analogous to the change urged by the Problem Solvers Caucus in the House would work.⁶¹ The person who controls the agenda in the Senate should be chosen through a process that requires a two-thirds majority of the members of the Senate.

The combination of the primary process and the present methods of electing the people who control the agenda-setting process in the House and Senate produces a situation in which a minority of a minority can veto any Bill. The minority with the veto power lies on the far-right fringe of the Republican Party and the far-left fringe of the Democratic Party. If we replace the primary process with a peer-based system of choosing candidates for office and we change the rules of the House and Senate applicable to the selection of the person who controls the agenda-setting process, we will return to an institutional environment in which the members of both the House and the Senate are more representative of the views of a majority of the electorate and in which they are far more likely to be able to perform the critical task of enacting legislation.

Without major changes in our methods of choosing candidates for office and choosing the people who control the agenda-setting process in the House and Senate, there is no reason to believe that the Adler/ Walker proposal would produce the careful periodic re-evaluation and re-enactment in revised form that is critical to the success of their proposal. I am not confident that Congress could and would perform that task even if the political parties make the radical changes I propose. The best illustration of the difficulty of the task is our experience with the Congressional Review Act ("CRA").

Congress enacted the CRA in 1996 in an attempt to create an easy means through which Congress can veto any agency rule that it dislikes.⁶² The CRA relies on the same set of tools that Adler and Walker propose to make it easy for Congress to implement the process of re-evaluation and reenactment of a statute that is about to expire. The House and Senate are required to give priority to any resolution to veto a rule; amendments are prohibited; floor debate is limited; and the usual requirement of sixty votes for cloture in the Senate does not apply.⁶³

Yet with all of those mechanisms in place to expedite the process of vetoing a rule, the CRA was used only once between 1996 and 2017.⁶⁴ There are only two potential explanations for the lack of use of the CRA for over twenty years. Either no agency issued a rule that Congress disliked for over twenty years, or

60. *Id.*

61. *See supra* text accompanying notes 57–58.

62. Adler and Walker describe CRA and its effects at Adler & Walker, *supra* note 1, at 1951–54.

63. *See id.*

64. *Id.* at 1952–53.

even with access to mandatory expedited procedures it was virtually impossible for Congress to take any legislative action to veto a rule it disliked. Only the second potential explanation seems plausible. That suggests strongly that Congress would find it impossible to re-enact an expired regulatory statute in a new and improved form.

In 2017, Congress used the CRA to veto fifteen agency rules.⁶⁵ Those actions were not the product of careful evaluation of the hundreds of rules that were eligible for veto in 2017, however. When Dan Farber compared the handful of rules that were vetoed with the many rules that were eligible for veto but were not vetoed, he was unable to identify any principle that could explain why a few rules were vetoed and most were not.⁶⁶ The vetoed rules were not particularly important, and their ratio of costs to benefits did not differ from those of the rules that were not vetoed.⁶⁷ This suggests that the decisions were based solely on complaints from a few politically powerful interest groups that disliked a handful of rules. There is no evidence that Congress engaged in the kind of careful evaluation process that Adler and Walker imagine as the basis for a congressional decision to re-enact an expired statute in an improved form.

Thus, while I agree with Adler and Walker that broad congressional delegations of power to agencies (or to the president) create a growing temporal problem that compounds the political legitimacy problem they create I reject their proposed solution as beyond the capacity of Congress.

III. WHAT CAN COURTS DO TO ADDRESS THE PROBLEM?

Having acknowledged a serious problem and rejected one proposed solution I owe readers an alternative solution. I suggest a combination of continuation of four changes in judicial review that are already in progress: continuation and extension of the canonical approach to statutory interpretation that Cass Sunstein has documented, reduced deference to agency interpretations of statutes, increased vigor in applying the arbitrary and capricious test, and continued judicial receptivity to arguments that some statutes are unconstitutional because they violate the non-delegation doctrine.

In a recent article, Cass Sunstein argued persuasively that the Court is already in the process of enforcing the non-delegation doctrine by adopting canons of construction that narrow agency discretion to exercise power when they rely on unduly broad delegations of power.⁶⁸ He used the opinions in *Michigan v. EPA*⁶⁹ to make his point. All nine Justices agreed that the EPA cannot issue a rule without considering cost unless Congress explicitly precludes the EPA from considering cost.⁷⁰

65. *Id.* at 1953–54.

66. Daniel A. Farber, *Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 383, 395–400 (2019).

67. *Id.*

68. Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1197–1203 (2018).

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

70. See Sunstein, *supra* note 68, at 1197.

The *Gundy* case that evoked multiple opinions from a badly divided court in 2019 was another good candidate for resolution through invocation of a canon of construction.⁷¹ The question before the Court was whether the decision of Congress to leave to the discretion of the Attorney General the question of whether to apply the SORNA sex offender registration system retroactively violated the non-delegation doctrine.⁷² The Court could (and should) have resolved the case by invoking the canon that retroactive application of statutes is disfavored. The majority chose instead to resolve the case by attributing to Congress an intent to require the Attorney General to apply the registration system as early as feasible.⁷³

Numerous Supreme Court opinions issued over the last decade illustrate the Court's increasing tendency to confer less deference on agency interpretations of statutes.⁷⁴ The temporal problem that Adler and Walker identify provides another good reason for the Court to continue to move in that direction. A court should not uphold an agency action unless the court is convinced that Congress has authorized the action.

Recent Supreme Court opinions also suggest that the Court is increasingly willing to use a hard look approach to agency decision making when it applies the arbitrary and capricious test.⁷⁵ The problem that Adler and Walker identify supports a continuation and expansion of that effort. If an agency is justifying its action by relying on an old statute that confers broad power on the agency, it should be required to explain the basis for its action in detail.

Finally, the Court should continue to be receptive to arguments that some statutes are worded so broadly that they violate the non-delegation doctrine. The views expressed by the Justices in *Gundy* in 2019 suggest that the Court is increasingly receptive to such arguments.⁷⁶ Three Justices joined a dissenting opinion in which they expressed the view that SORNA was unconstitutional as a violation of the non-delegation doctrine.⁷⁷ A fourth Justice wrote a separate concurring opinion in which he indicated his willingness to participate in an

71. See *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (upholding validity of the Sex Offender Registration and Notification Act (SORNA)).

72. See *id.* at 2121–22.

73. See *id.* at 2129–30.

74. See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2424 (2019), discussed in Daniel E. Walters, *A Turning Point in the Deference Wars*, REGUL. REV. (July 9, 2019), <https://www.theregreview.org/2019/07/09/walters-turning-point-deference-wars> [<https://perma.cc/RWP7-8VN4>]; and Ronald A. Cass, *Deference After Kisor*, REGUL. REV. (July 10, 2019), <https://www.theregreview.org/2019/07/10/cass-deference-after-kisor> [<https://perma.cc/P5ZU-PTZQ>].

75. See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (overturning agency action because the agency did not adequately explain why it took the action); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019) (rejecting the Department of Commerce's addition of a citizenship question to the 2020 census because the Department did not adequately explain its reasons for including this question), discussed in Richard J. Pierce, Jr., *Reason Trumps Pretext*, REGUL. REV. (July 30, 2020), <https://www.theregreview.org/2020/07/30/pierce-reason-trumps-pretext> [<https://perma.cc/3UU7-WZ5N>].

76. See *Gundy*, 139 S. Ct. at 2123–24.

77. See *id.* at 2131–32 (Gorsuch, J., dissenting) (joined by the Chief Justice and Justice Thomas).

effort to reinvigorate the non-delegation doctrine in the future.⁷⁸ A fifth Justice did not participate, but it is fair to infer from his opinions in other cases that he too is open to arguments that some statutes contain standardless delegations of so much power that they violate the non-delegation doctrine.⁷⁹

The serious problem that Adler and Walker identify supports the open-minded attitude toward reinvigoration of the non-delegation doctrine that is evidenced by the opinions in *Gundy*, particularly if the Court chooses the canonical remedy urged by Sunstein rather than the more draconian remedy of invalidation of the statute.

I end where I began. Even though I oppose the remedy Adler and Walker propose for the temporal problem created by broad delegations of power to agencies in old statutes, I applaud their successful effort to identify and to document the problem.

78. *See id.* at 2130–31 (Alito, J., concurring).

79. *See id.* at 2130 (majority opinion) (noting that Justice Kavanaugh took no part in this opinion).