THAT SICK CHICKEN WON'T HUNT: THE LIMITS OF A JUDICIALLY ENFORCED NON-DELEGATION DOCTRINE

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INTRODUCTION

Since the resolution of the New Deal constitutional crisis, the non-delegation doctrine has lived a "fugitive existence at the edge of constitutional jurisprudence."[1] Advocates of the doctrine argue that legislative delegation of rule-making power to the executive branch is unconstitutional, and that the federal courts should strike down legislation that delegates. Over the last few decades, many constitutional scholars and critics of the administrative state have expressed at least passing approval for the doctrine, with an occasional thorough exploration and defense—most notably in David Schoenbrod's 1993 book, *Power Without Responsibility*.[2] Numerous scholars across the political and ideological spectrum seem to accept the critique of the administrative process offered by proponents of the non-delegation doctrine.[3] Nevertheless, the doctrine's existence remains "fugitive," both in the law and in the academy. The Supreme Court

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1. Peter L. Aranson, Ernest Gellhorn, and Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 17 (1982).

2. David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (Yale U. Press, 1993). Other notable and thorough critiques of delegation are Aranson, Gellhorn, and Robinson, 68 Cornell L. Rev. 1 (cited in note 1); Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, (Norton, 2nd ed. 1979). Lowi continues to attack delegation, but his belief that judges can solve the problem has waned. See, e.g., Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 Am. U. L. Rev. 295 (1987).

3. The dust jacket for Schoenbrod's book (cited in note 2) features approving quotes from a remarkable combination of people: Bill Bradley, Robert Bork, John Hart Ely, Morris Fiorina, and Nadine Strossen.

has shown little sustained inclination toward reviving the doctrine, and many of the scholars who express some support for it don't seem to take it very seriously.

This paper takes the non-delegation doctrine seriously, but argues that even strict judicial enforcement of a ban on legislative delegation will not necessarily result in dramatic improvements in policies or political accountability in the American separation of powers system.[4] Earlier critics of the doctrine make important and compelling points, but their focus on constitutional and practical problems leads many of them to buy into the same misleading assumptions about the connections between delegation and accountability that defenders of the doctrine embrace. This paper instead challenges the non-delegation doctrine by challenging the understanding of political accountability relied upon by proponents of the doctrine. I argue that proponents of the doctrine incorrectly give primacy to legislative decision-making when they think about accountability in our constitutional system, and thus incorrectly conclude that accountability can be established or improved by judicial enforcement of a doctrine that forces legislators to make more decisions. The structure of the Constitution means that even a strictly enforced non-delegation doctrine will not by itself create a system in which accountable legislators have supreme and exclusive law-making authority.

To show that judicial enforcement of a non-delegation doctrine cannot solve the problems of accountability identified by the doctrine's proponents, I will provisionally accept some of the key claims made by defenders of the doctrine. I will assume for the sake of argument that the courts have the constitutional authority to enforce a non-delegation doctrine and the practical capability to prevent legislators from delegating lawmaking power to the executive branch. Accepting these assumptions

4. Unlike other critics of the non-delegation doctrine, I will not focus on the arguments that advocates use to locate the doctrine in the Constitution's text and history, see, e.g., Harold J. Krent, *Delegation and Its Discontents*, 94 Colum. L. Rev. 710 (1994) (reviewing David Schoenbrod, *Power Without Responsibility* (1993)); Book Note, *Delegation Without Accountability* 108 Harvard L. Rev. 751 (1995) (reviewing David Schoenbrod, *Power Without Responsibility* (1993)). Nor will I argue that it is impossible for judges to solve the practical problem of inventing a feasible and coherent test of unconstitutional delegation. See, e.g., Krent, 94 Colum. L. Rev. at 734-52; Richard B. Stewart, *Beyond Delegation Doctrine*, 36 Am. U. L. Rev. 323 (1987); Richard J. Pierce, *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 Am. U. L. Rev. 391 (1987). I also will not mount a freestanding defense of the desirability of insulated bureaucratic decision-making processes. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. Econ. & Org. 81 (1985).

allows me to focus on a question that has not yet received enough attention: Would a judicially created "world without delegation" be a world of greater democratic accountability than today's world?

I find that the surface attractiveness of the non-delegation doctrine masks some rather large gaps in its proponents' account of the way that representation and democratic accountability work in the American separation of powers system. Proponents of the non-delegation doctrine urge the courts to bring an end to delegation as a means of restoring or improving democratic accountability. And proponents of the doctrine usually do a very good job demonstrating that there are problems with accountability in the current world of rampant delegation. But they have failed to demonstrate a link between accountability and delegation that is strong enough to prove that ending delegation will solve the problems of accountability that they identify. In response, I argue that proponents of the non-delegation doctrine have underestimated the complexity of problems of accountability and thus overestimated the importance of delegation to problems of accountability. Critics of delegation and proponents of the non-delegation doctrine have mistaken one *symptom* of some underlying problems with accountability in our constitutional system for the *cause* of those problems.

The observation that delegation is a symptom rather than a cause emerges after a more careful consideration of how legislators and voters could respond to strict judicial enforcement of a non-delegation doctrine. Proponents of the doctrine often admit to considerable uncertainty about the precise results of strict judicial enforcement of the non-delegation doctrine.[5] But they are apparently so unimpressed with the advantages of delegation, and so appalled by the harms they associate with delegation, that they are willing to take a plunge into the unknown. I agree that the precise consequences of a judicial ban on delegation are difficult to predict, but I am less convinced that judicial intervention alone will dramatically improve the capacity of the people to hold legislators accountable or to force legislators to produce better policies. While critics suggest that delegation is an aberration in the constitutional system because it allows legislators to escape accountability, I argue that the Constitution has always allowed, and will continue to allow, legislators to use a wide variety of strategies to avoid accountability. Strict judicial en-

5. See, e.g., Schoenbrod, *Power Without Responsibility* at 196 (cited in note 2).

forcement of the non-delegation doctrine may prompt legislators to shift to one of these alternative strategies for escaping accountability. But the non-delegation doctrine cannot create a system in which Congress alone makes the laws or a system in which majoritarian processes in Congress are sufficient to guarantee that outcomes have democratic legitimacy.

Thus, while it is possible to imagine some worlds without delegation in which there is greater accountability, it does not seem likely that the courts alone can create such a world. Improved accountability can be achieved within the Constitution's flexible framework only if judicial resolve is accompanied by numerous other, equally revolutionary, changes in the electorate and in the structure of the intermediary organizations (e.g., parties, interest groups, mass-media organizations) through which people participate in politics. Because court enforcement of the non-delegation doctrine cannot force those changes, there is little hope that judicial enforcement of the doctrine will solve the problems of accountability identified by proponents of the non-delegation doctrine.

Part one of the paper explains some of the connections between the non-delegation doctrine and the dominant theoretical framework for understanding accountability in the constitutional system of separation of powers. I use these connections to establish the importance of the debate over delegation in constitutional theory, and to suggest some reasons for the puzzling status of the doctrine among constitutional scholars. Part two explores and rejects three potential explanations of why the doctrine will improve accountability. Part three examines some of the limits on the power of judges to ensure the integrity of legislative choices in a post-delegation world by focusing on one very likely alternative legislative strategy for avoiding accountability: the use of deliberate legislative ambiguity to shift decisions to the courts. I conclude by noting the need for a more satisfying explanation of accountability in the American constitutional system, and make some suggestions toward developing an alternative account that better matches both the theory and the lived experience of the United States Constitution.

I. DELEGATION, ACCOUNTABILITY, AND THE COUNTER-MAJORITARIAN FRAMEWORK

Critics of delegation claim that legislative delegation to executive branch agencies is bad because it produces bad policies

and weakens the accountability provided by electoral controls on legislators. Legislative delegation to the executive branch allegedly creates these problems by shifting responsibility for making important policy choices from elected officials in Congress to unelected bureaucrats in executive branch agencies. When decisions are properly made in Congress, electoral controls on individual members make those members reluctant to support policies that benefit narrow interests. However, if Congress delegates the power to make decisions to agency bureaucrats, the lack of electoral controls on those bureaucrats allows concentrated interests to exert a corrupt influence on agency decision-making processes. Shifting such decisions to the executive branch also allows legislators to escape accountability because it allows them to blame the executive branch agencies for any unpopular decisions. Based on this understanding of delegation, the critics conclude that ending delegation will improve accountability. By intervening and striking down all statutes that delegate, judges would force legislators to take responsibility for the "hard choices" involved in regulatory policy-making. Forcing legislators to make those choices will make it less likely that the government will produce policies that favor narrow interests at the expense of a broader public.[6]

David Schoenbrod adds to the surface plausibility of this analysis by using concrete examples of delegated regulatory decisions gone awry. Schoenbrod devotes a great deal of attention to a favorite example, the regulation of navel oranges in the 1980s.[7] Such regulation came in the form of marketing orders, issued by the Secretary of Agriculture under powers originally delegated by Congress in the Agricultural Adjustment Act of 1933.[8] Schoenbrod convincingly argues that the marketing orders issued during the 1980s established bad policies that served narrow interests and harmed the general public. Congress empowered an Agriculture Department advisory board to make decisions on marketing orders. One industry actor, Sunkist, was able to dominate the decision-making processes on that board. Sunkist convinced the board to fix an artificially high price for oranges, a policy that advanced Sunkist's interests at the expense of both smaller growers and the general public.[9]

6. On this last point, see id. at 16-18, 99-106, 119-34.
7. Id. at 47-57, 108, 114, 116, 140-42, 169-70.
8. Id. at 4.
9. Id. at 50-51.

Schoenbrod blames this outcome on the ability of Congress to delegate. Delegation shifted the decisions to an obscure wing of the executive branch, making it likely that the public would pay little attention (and perhaps not even notice that the price supports existed). Because delegation allowed the executive branch to issue the marketing orders without members of Congress taking a direct vote to create them, members of Congress expected to be able to blame the Department of Agriculture if anyone noticed the harmful orders and complained. At the same time, delegation allowed members of Congress to win support from the concentrated interests that expected to benefit from the shift in authority.[10]

The critique of delegation made by Schoenbrod and other advocates of the non-delegation doctrine is based on a particular understanding of how accountability is supposed to work. The critics assume that legislative decision-making occupies a sort of privileged position when establishing or measuring accountability. In this respect, the critique of delegation is connected to the dominant theoretical framework that constitutional scholars use to understand democratic accountability in the separation of powers system. I call that framework the *counter-majoritarian framework* because its current dominance can be traced back to Alexander Bickel's claim, in *The Least Dangerous Branch*, that the power of judicial review created a "counter-majoritarian problem" in American democracy. Bickel claimed that judicial review was a "deviant" institution in American democracy because the power allowed unelected judges to make decisions that reversed the choices made by elected legislatures.[11] Although Bickel was primarily concerned with explaining judicial review, the basic assumptions of his framework have wider application.

The counter-majoritarian framework's understanding of accountability in the separation of powers system begins with the observation that the Constitution establishes different branches of government, sketches the different duties of each branch, and outlines separate methods for selecting the decision-makers in

10. Id. at 54-57.

11. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill Co., 1962). See also Stephen P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 712 n.66 (1995), for a list of prominent scholars who note the continued centrality of the Bickel's framework. Bickel's framework has lately been blamed for some important ills that beset constitutional theory, see, e.g., Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 Colum. L. Rev. 531 (1998) but the book remains far more nuanced and sophisticated than its current critics seem to remember.

each branch. The distinctively counter-majoritarian moves are to make the differences in the methods for selecting decision-makers central to understanding accountability in each independent branch, and to make legislative outcomes the baseline against which the democratic or majoritarian legitimacy of inter-branch outcomes are measured. The counter-majoritarian theorists associate differences in methods of selecting decision-makers with different levels of accountability, and then use those differences among the branches to place each branch into a hierarchy of the branches. In that hierarchy, Congress occupies the most exalted position because (since the adoption of the 17th Amendment) each of the principal decision-makers in that branch must face regular popular election. The courts, however, finish a distant third to the two "elective" branches of government because of the weak and indirect electoral controls on judicial decisions. Judicial influence over policy is thus properly exercised only in the unusual set of circumstances that warrant exercise of the power of judicial review.

The pervasive practice of legislative delegation in today's polity disrupts this counter-majoritarian framework because delegation challenges some of the assumptions that underlie the framework's obsession with legislative outcomes as the baseline for legitimacy and accountability. The counter-majoritarian framework assumes, for example, that the branches act independently and compete with each other for influence over policy. The framework also assumes that the branches act in a fixed sequence, in which Congress first establishes a policy that serves as the baseline against which to evaluate the legitimacy of decisions later made in other branches. [12]

When Congress delegates, however, Congress deliberately refrains from choosing a particular policy outcome, and instead empowers the relevant executive branch department or agency to make those choices. This means that scholars cannot assess the final policy outcome at the end of the implementation process by comparing it to some baseline position established in Congress when the legislation passed. As critics of delegation

12. The executive branch presumably finishes somewhere between Congress and the courts in the counter-majoritarian hierarchy of the branches. The president has a unique status as the only nationally elected official, and in theory has control over many of the decisions made in the hierarchically structured executive branch. However, few observers are satisfied that such hierarchical control is effective enough to produce electoral accountability.

often point out, delegation amounts to a refusal to establish such a baseline.

Delegation also undermines the claim that unelected judges can ensure the legitimacy of their interpretation of statutes by deferring to the intent of a more accountable Congress. In a world with delegation, judicial deference to legislative intentions merely shifts decisions from unaccountable judges to perhaps equally unaccountable bureaucrats in the executive branch.

Some of the scholars who work within the counter-majoritarian framework do take the time to notice the existence of the modern executive branch. Such scholars have tried to respond to the glaring fact that so many of the actual legislative outputs that Congress produces fail to make the kinds of policy choices that their theoretical framework envisions. Many such scholars respond by declaring that delegation is itself a deviant practice or historical aberration that is foreign to the overall constitutional scheme.[13] This move leads those scholars to suggest that delegation is something that judges should, at a minimum, discourage.

However, what is curious about the embrace of the critique of delegation by these scholars is that, with the admirable exception of David Schoenbrod, the embrace seems half-hearted. John Hart Ely provides a good example. Ely explicitly defends the non-delegation doctrine in *Democracy and Distrust* but his defense comes across as less than completely sincere.[14] After a lengthy, nuanced account of the way judicial power can be used to supplement and reinforce representation in legislatures and thus improve accountability, Ely devotes just four pages to an alleged rise in delegation. Ely expresses both support for the non-delegation doctrine and doubts about the likelihood of the Court's adopting and enforcing it. Ely's almost passing reference to the non-delegation doctrine strikes this reader as odd. The doctrine, by Richard Pierce's estimate, calls for striking down perhaps ninety-nine percent of our current regulatory statutes.[15] If the Court did follow Ely's suggestion, the consequences would be far more dramatic than the cumulative consequences of all the doctrines to which Ely gives a more thorough

13. See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 131-34 (Harvard U. Press, 1980); Bickel, *Least Dangerous Branch* at 158-62 (cited in note 11).

14. Ely, *Democracy and Distrust* at 131-34 (cited in note 13)

15. Pierce, *Political Accountability and Delegated Power* at 401 (cited in note 4).

treatment in the other 180 pages of his book. It seems especially odd to conclude a book devoted to developing a framework for judicial restraint by saying, in effect, "Oh, by the way, most of the existing U.S. Code is unconstitutional and deserves to be struck down but we needn't worry about that because it isn't likely to happen."

Many other scholars have been content to take a path similar to the one charted by Ely: Treat delegation as a harmful historical aberration, announce some form of lukewarm support for some doctrine that limits delegation, but stop short of embracing the dramatic consequences that a judicial ban on delegation would cause, usually after noting that judges lack the *chutzpah* to try it. Ironically, this is true not just of scholars like Ely, for whom the non-delegation doctrine is a subsidiary concern, but also of scholars who have developed some of the most compelling critiques of the practice of delegation and the strongest defenses of the non-delegation doctrine. Scholars have not devoted much attention to explaining what accountability and policy-making will look like in a post-delegation world.[16]

I submit that the difficulty that delegation poses for the counter-majoritarian framework helps to explain the scholarly

16. Lowi, *End of Liberalism* (cited in note 2), and Aranson, Gellhorn, and Robinson, 68 Cornell L. Rev. at 7-21 (cited in note 1) review judicial decisions and defend the doctrine, but they doubt that the courts will revive the doctrine and don't fully explain how revival would create accountability. The exception to the pattern is David Schoenbrod, the doctrine's most accomplished defender. To his credit, Schoenbrod readily admits that the doctrine he advocates requires judges to take on a startlingly activist role, and even scripts a twelve year plan that judges can use to ease the transition to a world without delegation. Schoenbrod, *Power Without Responsibility* at 180-91 (cited in note 2).

Scholarly ambivalence has been mirrored and supported by the courts. The Supreme Court has never rejected the ban on legislative delegation articulated in *Schechter Poultry*, but other than an infrequent mention in a dissenting or concurring opinion, the courts have not moved very far toward the dramatic strategy that Schoenbrod advocates. Judicial decisions on the doctrine are reviewed in Schoenbrod, *Power Without Responsibility*, at 25-46, (cited in note 2); Aranson, Gellhorn, and Robinson, 68 Cornell L. Rev. at 7-18 (cited in note 1); and Jerry L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* 132-36 (Yale U. Press, 1997). Judicial ambivalence reinforces the scholarly ambivalence because it allows scholars to fall back on the "realistic" position that the courts will not embrace the doctrine any time soon.

A 1999 decision by the D.C. Circuit (*American Trucking Ass'ns, Inc. v. United States Envtl. Protection Agency*, 175 F.3d 1027) rejected an EPA construction of a statute after claiming that the construction effected an unconstitutional delegation of legislative power. While the case attracted attention, the court did not take the bold approach advocated by leading proponents of the non-delegation doctrine. Instead of focusing its wrath on Congress for writing a bad statute, the court criticized the EPA. Demonstrating a lack of *chutzpah*, the court remanded the controversy to the agency (to come up with a new rule) rather than to Congress (to come up with a statute that did not delegate).

ambivalence that gives the non-delegation doctrine its "fugitive existence." Faced with the threat that pervasive delegation poses to their theoretical framework, constitutional scholars have the choice of either 1) abandoning the framework, or 2) declaring delegation to be an aberrational and/or intolerable practice within the existing framework. Too many have chosen the latter course.[17] The fact that so many scholars have made that choice is one reason why, at the end of a century when executive branch actors have taken over more and more lawmaking functions, scholarly work on accountability under the Constitution is still dominated by a framework that cannot make much sense of the means through which most of our regulatory law is made—executive branch policy-making.

The remainder of this paper argues that the uneasy ambivalence about delegation should not be resolved by treating delegation as an aberrational practice or quietly urging the Court to end it. Nor, for that matter, should it be resolved by continually coming up with new arguments that defend executive branch lawmaking from within the existing theoretical framework.[18] A better way of resolving the ambivalence about delegation is to reject the dominant framework for understanding democratic accountability in a constitutional system of separation of powers. That dominant framework simply cannot be reconciled with the lawmaking practices that our Constitution has created, not just since the New Deal but from the very beginning. I turn first to the task of examining further the threat that delegation poses to the Constitution's system of accountability.

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17. Recently, there have been some attempts to document the importance of executive branch discretionary decision-making and incorporate it into models for understanding the legitimacy and impact of judicial decisions. Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 Wm. & Mary Bill Rts. J. 427 (1997); Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. Pa. L. Rev. 759 (1997). However, such scholars are still outnumbered by those who have declined to modify the dominant framework.

18. For example, scholars like Stewart and Mashaw have suggested that delegated decisions can be connected to democratic processes through effective procedural constraints on administrative processes. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975); Mashaw, *Greed, Chaos, and Governance* (cited in note 16).

II. DELEGATION AND ACCOUNTABILITY

Schoenbrod's example of navel orange regulation is compelling because the process he describes seems so indefensible. The marketing orders helped to fatten one already dominant group without producing any offsetting public benefit. However, it is still possible to question whether such examples mount an effective attack on delegation. Given that almost all regulatory statutes delegate, the fact that critics of delegation can tell horror stories about regulations issued by agencies does not prove that *delegation* causes all the problems that the critics identify. They may be confusing correlation with causation.[19] To support the non-delegation doctrine, the critics need a strong causal argument that links their horror stories to delegation, and a more complete explanation of how judicial enforcement of a non-delegation doctrine will improve accountability.

In this section, I consider and reject three complementary explanations of how ending delegation will improve accountability. I derive these explanations from the complaints that defenders of the non-delegation doctrine make about delegation. The first explanation is that ending delegation will force members of Congress to take more decisive stands on regulatory issues. The second explanation is that ending delegation will improve accountability by locating decisions in the branch of government to which people are more likely to pay attention. The third explanation is that ending delegation will improve democratic accountability by restoring some important constitutional limits on congressional power. None of these explanations turns out to be entirely convincing. In each case, critics of delegation fail to appreciate that even if the courts deprive Congress of the power to delegate rule-making authority to executive branch agencies, Congress would retain numerous substitute

19. For example, it seems to me that one can construct an argument that our current system of *campaign finance* caused the problems in the navel orange case—an argument just as strong as Schoenbrod's argument that delegation caused those problems. Schoenbrod himself provides support for this alternative causal account when he explains how the dominant navel orange interests used campaign contributions to ensure congressional compliance in the navel orange program. Schoenbrod, *Power Without Responsibility* at 8 (cited in note 2). It may also be that preventing contributions like those from corrupting the legislative process would do more to prevent such rent-seeking policies than a judicially enforced non-delegation doctrine. It also seems to me quite clear that the problems of our current system of campaign finance are not unrelated to the propensity of many members of Congress to support rent-seeking regulatory policies, and their subsequent need to hide the sources and consequences of those policies through delegation. Happily, however, the issue of campaign finance and the associated constitutional complications are well beyond the scope of this paper.

strategies that circumvent democratic controls just as capably as current forms of legislative delegation.

Explanation 1: Forcing Congress to go on Record Regarding Unpopular Programs

Critics often complain that delegation allows members of Congress to establish new regulatory policies without going on record with a "yes" or "no" vote on particular regulatory rules. For example, Schoenbrod complains that members of Congress could selectively avoid responsibility for the navel orange marketing orders because members never had to indicate unambiguously their approval or disapproval of the orders issued by the executive branch.[20]

An initial problem with this complaint is that it is not entirely accurate. Even in a world with delegation, voters can usually trace regulatory decisions to "yes" or "no" votes cast by their representatives in Congress. It is true that members of Congress do not cast "yes" or "no" votes on particular rules created by agencies, but they do quite often need to go on record with "yes" or "no" votes that make agency activities possible. Legislators must cast votes to establish executive branch agencies and to give those agencies the authority to make regulatory decisions. The democratic controls created by such votes weaken over time. (Most of the voters who voted for the legislators who passed the Agricultural Adjustment Act are now dead). But members of Congress need to take at least one vote per year (on the relevant appropriations bill) in order for any regulatory program to continue, and circumstances sometimes force members to cast additional votes on particular programs.

Since no regulatory program can operate without being created and continually authorized by Congress, there is nothing about delegation that prevents an unhappy electorate from holding members of Congress accountable for regulatory power exercised by the agencies. Opponents of incumbents are certainly free to make such votes an issue in the next campaign, and they sometimes do. Representative George Nethercutt (R-Washington) recently found this out the hard way from an ad sponsored by some of his political opponents. Nethercutt probably did not know that he had voted for the Endangered

20. Schoenbrod, *Power Without Responsibility* at 54-55, 102, 103-05 (cited in note 2).

Species Act twelve times until he saw an ad that recounted his votes on various appropriations and authorizations items.[21]

Schoenbrod's own example of delegation gone awry in navel orange regulation confirms that regulatory programs can continue only because members of Congress take recorded votes to support them. Schoenbrod notes that the marketing orders he attacks were only possible because *Congress* passed a special appropriations rider that exempted the orders from the anti-regulatory review programs of Reagan's OMB. In the House, opponents of the marketing orders forced a floor vote on the rider that determined whether the program could continue. The marketing orders won that recorded vote, 319 to 97.[22] That outcome does not bode well for those who think ending delegation will automatically right the ship of state. Sunkist was apparently able to buy elected members of Congress just as easily as Sunkist was able to capture executive branch regulators.[23]

Schoenbrod and other critics might respond to these observations by claiming that the problem is not that delegation makes it *impossible* for the people to hold legislators accountable, but that delegation makes it exceedingly *difficult* to do so. Schoenbrod claims that delegation is harmful because it allows legislators to hide their choices in technical votes that fail to frame issues clearly: "appropriations riders do not attract the same level of public attention as legislation to raise the price or cut the supply of a widely used commodity."[24] Schoenbrod seems to be suggesting that the people would have paid more attention if Congress had been forced to address the marketing orders more directly, e.g., by voting on the orders themselves rather than on some obscure exemption from a regulatory review procedure.

Schoenbrod's suggestion that the people would have paid more attention to a direct congressional endorsement of the price fixing program has some merit. Unfortunately, the suggestion is of limited relevance to the debate over the non-delegation doctrine. The suggestion would be relevant if we imagined that a judicially enforced non-delegation doctrine would force Congress to take a recorded vote on the "Inflate the Price of Orange

21. Jake Tapper, *Endangered Congressman?*, Salon Magazine (May 5, 1999) <http://www.salon.com/news/feature/1999/05/05/limits/index.html>.

22. Schoenbrod, *Power Without Responsibility* at 52 (cited in note 2).

23. Id. at 8.

24. Id. at 55.

Juice in Order to Line the Pockets of the Fat Cat Orange Growers Act of 2000." The problem, however, is that the non-delegation doctrine, even in the strong form proposed by Schoenbrod, cannot force Congress to address regulatory problems in such a stark form. Since the Constitution explicitly gives Congress control over its internal decision-making procedures, members would retain considerable power to structure votes to serve their own interests and to hide controversial votes. The non-delegation doctrine cannot prevent Congress from burying divisive regulatory decisions in the technical details of omnibus regulatory bills, or in bills with misleading names and provisions. For example, Congress could presumably bundle all the rules in the current Code of Federal Regulations into a single bill. Members of Congress who voted for such a bill could escape responsibility for any unpopular programs included in it by pointing to other, more popular, items in the compromise package.

Thus, the desirability of forcing Congress to vote on regulatory rules does not provide much support for the claim that the non-delegation doctrine will solve the problems of accountability that delegation seems to create. Members of Congress already have to cast such votes in order for agencies to exercise delegated power. The new doctrine would force members of Congress to cast votes on particular rules, but members would retain the ability to shield those votes from public attention and the power to take responsibility for regulatory programs only selectively. Accountability might be improved by forcing Congress to vote separately on each regulatory program, but neither the non-delegation doctrine nor anything else in the Constitution forces Congress to do so.

Explanation 2: Relocating Regulatory Decisions

It is, however, possible to improve on the first explanation by supplementing it. Critics of delegation suggest that something about the nature of decision-making processes in bureaucratic agencies adds to problems of accountability. Critics conclude that accountability breaks down in cases involving delegation because the public lacks the capacity to pay sufficient attention to regulatory decisions in the agencies. The non-delegation doctrine may improve accountability by simply ensuring that the decisions are made in Congress, the location where the public is most able to pay attention.

Critics of delegation sometimes suggest an explanation of this type when they characterize agency decision-making processes. Critics claim that delegation erodes accountability because it makes policy-making processes complicated, obscure, or just plain boring. Schoenbrod claims that public opinion is often dampened by "prolonged administrative procedures" making public opinion "less powerful" in an administrative setting than "in an open legislative battle."[25] Delegation allows Congress to defeat the democratic controls by leaving Congress free to add enough layers of decision-making authority to make sure that the process always exhausts the public's limited capacity to pay attention. Faced with such complexity, the people will not bother to identify and punish the legislators responsible for the bad policies.

Critics of delegation often use claims of this sort to add a strong normative component to their arguments. Schoenbrod, for example, contrasts the "unsophisticated interests" most often the victims of delegation with the "sophisticated interests" that pressure Congress to delegate. "Sophisticated interests" like Sunkist benefit from delegation because they possess the resources to monitor and influence agency decision-making processes. Meanwhile the "unsophisticated" interests, a much larger group, pay the dispersed costs of rent-seeking regulations that they are often too duped to notice.[26]

The problem, however, is that critics of delegation wield a double-edged sword when they complain about the mass public's limited capacity to pay attention to regulatory decisions. By emphasizing how difficult it is for the public to pay sufficient attention to the details of government processes, and arguing that it is easy for "sophisticated" interests to dupe the masses, critics of delegation make it *more* difficult to believe that judges can create significant improvements in accountability by enforcing a strict non-delegation doctrine. It is hard to see how ending delegation will make the masses more sophisticated or lengthen their attention span.[27]

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25. Id. at 77.

26. On the link between concentrated benefits, dispersed costs, and delegation, see Morris Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in Roger G. Noll, ed., *Regulatory Policy and the Social Sciences* 175-97 (U. of California Press, 1985); Michael T. Hayes, *The Semi-Sovereign Pressure Groups: A Critique of Current Theory and an Alternative Typology*, 40 Journal of Politics 134 (1978).

27. Mashaw argues against the non-delegation doctrine by suggesting in part that delegation does not result in a loss of relevant information for most voters because most voters rely on rough assessments of candidate ideology to make decisions about how to

More importantly, if the courts were to end delegation, the capacity of the public to monitor decisions in *Congress* would be severely tested. Congress would presumably be forced to make more decisions—and more complicated decisions—about the details of regulatory policies. Presumably, much of the boredom that the public now associates with the administrative processes would simply be transferred to Congress, along with the responsibility for making many of the boring decisions that used to be made in the agencies.

The critics of delegation could respond to these concerns by arguing that in today's world of rampant delegation, it is the location, and not the technical content, of the decisions that creates the boredom. Perhaps there is some inherent feature of bureaucratic decision making that mutes public (or perhaps media) attention to agency decisions. Arguments of this sort have been made about judicial decision-making. Girardeau Spann, for example, worries about the power of judges to "legitimate" unpopular outcomes, and suggests that people quietly accept policy outcomes established by judges, even when the same people would actively resist the same policy outcomes had they been established by elected legislators.[28] Unfortunately, however, it is quite difficult to extend Spann's arguments about the mystical legitimating powers of judges to the considerably less mystical powers of bureaucrats. It seems quite unlikely that people on the receiving end of a bad regulation would fail to complain simply because they fell under some hypnotic spell of bureaucratic infallibility. Indeed, critics of delegation sometimes emphasize that one *problem* with bureaucratic decision making is that the

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vote, not on information about how legislators voted on particular details of particular policies. Mashaw, *Greed, Chaos, and Governance* at 139-40 (cited in note 16). Schoenbrod recently responded by saying that a judicial ban on delegation will improve accountability even if voters do not pay attention to the details of legislation. This is because ending delegation will mean that legislators will no longer be able to avoid floor fights on contentious issues. Schoenbrod claims that "the fulcrum of legislative responsibility is not the statute but the floor fight," Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 Cardozo L. Rev. 731, 744 (1999), in part because "[f]loor fights are newsworthy and attract public interest," id. at 745. However, there is no guarantee that choices will be fought out on the floor just because they are written into legislation. Furthermore, if the framers of the Constitution were convinced that the floor fight was the "fulcrum of responsibility," it is odd that they did not include provisions in the Constitution ensuring that those fights would be carried out in the open. Congress can close the door on a floor fight when it wants. It is public vigilance, not judicial enforcement of a constitutional doctrine, that keeps most debates open.

28. Girardeau A. Spann, *Race Against the Court: The Supreme Court and Minorities in Contemporary America*, 150-60 (N.Y.U. Press, 1993).

public accords bureaucratic decisions *less* legitimacy than decisions made in Congress.[29]

Of course, there is no reason to take the current capacity of the public to pay attention to the details of regulatory processes as a permanent fact about the world. The current low level of public attention to agency decisions may be a product of the rampant use of delegation. The public might be calculating that it is not worth monitoring government decisions when the officials most responsible for harmful decisions are likely to be insulated from electoral controls. Those calculations might change in a world without delegation because people will instinctively assume that responsibility for decisions rests with elected officials in Congress. Seen in this light, the claim that ending delegation will improve the public's capacity to pay attention to regulatory decisions is more plausible.

While these considerations provide a coherent story of one source of improved accountability in a world without delegation, they do not prove that judicial enforcement of a non-delegation doctrine will, on balance, improve accountability or improve the position of "unsophisticated" interests. The added congressional workload and added need for congressional attention to detail that the non-delegation doctrine would create could still exhaust the public's newly stimulated appetite for monitoring Congress. And because Congress would retain numerous avenues for complicating and obscuring its choices, there might still be opportunities for members of Congress to do favors for their most sophisticated friends and to hide their most cynical compromises.

Explanation 3: Restoring Constitutional Limits on Legislation

A third explanation of how the non-delegation doctrine improves accountability is that ending delegation will restore some important constitutional limitations on Congress's power. According to some critics of delegation, the framers of the Constitution wanted to ensure that Congress would not pass legislation unless, after careful deliberation, a strong consensus formed in favor of a new law. To inhibit excessive legislation and protect liberty, the framers established numerous procedural constraints that slow down the legislative process, prevent Congress from reaching bad compromises without careful deliberation, and of-

29. See, e.g., Schoenbrod, *Power Without Responsibility* at 122 (cited in note 2) (arguing that "statutory laws are more likely to be taken as community standards of right and wrong than are agency laws").

fer opportunities to block or delay legislation. The procedural obstacles that the critics of delegation point to are bicameralism, presentment, and, most importantly, the alleged ban on delegation.[30]

Critics suggest that delegation subverts these important constitutional limits on Congress's power. Delegation makes it easier for members of Congress to pass laws in the absence of a strong consensus, and thus more likely that Congress will pass laws without careful deliberation and restraint. While finding consensus will be harder in a world without delegation—in which members of Congress are forced to take responsibility for their decisions—the delays will be desirable since they will allow opportunities for more careful deliberation. In some cases, a ban on delegation may lead Congress to abandon attempts at regulation, an outcome that critics of delegation are often happy to embrace.[31]

Once again, however, it is not certain that the only consequences of enforcing a non-delegation doctrine are going to be the ones applauded by the doctrine's proponents. The claim that a non-delegation doctrine will force Congress to deliberate more carefully and inhibit excessive legislation is only believable if members of Congress cannot find alternative means of reaching compromises in the absence of delegation. As things now stand, delegation is not the only means used by members of Congress to find compromises that break stalemates or to avoid responsibility. If the courts made it impossible for Congress to delegate, Congress would be likely to substitute one or more of those other means.

For example, legislators deprived of their power to delegate might instead try to reach compromises by increasing pork barrel spending or by logrolling regulatory programs into huge omnibus bills. Such practices are already notorious in those policy areas in which Congress now passes detailed legislation (e.g., taxes and appropriations). Recognizing that the consequences of pork barreling might be even worse than the consequences of delegation, critics of delegation deny that these alternative methods of reaching compromise are a significant concern. Aranson, Gellhorn, and Robinson, for example, reject the suggestion that Congress would increase pork barrel spending,

30. For an extended discussion of these issues, see id. at 107-18.

31. See, e.g., id. at 135-36, 139-42. Aranson, Gellhorn, and Robinson, 68 Cornell L. Rev. at 63-65 (cited in note 1), make similar claims.

claiming: "This argument assumes that the legislature is not already maximizing its return from pork-barrel (private-goods) production. We assume the contrary, however, and conclude that an increase in the cost of delegation will reduce the total output of inappropriate legislation."[32]

Aranson, Gellhorn, and Robinson's contrary assumption is itself implausible, as can be seen by using a market metaphor. Enforcing a non-delegation doctrine would presumably change legislators' calculations about the costs of pork barreling. Raising the cost of delegation (or removing delegation from that market altogether) will presumably make legislators eager to purchase more of a substitute good, in this case, pork-barrel legislation. Thus, the level at which a legislature maximizes its return from pork-barrel production in a world of rampant delegation may be much lower than the level at which returns will be maximized in a world with a judicially enforced non-delegation doctrine. Presumably, Congress would also adjust to the world without delegation by making its internal structure more conducive to alternative means of reaching compromises.[33]

Even beyond the problems posed by alternative means of forming compromises, there are compelling reasons to think that the critics have offered a flawed analysis of Congress's incentives with regard to constitutional limitations inhibiting excessive legislation. The critics' arguments suggest that delegation is a sign of a legislation-mad Congress trying to subvert structural controls that inhibit legislative compromises. This assumption seems quite odd when tested against the internal procedural rules that Congress has created for itself. Many of those rules

32. Aranson, Gellhorn, and Robinson, 68 Cornell L. Rev. at 64 n.246 (cited in note 1).

33. Stewart discusses the possibility of Congress responding to a ban on delegation by relying on more internal delegation to committees. Stewart, 36 Am. U. L. Rev. at 331-32 (cited in note 4). Schoenbrod himself mentions Justice Breyer's suggestion that Congress simply adopt agency rules as statutes, an outcome that would presumably defeat much of the gain in accountability from judicial enforcement of the non-delegation doctrine, unless Congress chose to vote separately on each rule, a very unlikely outcome. Schoenbrod, 20 Cardozo L. Rev. at 765 (cited in note 27). The article by Stephen Breyer, *The Legislative Veto After* Chadha, 72 Geo. L.J. 785 (1984), also provides a reminder of a past lesson about the capacity of legislators to get around court rulings that seem on the surface to deny Congress the ability to be flexible in designing administrative processes. The Supreme Court's famous ruling "ending" the legislative veto in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), like the non-delegation doctrine, attempted to limit Congress's power by reasserting constitutional limits on Congress's power. But while *Chadha* attracted a great deal of attention, the decision-making flexibility given to Congress by the Constitution left Congress with numerous means of getting around the force of the court's opinion. See Breyer, supra.

make it much harder for legislation to pass, not easier. Members of Congress have created the filibuster in the Senate, rules limiting amending activity in the House, and the decentralization institutionalized through the committee system and weak institutional sources of party cohesion.[34] These rules and practices often inhibit the passage of legislation by increasing the veto points for opponents, and often make it more difficult to form compromises. A Congress bent on finding easy compromises and subverting the Constitution's structures for inhibiting legislation would presumably have adopted a different way of proceeding.

A more fundamental shortcoming in the third explanation appears when one looks beyond the federal legislature to state and local governments. One possible and perhaps likely consequence of a judicially enforced non-delegation doctrine is that many regulatory functions currently performed by the federal government would be taken over by the states. Once again, this is a consequence that some critics of delegation are quite happy to embrace.[35]

Presumably, critics of delegation are comfortable returning regulatory powers to the states because they are confident that state governments will exercise power more responsibly than the federal government. Surprisingly, however, the critics don't fully explain why they are so confident. Schoenbrod, for example, provides some examples of states successfully creating responsible regulatory programs, but is also forced to concede that James Madison believed that the state governments were more susceptible to capture by factions.[36] Without making a further positive argument, Schoenbrod concludes his discussion of state governments by stating that states should be given the power to take over federal regulatory functions "unless we have a good reason to distrust state government more than we distrust national government."[37]

Schoenbrod and other critics of delegation may be covertly buying into the arguments of modern day states' rights advo-

34. Walter J. Oleszek, *Congressional Procedures and the Policy Process* (Congressional Quarterly Press, 4th ed. 1996), contains a readable overview of congressional procedures and their effect on decision making. None of the rules and institutional practices just listed are required by the Constitution. Congress created them and could also abandon them.

35. See, e.g., Schoenbrod, *Power Without Responsibility* at 136-39 (cited in note 2).

36. Id. at 137. Schoenbrod responds to Madison by claiming that such concerns are less relevant in the modern world where "most states surpass the entire original thirteen in population and diversity." Id.

37. Id.

cates, who repeat as mantra the claim that state governments are "closer" to the people than is the federal government in Washington, and thus are less likely to pass excessive regulations that interfere with liberty. But that claim is certainly open to challenge in a modern world of mass communication, where people participate at much higher rates in federal than in state or local elections. Furthermore, while some state capitals are today hotbeds of anti-regulatory sentiment, there is no historical pattern linking level of government with opposition to regulation or protection of liberty. William Novak's recent comprehensive account of law and regulation in the nineteenth century destroys the myth that state and local governments did not regulate the economy or interfere with liberty in the nineteenth century. Novak exhaustively documents efforts by state and local governments to regulate "nearly every aspect of early American economy and society, from Sunday observance to the carting of offal."[38]

It is, of course, unlikely that state governments would respond to judicial enforcement of a non-delegation doctrine by exercising the same regulatory powers that they exercised in the nineteenth century. The more important and more general lesson that emerges from accounts like Novak's is that state governments retain broad and undefined police powers under our Constitution, powers that the states would be free to exercise should federal power go into remission.

These expansive and largely undefined police powers of the states should be especially disturbing to someone like Schoenbrod, who insists that the people are not smart enough to use electoral controls on government officials to protect liberty, and that judges need to step in to supplement those electoral controls by enforcing constitutional limits on the power of those elected officials.[39] Schoenbrod's lack of faith in electoral controls can be seen in his insistence that the Supreme Court intervene to enforce the non-delegation doctrine. Schoenbrod argues that such judicial interference is necessary because the people are not clever or attentive enough to use the ballot to protect liberty or

38. William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* 1 (U. of North Carolina Press, 1996). For additional perspective on regulation by state courts (often without the nuisance of statutory law) in the nineteenth century, see Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Harvard U. Press, 1977); Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge U. Press, 1991).

39. Schoenbrod, *Power Without Responsibility* at 170-73 (cited in note 2).

end excessive regulation.[40] Ironically, however, state legislators are not subject to many of the constitutional limits that Schoenbrod sees as essential for producing accountability in the federal system.[41] State laws don't even need to be made by legislatures![42] Given that Schoenbrod concedes that state governments are likely to assume expanded regulatory functions in the aftermath of a judicially enforced non-delegation doctrine, the absence of many of those constitutional controls on the powers of state governments seems to provide the "good reason to distrust state government more than we distrust national government" that Schoenbrod was searching for.

Ironically, one limit on federal power that does not seem to apply to the states is the non-delegation doctrine itself. While Schoenbrod and other critics of delegation can imaginatively derive a constitutional prohibition on delegation by placing a particular gloss on a particular piece of constitutional text (the first sentence in Article I),[43] there is almost nothing in the Constitution that suggests that a similar prohibition applies to state governments.[44] As state governments assume important regulatory functions now performed by the federal government, it is unlikely that the private interests that are now so successful at pressuring Congress will simply wither away. Their more likely response will be to expand operations in the state capitals. Once there, there is nothing that prevents them from recreating at the state level the incentives to shift many important regulatory decisions to state regulatory agencies. And there is nothing in the case law of the nineteenth or twentieth centuries that could support a Supreme Court effort to stop the state governments should they decide to delegate more.

Of course, there is no way to know for certain the extent to which Congress and the states would make these adjustments in response to judicial intervention. But in the face of Schoen-

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40. Id.

41. Of course, some critics of regulation complain that many of the limits on federal power have been eliminated in practice during this century as the courts have adopted expansive definitions of Congress's enumerated powers, especially the commerce power. But parallel limits on state powers do not even exist in theory.

42. Marci A. Hamilton, *Power, Responsibility, and Republican Democracy*, 93 Mich. L. Rev. 1539 (1995) (reviewing David Schoenbrod, *Power Without Responsibility* (1993)) discusses the importance of making state ballot initiatives a part of the discussion on the non-delegation doctrine.

43. Schoenbrod, *Power Without Responsibility* at 155-57 (cited in note 2).

44. Ely suggests that the courts locate a ban on state delegation in the *guarantee clause*. *Democracy and Distrust* at 240-41 n.78 (cited in note 13). I think Ely's resort to the guarantee clause speaks for itself.

brod's admitted uncertainty about what the world will look like without delegation, the possibility of state government delegation, coupled with the much broader police powers retained by the states, creates a counterweight to the optimistic presumption that curbing federal delegation will result in less regulation and/or more liberty. While the non-delegation doctrine may reinvigorate some constitutional limits on federal legislative powers, gains made at the federal level could be more than offset as regulatory responsibilities shift to a level of government that is less subject to the constitutional restraints that Schoenbrod thinks are essential to protecting liberty.

III. THE CONTINUING ROLE OF THE COURTS

In addition to considering the changed role state and local governments might play in the aftermath of the non-delegation doctrine, it is important to consider the changed role of the courts. In particular, it is important to consider whether judges will end up assuming responsibility for making a large number of the "hard choices" that Congress now delegates to the agencies.

The practice of legislators deferring important decisions to the courts in order to avoid responsibility for difficult policy choices is not without historic precedent.[45] Before delegation to executive branch agencies became such a common practice, legislative default and judicial regulation was more the norm than the exception in many areas of policy making. In the nineteenth century, judge-made common law constituted a significant part of legal regulation of both the economy and private conduct. Many aspects of daily life were regulated by judges without authorization or involvement of legislators. Some scholars have mistaken the shortage of legislative regulation in the nineteenth century for a *laissez faire* economic system. But over the past few decades, James Willard Hurst, Morton Horwitz and the generation of legal historians that they inspired have tried to correct that mistake by tracing the important constitutive power of law and judicial regulation in the nineteenth century.[46]

The relative significance of the common law in the nineteenth century "state of courts and parties"[47] is worth consider-

45. See, e.g., Mark A. Graber, *The Non Majoritarian Difficulty: Legislation Deference to the Judiciary,* 7 Studies in American Political Development 35 (1993).

46. For a discussion of these issues and review of the literature, see Novak, *The People's Welfare* at 19-50 (cited in note 38).

47. See Stephen Skowroneck, *Building a New American State: The Expansion of*

ing because the conduct of legislators during that pre-delegation era was in many respects similar to the conduct they engage in today when they delegate: Nineteenth century legislators routinely deferred to judicial law-making as a means of avoiding accountability for divisive decisions. Understanding the role of judges in the nineteenth century is crucial for making an accurate assessment of how accountability was damaged or improved by the development of the modern administrative state.[48]

Schoenbrod suggests that before the development of the administrative state, our political system was one in which judges were able to ensure accountability by preventing delegation and thus forcing legislators to take principled stands divisive policy issues. Schoenbrod bases his account of pre-New Deal governance and accountability on two things: 1) The observation that the federal government did not create independent regulatory agencies until the twentieth century; and 2) a very small number of Supreme Court decisions articulating a rule against delegation.[49] But because he thinks of regulation and delegation only in their twentieth century forms, and then looks only at the case reporters for the Supreme Court for evidence of how law and governance worked before the New Deal, Schoenbrod ends up with a tremendously distorted picture of law, governance, and politics before the New Deal. That picture does not square at all with the accounts offered by scholars who have looked in more detail at how democratic processes actually worked before the creation of the modern administrative state.

A powerful example is Stephen Skowronenck's very detailed account of the transformation from the party system of the late nineteenth century to the modern administrative state. Skowroneck makes it clear that before the creation of the administrative state, political competition was nothing like the system Schoenbrod imagines in the past and aspires for in the future. Accountability, such as it was, was not based on voters

National Administrative Capacities, 1877-1920 at 39-46, 47-162 (Cambridge U. Press, 1982).

48. Nothing I say in this section is meant to establish that accountability could not be improved in the future if some decisions that are now delegated were instead made by legislators. But a proper understanding of the past is important, not just to counter the misleading historical claims made by proponents of the non-delegation doctrine, but also for understanding the complexity of the problem of accountability and for understanding why judges lack the power to create accountability through constitutional doctrines. I do not mean to deny that it is possible to create an improved system of democratic governance where there is both more accountability and less delegation.

49. Schoenbrod, *Power Without Responsibility* at 30-31, 33-36 (cited in note 2).

responding after judges forced legislators to take principled stands on divisive policy issues. Rather, political competition was centered primarily on the distribution of patronage, and judges rather than legislators took responsibility for settling a broad range of important policy questions.[50]

Legislators did occasionally step in and codify some areas of law, usually after judicial rulings came under attack by reformers.[51] Often, however, nineteenth century legislators could avoid policy controversies by doing nothing at all, confident that the courts would go on making decisions about regulation as they announced evolving common law rules.[52]

Perhaps the most significant example of judicial regulation in the face of legislative default is provided by regulation of labor relations. While nineteenth century legislators never delegated power to a powerful centralized regulatory agency like the NLRB, that did not mean that legislators took responsibility for labor regulation, nor did it mean that labor organizations went unregulated. Christopher Tomlins,[53] Karen Orren,[54] David Montgomery,[55] Victoria Hattam,[56] and William Forbath[57] have all documented how judges controlled and shaped the labor movement through such common law prohibitions as conspiracy, vagrancy, and enticement, and later by enforcing yellow dog contracts and issuing injunctions. Because of this web of judicial controls, legislators in the nineteenth century could be confident that labor would not roam free even if legislators never took clear stands on divisive issues of labor regulation.[58]

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50. Skowroneck, *Building a New American State* (cited in note 47).

51. Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Greenwood Press, 1981).

52. Of course, regulation by judges is not the same thing as regulation by agency bureaucrats. The judiciary is probably more insulated from political pressures than the agencies, a feature that gives legislative deference to judges both advantages and disadvantages over legislative delegation.

53. Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law and the Organized Labor Movement in America, 1880-1960* (Cambridge U. Press, 1985); Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge U. Press, 1993).

54. Orren, *Belated Feudalism* (cited in note 38).

55. David Montgomery, *Citizen Worker: The Experience of Workers in the United States with Democracy and the Free Market During the Nineteenth Century* 52-114 (Cambridge U. Press, 1993).

56. Victoria C. Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States* (Princeton U. Press, 1993).

57. William E. Forbath, *Law and the Shaping of the American Labor Movement* (Harvard U. Press, 1991).

58. Schoenbrod's response to concerns about the role of common law courts in the nineteenth century is to claim that common law is more democratic than agency law be-

Do any important lessons about the limits of a non-delegation doctrine emerge from these observations regarding deference to judicial policymaking in the nineteenth century? Past experience with common law regulation seems on the surface to be of limited relevance today. The "state of courts and parties" of the nineteenth century was replaced by the modern administrative state because judge-centered regulation lacked the capacity to administer the regulatory tasks that needed to be performed in the complex economy of the twentieth century.[59] After a century of codification of regulatory policies by legislatures and agencies, it seems very unlikely that judge-made law could substitute for very much of the agency law that would be dismantled by a non-delegation doctrine. More importantly, if I am assuming that judges are enforcing a non-delegation doctrine, I should also be willing to assume that those judges have a strong commitment to forcing legislators to act responsibly. There is no reason to think such judges would conspire with legislators in further efforts to regulate without legislation.

Nevertheless, I think proponents of the non-delegation doctrine still need to be quite concerned about the possibility that ending delegation will lead legislators to rely on judges to resolve conflicts over policy choices. The common law is not the only means through which legislative deference to the courts can result in a shift of policy-making responsibility from legislators to judges. In a future world without delegation, the more relevant strategy of legislative deference to the courts would probably be deliberate ambiguity in legislative language. This legislative strategy for avoiding accountability is often overlooked despite the fact that it has long been a most reliable and resilient tool for legislators wishing to avoid accountability.[60]

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cause it is derived from custom. "To the considerable extent that common law grows out of community custom, it reflects a popular consensus and so is no less democratic than statutory law." Schoenbrod, *Power Without Responsibility* at 157 (cited in note 2). There may be some contexts in which such a claim is plausible. But the claim of democratic custom appears almost ludicrous in the context of judicial regulation of the economy in the nineteenth century as documented in the above-cited sources on labor history and by accounts such as Novak's. Schoenbrod also suggests in private correspondence that the policy-making role of the courts in the nineteenth century is "inflated in retrospect." Much recent historical work on the role of the courts during that period supports precisely the opposite conclusion—that the important regulatory role of the courts has been badly underestimated. Letter to author, dated 8/19/99 (on file with author).

59. Skowroneck, *Building a New American State* (cited in note 47).

60. In an earlier unpublished paper, I noted that many scholars of statutory interpretation notice the importance of deliberate legislative ambiguity, but also argue that few of them bother to incorporate the problems created by deliberate ambiguity into their models and explanations. George I. Lovell, *Deference, Denial, and Labor Legisla-*

Two studies that I conducted of labor reform legislation demonstrate the importance of the strategy of legislative ambiguity.[61] My studies re-examined nineteenth and early twentieth century conflicts between legislatures and the courts by looking at the evolution of several failed reform statutes. The statutes I looked at gave rise to notorious instances of alleged judicial interference with legislative reforms. I was able to show in several cases that the failure of the statutes to attain their advertised goals was not the result of judicial usurpation of legislative power, as earlier scholars had claimed. The failure was instead the result of legislators deliberately using ambiguity in statutory language to shift responsibility for difficult decisions to judges. This political strategy seemed to work even as the reforms failed: Judges typically received most of the blame after they (quite predictably) resolved the ambiguity in the statutes with interpretations that hurt the interests of labor organizations.

I first found examples of such deliberate legislative ambiguity in nineteenth century state statutes aimed at judges who were using the common law of criminal conspiracy to control labor organizations.[62] A subsequent longer study found that ambiguity remained an important legislative strategy in a series of federal statutes from 1898-1935, a period that covers the crucial transition from the nineteenth century common law system to the New Deal administrative system.[63]

Of course, examples of past use of legislative ambiguity are only relevant here if it is likely that legislators will respond to strict enforcement of a non-delegation doctrine by using ambiguity to shift decisions to judges. My initial but incomplete answer is to point out that legislators have never stopped using the strategy of deliberate ambiguity. Even as Congress has increasingly relied on delegation, judges continue to make important policy decisions as they interpret statutes and oversee decisions made in the agencies. Legislators are well aware of the important role of judges as interpreters of statutes when they draft

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tion: Rethinking Judicial Policymaking, Legislative Decision Making, and Democratic Accountability, Paper presented at the Law and Society Association Annual Meeting, Aspen, Colorado, June 4-7, 1999 (on file with author).

61. George I. Lovell, *The Ambiguities of Labor's Legislative Reforms in New York State in the Late Nineteenth Century*, 8 Studies in American Political Development, 81 (1994); George I. Lovell, *Legislative Deferrals and Judicial Policy Making in American Labor Law*, Ph.D. Dissertation, Political Science, University of Michigan (1997) (on file with author).

62. Lovell, *Ambiguities of Labor's Legislative Reforms* (cited in note 61).

63. Lovell, *Legislative Deferrals* (cited in note 61).

legislation, and have not always been able to resist the temptation to use open-ended language to shift important policy decisions to judges.

The continuity between pre- and post-New Deal use of deliberate ambiguity can be seen by considering the Wagner Act. The Wagner Act was a quintessential New Deal statute that established a permanent regulatory agency (the NLRB) and delegated important policy-making functions to that agency. My earlier study found evidence that even as Congress was perfecting the growing practice of delegation to executive branch agencies, Congress was also establishing important oversight responsibilities for judges and artfully using ambiguity in legislative language to make sure that judges would have the final say over at least some particular policy controversies.[64]

The possibility of legislators using ambiguity in legislative language as a tool for shifting accountability to judges is not unlimited. In some policy contexts, (e.g., criminal law or laws that have a plausible chilling effect on free speech) judges may be inclined to strike down ambiguous laws on grounds of overbreadth or vagueness.[65] But despite doctrines that discourage vagueness and ambiguity, judges spend a tremendous amount of time and energy resolving interpretive controversies about the meaning of statutes. Often, the courts are called on to make choices that Congress could have easily made when the statute was passed, and members of Congress continue to keep legislative language open-ended as a way of building consensus. One need look no further than recent interpretive decisions on the Americans with Disabilities Act and sexual harassment to realize that Congress has not given up on the practice.[66]

Defenders of the non-delegation doctrine might still object that judges inclined to end delegation will also take steps to end deference to the courts through legislative ambiguity, perhaps by more vigorously striking down laws that are open-ended or am-

64. Id. at 203-32.

65. The requirement related to vagueness and overbreadth are themselves limited. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

66. Journalists' accounts of deliberate ambiguity and subsequent judicial decisions appeared in both the New York Times and the Washington Post on the same day in 1998. See Fred Barbash, *Congress Didn't So the Court Did*, Washington Post C1 (July 5, 1998); Linda Greenhouse, *Sure Judges Legislate. They have to*, New York Times 4:1 (July 5, 1998). These articles discuss, among other things, the Americans with Disabilities Act (ADA), 104 Stat. 327, 42 U.S.C. 12102, et seq (1994). The Supreme Court resolved one of many ongoing interpretive controversies about the meaning of the ADA in *Sutton v. United Air Lines, Inc.* 119 S. Ct. 2139 (1999).

biguous.[67] However, the task of limiting ambiguity in statutory language is very different from the task of limiting delegation of rule-making authority to the agencies. Even if judges can, in theory at least, hold legislators to a "no delegation" standard, they cannot possibly hold legislators to a "no ambiguity" standard. To expect legislators to resolve in advance all the interpretive controversies that might arise as judges decide concrete cases is simply unreasonable. Scholars of statutory interpretation have recognized since at least the time of Aristotle that unexpected situations and changes in background conditions make accidental ambiguity and the resulting interpretive controversies inevitable.[68]

It is because defenders of delegation know that interpretive controversies cannot be eliminated that they are very careful to distinguish impermissible delegation to agencies from the inevitable and perfectly permissible interpretive role that judges will play as they apply legal rules. Schoenbrod, for example, recognizes the problem of ambiguity and goes to considerable effort to explain that judges retain responsibility for interpreting statutes in a world without delegation.[69] He also offers several suggestions for distinguishing law-making from law interpretation, and distinguishes statutes that delegate from statutes that are not specific.[70] However, his suggested method for distinguishing statutes that allow for judicial interpretation from statutes that unconstitutionally delegate legislative power cannot distinguish interpretation that arises from accidental ambiguity from interpretation that results from deliberate ambiguity. Schoenbrod does not even attempt to make that distinction. This omission is crucial because judges will have a very difficult time improving

67. Some celebrated cases over the past few decades have been taken as a signal that judges have become less tolerant of this legislative strategy and more willing to try to force Congress to legislate clearly by shrinking their own role as interpreters of statutes. See, e.g., *Chevron U.S.A. Inc., v. National Resources Defense Council,* 467 U.S. 837 (1984). Some critics of delegation have applauded these decisions as a sign of judges' interest in giving members of Congress incentives to pass clearer laws. Nevertheless, judges continue to make policy decisions of considerable consequence as they resolve ambiguities in statutes. For an empirical account of the complicated effects of *Chevron* on administrative decision making, see Peter H. Schuck and E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984, 1020-43, 1058-59.

68. R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* 8 (Brookings Institution, 1994).

69. Schoenbrod, *Power Without Responsibility* at 189 (cited in note 2).

70. Id. at 181-85.

accountability through a non-delegation doctrine if they cannot prevent Congress from delegating to the courts.

These problems are exacerbated by the fact that the conventions judges follow when interpreting statutes are almost completely blind to the practice of deliberate deference to the courts through ambiguous legislative language. The competing methods judges use to discover, recover, or imaginatively reconstruct the "intent" of Congress or the meaning of statutory texts invariably assume that ambiguity in statutes is the result of accidents.[71] And the conventions that judges observe when they peruse legislative records in search of "intent" make it very unlikely that interpreters will uncover evidence of deliberate ambiguity.[72]

The problem is that the interpretive conventions that judges follow when they attempt to resolve controversies about the interpretation of statutes are tremendously misleading in cases involving deliberate ambiguity. While committee reports and speeches by floor managers can be reliable sources for finding legislative intent when there is an intent to be found, they are also the least likely place in the congressional record to find evidence of deliberate ambiguity. Committees and floor managers typically have the greatest stake in holding together a coalition that is built through ambiguity, and are thus much less likely to call attention to ambiguity than backbenchers who want to disrupt that coalition. In my study, I was able to uncover evidence

71. Lovell, *Deference, Denial, and Labor Legislation* (cited in note 60).

72. For example, in my studies of labor legislation (cited in note 61), judges always responded to interpretive controversies by making a conventional, and very limited, inquiry into the legislative text and history and then announcing their discovery of the "intent" of a unified Congress. After making a more extended inquiry into the legislative history, I was able to show that Congress had, in reality, deliberately used ambiguous or contradictory language to avoid establishing a single intent on the relevant policy choice and to force the courts to resolve the inevitable interpretive controversies that the statutory language would create. The "intent" that the judges "discovered" was not the work of Congress, but something that the judges themselves manufactured through the interpretive process.

Significantly, I was able to explain the judicial decisions that manufactured intent without claiming that judges acted out of bad faith, conspiratorial motives, or a lack of interest in legislative integrity and congressional accountability. Their discovery of legislative intent was the natural result of their reliance on conventional methods for reading legislative histories. Those methods could probably not be better designed to hide evidence of deliberate legislative ambiguity. For example, in a notorious case interpreting the Clayton Act of 1914, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), the Supreme Court followed well-established interpretive conventions that tell judges to ignore most legislative records. The judges in *Duplex* were willing to examine and cite committee reports and floor speeches by the floor managers to support their positions, but they ignored everything else. Id. at 474-75.

of deliberate ambiguity only by rejecting interpretive conventions and developing a method of interpreting legislative decisions that looked at the full legislative record and the broader political context in which legislation passed. [73]

So long as judges retain the established conventions for working with legislative histories, the possibility of legislators successfully using ambiguity to force judges to decide contentious issues remains a real one. Judges might try to eliminate this problem by abandoning the interpretive conventions and looking at more legislative records, but doing so would buck the current trend. Judges might even adopt some of the heretical practices I used in my second study, including looking at all the floor speeches and at rejected legislative proposals from earlier congresses. However, that is not a course I could recommend. In addition to being incredibly cumbersome and time-consuming, the methods I used to uncover evidence of deliberate ambiguity in statutes are not foolproof. I designed a conservative set of conditions for identifying cases of deliberate ambiguity that I hoped would minimize false positives (i.e., incorrectly concluding that an accidental ambiguity was deliberate). However, it was impossible to specify those conditions so that they did not allow false negatives (i.e., incorrectly concluding that deliberate ambiguity was accidental). The conditions I used were good enough for my purpose, which was only to demonstrate that deliberate ambiguity *sometimes* plays a significant role in interbranch conflicts. But it is not good enough if the goal is to allow judges to identify and then strike down all statutes in which Congress makes deliberate use of ambiguity to avoid responsibility for some policy controversy. Based on my experience with early twentieth century labor statutes, I don't think the records legislators leave behind are sufficient to make those judgments with sufficient confidence. Furthermore, as soon as judges announced a new set of interpretive conventions that called for looking at additional records, legislators would pre-

73. Justice Scalia argues that judges should avoid all of these complications by giving up on the idea of finding legislative intent, ignoring legislative history, and sticking to the text of statutes to find their objective meanings. See, e.g., Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton U. Press 1997). However, judges will presumably have a hard time finding the objective meaning in the text of statutes that are deliberately designed to be ambiguous and to generate interpretive controversies for judges to resolve. In cases of deliberate textual ambiguity, the strategy of sticking to the text has the opposite effect to the one Scalia hopes for: The strategy maximizes the discretion of the individual judge to choose the policy outcome that he or she personally favors.

sumably adjust their behavior by keeping evidence of deliberate ambiguity out of those records.

Thus, there is no guarantee that judges will recognize their own complicity in legislators' deliberate use of ambiguity, even in a post-delegation world in which conscientious judges want to restrict legislators' efforts to use ambiguity in statutes. If legislators did respond to a judicial prohibition on delegation by increasing their use of ambiguity, they might not be able to shift responsibility for decisions to judges as reliably as they have been able to shift responsibility for making substantive regulatory rules to the executive branch. But even if the method of deferral to the judiciary is less reliable, it still undermines the claim that the delegation doctrine forces legislators to assume responsibility for regulatory choices.

Moreover, the possibility of inadvertent judicial complicity in legislative efforts to avoid accountability threatens the legitimacy of judicial efforts to prevent delegation. If unelected judges decide to strike down ninety-nine percent of the regulatory laws that the people's representatives have passed over the last century in the name of forcing greater legislative accountability, those judges had better be pretty confident that doing so does not simply create the appearance of a judicial coup. Since one consequence of strict enforcement of a non-delegation doctrine is likely to be an increased judicial power to make substantive decisions on regulatory policies, it would be quite difficult to avoid that appearance. Whether they like it or not, judges are likely to help Congress to continue to avoid accountability in the uncharted world without delegation.

IV. CONCLUSION. BRINGING THE PEOPLE BACK IN

The non-delegation doctrine is presented by many of its proponents as a tool for restoring the original vision of the framers of the Constitution.[74] One lesson that seems to emerge from the above discussion is that judged by the standards for accountability offered by defenders of the non-delegation doctrine, the Constitution's system of separation of powers is a miserable failure. If the framers of the Constitution thought that they had provided for accountability and legitimacy by empowering judges to force elected legislators to make all the laws and rules, and if they thought they had done this by giving the courts the

74. See, e.g., Schoenbrod, *Power Without Responsibility* at 155-58 (cited in note 2).

power to enforce a rule that prevents delegation to the executive branch, then the system that they established has thus far proven incapable of advancing their vision. We have never had either the majoritarian system envisioned by the counter-majoritarian framework, or the purely legislative system that the proponents of the non-delegation doctrine seek to restore. After more than two centuries, the Constitution has yet to coincide with a system in which popularly elected officials create and take responsibility for the bulk of our laws and regulations.

The discussion above also makes it clear that the problem did not start with, and is not the result of, judicial weakness of will at the time of the New Deal. It has always been the case that much of the law in place under the Constitution has been created outside the legislative branch by unelected officials who elude direct accountability by democratic controls. Things don't look any better for the future. Even if future judges decide to enforce new restrictions on the legislative power to delegate, the remaining constitutional controls on legislative activities are much too porous to guarantee that legislators will make the "hard choices" or to ensure that they can be held directly accountable for the choices that they make.

The lesson that I wish to draw, however, is not that the framers failed to attain their vision, but that scholars have failed to identify correctly what that vision was. If the framers of the Constitution intended to establish a set of rules, procedures, and limitations that was sufficient, with appropriate judicial guidance, to ensure majoritarian accountability, they made some very strange choices. In particular, the system they established seems woefully incomplete. Majoritarian accountability cannot be guaranteed merely by holding the elections required in the Constitution and forcing those who win the elections to make "hard choices."

Whether or not the people can produce accountability in a democratic system depends on much more than giving people access to the ballot and easy knowledge of which choices elected legislators made on difficult policy issues. Knowledge of how one's elected representative voted on a divisive policy issue does not ensure that one can hold that representative accountable for making the wrong choice. The level and type of accountability achieved in any political system depends much more on a broad range of interrelated institutional and cultural factors. These factors include such things as basic constitutional structure (e.g., separation of powers/federal system vs. parliamentary systems)

system of representation (e.g., single member districts vs. proportional representation), internal decision-making rules for legislatures (e.g., agenda control, amending power, committee structure, filibusters), rules regarding elections (e.g., secret ballots or party ballots, access to the ballot, rules regarding patronage and campaign finance, procedures for drawing electoral districts), the number of viable political parties, the level of public attention to politics, voter turnout, the amount of information available to the electorate, distribution of educational opportunities, and the structure and norms of the mass media (amount of competition, partisan press vs. "objective media").[75] Significant changes in any of these factors can produce significant changes in who will be elected and in the kinds of policy choices those elected representatives will make. Such structural changes can lead to changes in outcomes even when the goals and preferences of the electorate remain unchanged.

When it comes to these structural factors that affect accountability, two things are striking about the choices made by the framers as they created the Constitution. The first is that they declined to make specific choices to influence a large number of the institutional and cultural factors just listed. The explanation for the failure of the framers to make all the relevant choices is not that the framers lacked the wisdom or foresight to understand that such choices were important. The framers instead trusted the people or their representatives to make most of those choices, and were content to establish a loose framework that has accommodated many different choices about important factors. The result is that the U.S. has experienced numerous successive democratic systems within the same constitutional framework, not a single correct system that has been disrupted by historical aberration or fits of judicial infidelity.

The second is that when the framers did make specific choices, the choices that they made are quite often difficult to square with the assumption that the framers equated legitimacy with majoritarianism (tempered by a few individual rights), and difficult to square with the assumption that they equated accountability with rule by legislators. Judged by those assumptions, many of the crucial decisions made by the framers are in-

75. On the importance of structural factors in the system of representation, see, e.g., Douglas W. Rae, *The Political Consequences of Electoral Laws* (Yale U. Press, rev. ed. (1971)). For a historical perspective on the importance of party structure and media conventions, see Michael E. McGerr, *The Decline of Popular Politics: The American North, 1865-1928* (Oxford U. Press, 1986).

explicable: for example, the decision to establish two other coequal and independent branches of government, the decision to leave the states largely to their own devices, the decision to establish a Senate that was not chosen by popular election, and the decision to include a provision explicitly giving Congress the power to structure almost all of its internal decision-making processes.

I think the more charitable interpretation of the choices that the framers made is to assume that they wanted to balance their commitment to democratic rule by majoritarian legislatures with their very powerful misgivings about a purely legislative, purely majoritarian system. In a system with one supreme and elective branch of government, it would be quite easy for people to assign blame for "hard choices" and to exact retribution for bad choices at the ballot box. But the framers decided not to create such a system. They instead created a separation of powers system in which independent judicial and executive branches, not to mention independent state governments, act as a counterweight to legislative power. It was the original decision to establish the independent sources of power outside the legislature, and not judicial cowardice in the face of the New Deal, that makes it possible for legislators to find strategies that shift responsibility for difficult decisions. If the federal legislature did not have to compete with state governments and two coequal branches at the federal level, it would be much more difficult for legislators to hide behind the actions of others, and thus much easier to hold Congress accountable for unpopular outcomes. But it also would be much harder to limit the power of that lone majoritarian branch. Full accountability comes only at the cost of granting absolute power, and on that issue the framers made a very clear choice.

The framers did not try to close off all the possible strategies available to members of Congress who wanted to avoid taking responsibility for choices. But the framers also did not prevent the people from collectively creating a better system with more democracy and more accountability than the original system allowed. Such changes as the 15th, 17th, 19th, 23rd, 24th, and 26th amendments are examples of constitutional changes that demonstrate the continuing capacity of the people to create improvements in accountability and the democratic system within the existing framework.

Likewise, the framers did not prevent the people from creating a political system with no delegation (like the one favored

by Schoenbrod), or from creating the "juridical democracy" envisioned by Lowi. The people could probably create such systems without changing the Constitution, and nothing I have said here contradicts the suggestion that the people would be better off if legislators delegated less power to the executive branch. But improvements will be much greater if delegation ends because the people develop an interest in holding legislators accountable for unpopular decisions that are now made through delegation. The people are likely to develop the capacity to insist on an end to delegation only if improvements in the way people are organized make it easier to hold legislators accountable for the choices they make.

So far, however, the people and their representatives have not constructed such a system. Efforts like Schoenbrod's and Lowi's to document the pathologies of the current system are no doubt a good way to convince the people to try something new. But it is doubtful that the courts could successfully impose on the people the type of system favored by Schoenbrod or Lowi before the people are capable of taking the ongoing steps needed to make such systems work. Ending delegation by judicial fiat will only improve accountability if the underlying organizational pathologies that give rise to delegation are cured as well. The most that the courts can do is cure one symptom of the underlying disease. The Constitution leaves it up to the people to develop the principles and capacities that will get us out of the current mess.

Strong proponents of judicial intervention might object to the suggestion that these choices were simply left to the people acting through their elected representatives. Critics of delegation might try to borrow a strategy advocated in a very different context by John Hart Ely.[76] Ely argues quite powerfully that the constitutional system assigns to the courts at least some responsibility for ensuring that representation works effectively and for making adjustments when representation breaks down. If critics like Schoenbrod are right that the people have failed to prevent their representatives from creating a distorted system with little accountability, perhaps judges should reinforce representation by forcing legislators to perform some particular version of their constitutionally mandated role as lawmakers. Judicial intervention may be especially well justified given Schoenbrod's suggestion that the people cannot check delegation because their

76. Ely, *Democracy and Distrust* at 73-104 (cited in note 13).

elected representatives have effectively hidden the costs of the current system from the unsophisticated masses.[77]

I think, however, that it is too soon to say that the people have failed, too soon to give up on the people as a potential source of solutions, and thus too soon to insist that the people have abdicated and need the help of judges if they are to continue the ongoing task of creating a "more perfect union." While the behavior of the people looks unsophisticated and indolent to the critics of delegation, that may only be because those critics view accountability through the lens of legislative supremacy and the counter-majoritarian framework. In reality, the people may not be as foolish as the critics of delegation suggest, or as helpless in the face of legislative deception.

I found some evidence for these claims in my case studies of labor legislation. My cases provided instances of labor organization attempting to use statutory changes to limit the ability of judges to interfere with workers' collective activities. Most of the statutes I looked at failed to achieve their advertised policy goals, in part because judges established interpretations of the statutes that were quite hostile to labor organizations. I showed, however, that the power of judges to make such decisions was the result of legislators' conscious choices to avoid settling divisive policy issues and to instead make legislative language more ambiguous.

On the surface, the labor cases seem to fit an explanation much like the one that critics of delegation give when attacking "rent-seeking" regulations emanating from the agencies. The explanation might be that better organized and more sophisticated employers won their battles with labor because the employers were able to dupe the unsophisticated workers into accepting bad legislative compromises. On this explanation, judges concerned about reinforcing representation might have felt justified in refusing to enforce the ambiguous legislation. Doing so would aid the helpless workers who lacked the sophistication needed to tell the difference between insincere legislation and political triumphs.

However, after looking more carefully at the legislative compromises from the perspective of labor organizations, I found that the surface explanation of labor's activities did not fit the facts. I found that instead of being dupes, labor organiza-

77. Schoenbrod, *Power Without Responsibility* at 92-93, 229 n.42 (cited in note 2).

tions had a very sophisticated understanding of the links between legislative language and the likely role to be played by the courts, and that they knowingly entered into and endorsed legislative compromises that had little chance of delivering their stated policy goals. After discovering that labor leaders were not fools, I had to develop an alternative explanation for their behavior. I found that their apparently uninformed and unsophisticated activities were in reality a very capable response to a difficult array of organizational imperatives and political realities. By choosing to compromise at the appropriate moment, labor leaders were able to attain important organizational goals, and their decisions ultimately put labor organizations in a better position to win longer-term goals by improving labor's political position for subsequent legislative bargaining.[78] Ironically, labor organizations might not have gained as much if they had been in a fully majoritarian system where it was impossible to defer to the courts. The problem for labor organizations was not that the workers were fools, but that they did not have the power to win clear majoritarian victories. A strict ban on delegation to both the executive branch and the courts would not have solved that problem, and would have deprived them of the ability to use legislative bargaining and compromises to achieve longer-term goals.

The important lesson that emerges from the labor example is that scholars should be careful about imputing particular goals to groups of people and then concluding that those groups are unsophisticated, incompetent, and in need of judicial assistance just because they don't achieve those goals. It is possible that behavior that looks unsophisticated is actually a rational adaptation to a complicated political system in which power is widely dispersed. To evaluate accountability in any political system, it is crucial that researchers try to understand the barriers that the system creates from the perspective of those interests actually taking part in the political processes. They may discover important advantages to the existing system that are invisible on the assumption that the goal of political activity is always clear cut legislative victories that produce favored policy outcomes or allow voters punish the responsible legislators.

Similarly, the fact that the people continue to tolerate widespread legislative delegation may be a more sophisticated choice than it appears to critics of delegation. While Schoenbrod has

78. Lovell, *Legislative Deferrals* at 70-131, 192-202 (cited in note 61).

recently taken on an admirable crusade against the forces of elitism by taking the side of "outsiders" against the "insiders" who want to subvert democracy by allowing delegation,[79] his unwillingness to trust the people to solve these problems without the aid of judges does not demonstrate an unblinking faith in democratic processes.

Furthermore, the choice to retain powerful institutional rivals to Congress is not one that has always been imposed upon the unsuspecting masses from the duping powers above them. There have been numerous times in American history when reformers have advocated magic bullet solutions designed to restore accountability by taking authority away from Congress's rival branches. From the codification movements of the nineteenth century to FDR's court packing plan to Reagan era deregulation, these reforms have produced important adjustments in the roles and responsibilities of the different branches within the constitutional framework. One great advantage of the constitutional system established by the framers is that it has allowed those changes and adjustments to occur. It is especially significant to note that these movements have always stopped short of stripping Congress's rival branches of so much power that they ceased to function as important alternative sources of lawmaking authority. The codifiers of the nineteenth century did not rid us of the common law, the Court survived and rose again despite Roosevelt's plan, and the regulatory agencies Reagan found when he arrived in Washington, with a few exceptions like the ICC, seem to chug along. The decisions to stop short of destroying independent sources of rule-making power may not be as irrational as they seem to critics of delegation. In an increasingly diverse and divided society, organized groups hoping to hold government accountable may prefer bargaining processes that allow those groups to develop organizational strengths while hunting for helpful legislative compromises. Such a system may produce a more responsive and permeable government than the all-or-nothing majoritarian system of accountability favored by the advocates of the non-delegation doctrine.

79. Schoenbrod, *Delegation and Democracy* at 749, 764 (cited in note 27).