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## Public Laws and Private Lawmakers

Kimberly N. Brown

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## PUBLIC LAWS AND PRIVATE LAWMAKERS

KIMBERLY N. BROWN\*

### ABSTRACT

*The Obama Administration's "Clean Power Plan" for addressing industrial carbon emissions is controversial as a matter of environmental policy. It also has important constitutional implications. The rule was initially crafted not by officers or employees of the Environmental Protection Agency, but by two private lawyers and a scientist with industry ties. Private parties operate extra-constitutionally, and no existing legal doctrine tethers constitutional scrutiny to the nature of the power delegated to them. The nondelegation doctrine applies to delegations by Congress—not to agencies' subdelegations of legislative power to private parties. The other doctrinal lens for reviewing rulemaking by entities other than Congress—Chevron U.S.A. v. National Resources Defense Council, Inc. and its progeny—is equally blind to subdelegations of policymaking authority to parties that function beyond the boundaries of the Constitution. This Article takes up the issue of private rulemaking, and argues that its inescapable constitutional implications warrant a stronger nondelegation doctrine and a more nuanced approach to Chevron that emphasizes public accountability, legitimacy, transparency, and rational decision-making over notions of agency prerogative.*

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## INTRODUCTION

In what The New York Times called “Mr. Obama’s boldest step in using his executive authority to halt the warming of the planet,” the President in June of 2014 proposed a regulation designed to substantially cut carbon emissions from power plants over the next 15 years.<sup>1</sup> He unveiled the final rule on August 3, 2015.<sup>2</sup> With major implications for the global fight to stall climate change, the rule was swiftly assailed as “unrealistic.”<sup>3</sup> Twenty-four states and a private coal company have challenged the EPA’s rule in federal court.<sup>4</sup> The EPA’s “Clean Power

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1. Coral Davenport & Peter Baker, *Taking Page From Health Care Act, Obama Climate Plan Relies on States*, N.Y. TIMES (June 2, 2014), <http://www.nytimes.com/2014/06/03/us/politics/obama-epa-rule-coal-carbon-pollution-power-plants.html> (describing criticisms of proposed rule); David Jackson, *Obama to Reveal Plan for Cutting Greenhouse-Gas Emissions*, USA TODAY (Aug. 2, 2015, 5:38 PM), <http://www.usatoday.com/story/news/2015/08/02/obama-administration-reveal-emissions-regulations-plan/31012963/>.

2. Colleen McCain Nelson & Amy Harder, *Obama Announces Rule to Cut Carbon Emissions from Power Plants*, WALL ST. J. (Aug. 3, 2015, 7:33 PM), <http://www.wsj.com/articles/obama-announces-rule-to-cut-carbon-emissions-from-power-plants-1438627158>.

3. William O’Keefe, *The EPA’s Clean Power Plan, Impractical and Unrealistic*, THE HILL (Aug. 6, 2015, 10:00 AM), <http://thehill.com/blogs/pundits-blog/energy-environment/250393-the-epas-clean-power-plan-impractical-and-unrealistic>.

4. Cole Mellino, *24 States Sue Obama Over Clean Power Plan*, ECOWATCH (Oct. 24, 2015, 10:18 AM), <http://ecowatch.com/2015/10/24/clean-power-plan-lawsuits/>.

Plan” (“CPP”) also raises a separation of powers problem. When *private* parties—here, two lawyers, a scientist, and a prominent environmental action group—craft regulatory policy,<sup>5</sup> is the final rule governed by the same constitutional norms that apply to lawmaking conducted exclusively by government actors?

To be sure, section 111(d) of the Clean Air Act (“CAA”) gives the Environmental Protection Agency (“EPA”) the legal authority to issue the CPP.<sup>6</sup> In *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*,<sup>7</sup> the Court famously addressed the separation of powers implications of Congress’s delegation of rulemaking authority in the CAA, holding that the EPA’s interpretation of ambiguous statutory language—not that of the courts—receives deference. *Chevron* thus made clear that, despite the mandate of Article I, Congress has the constitutional authority to hand off its legislative baton to federal agencies with impunity.

In bearing the heavy imprint of private influence, however, the CPP does not lie squarely within the realm of government action. If public, private, and quasi-public actions were plotted on a constitutional continuum—with acts of the President at one end and those of purely private parties at the other—the CPP would fit somewhere between those poles.<sup>8</sup> The question then becomes whether the constitutional rationales for *Chevron* deference apply with equal force when the private sector engages in legislative rulemaking on the President’s behalf, as with the CPP. This question inevitably invokes consideration of a related doctrine that preceded *Chevron*: nondelegation.

The nondelegation doctrine is a Lockean notion that is fundamental to the separation of powers.<sup>9</sup> In theory, nondelegation ensures that policymaking resides in the branch of government that is most responsive to popular will. It evolved in response to two kinds of delegations of legislative power: delegations to federal agencies and delegations to the private sector. Since the doctrine’s post-New Deal heyday, the Court has consistently deemed delegations of legislative authority to federal agencies

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5. See Coral Davenport, *Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint*, N.Y. TIMES (July 6, 2014), [http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html?\\_r=0](http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html?_r=0).

6. 42 U.S.C. § 7411 (2014); *What EPA is Doing*, U.S. EPA, <http://www2.epa.gov/carbon-pollution-standards/what-epa-doing#overview> (last updated Feb. 29, 2016).

7. 467 U.S. 837 (1984).

8. See generally Kimberly N. Brown, *Government by Contract and the Structural Constitution*, 87 NOTRE DAME L. REV. 491, 507–12 (2011) (arguing that public-private relationships fall on a constitutional continuum).

9. Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 254–55 (2010).

constitutional so long as Congress includes an “intelligible principle” in the enabling statute to guide the exercise of agency discretion.<sup>10</sup> With *Chevron*, the Court effectively reversed course, enhancing agencies’ discretion to make laws pursuant to vague legislative mandates—at the expense of de novo judicial review.

Notwithstanding the Supreme Court’s sanctioning of *Congress’s* authority to delegate its legislative power to the executive branch (and, for that matter, the private sector), constitutional doctrine says nothing about *agencies’* authority to subdelegate the same legislative powers to private parties. Because the Constitution does not restrict private behavior, rulemaking sheds its constitutional character when non-federal actors conduct it.<sup>11</sup> Thus, whereas congressional attempts to delegate legislative power trigger constitutional scrutiny, agency attempts to delegate rulemaking authority do not. Such a paradox—that important constitutional values come into play only when Congress attempts to privatize government, and not when agencies do—flies in the face of over a century of separation of powers doctrine.<sup>12</sup> It makes little sense for the Supreme Court to wrestle with line drawing around shared governmental powers if the question can be so easily nullified by a contract handing off rulemaking powers to an extra-constitutional, private actor.

This Article considers executive branch outsourcing of legislative power to private parties, and argues that its inescapable constitutional implications warrant a stronger nondelegation doctrine and a more nuanced approach to *Chevron* that emphasizes public accountability, legitimacy, transparency, and rational decisionmaking over notions of agency prerogative. The *Chevron* doctrine—like nondelegation—is driven by normative judgments as to which branch of government is best suited to make policy; by any measure, biased private actors do not qualify.

Part I describes the private exercise of public power in practical terms. It then situates the issue on a constitutional policymaking continuum. This approach is offered as a substitute paradigm for the strict public/private divide that currently drives constitutional doctrine. Whereas a handful of baseline values for good government necessarily influence the exercise of public power at the governmental end of the continuum, they do not color the exercise of identical powers by actors at the private end of that spectrum under current law.

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10. *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989).

11. See Henry C. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 HASTINGS CONST. L.Q. 587, 592–93 (1991).

12. See *infra* Part II.A (discussing the nondelegation doctrines).

Part II explores the constitutional doctrine bearing on the anomaly illustrated by the constitutional policymaking continuum: although the constitutionality of *Congress's* delegation of legislative powers outside Article I is addressed by the nondelegation and private delegation doctrines, the constitutionality of *agencies'* delegation of the same power beyond the confines of Article II are not covered by these or any other constitutional theories. The other available lens for judicial review of such delegations—*Chevron* and its progeny—similarly fails to recognize that executive branch subdelegations of legislative power to private parties frustrate the Court's justifications for deference to agency policymaking.

Part III argues that agency subdelegations of legislative power to the private sector should be subjected to heightened separation of powers scrutiny, not exempt from it. Currently, there is no statutory or doctrinal framework governing how agencies craft policy in the initial drafts of legislative rules. Nor does any law limit the private sector's influence on that process. This Part posits that courts should recognize a private *subdelegation* doctrine and expanded approach to *Chevron* step zero in order to account for private sector rulemaking that is not authorized by Congress in enabling legislation. Such a functional approach to agency subdelegations of legislative power is consistent with the Court's pragmatic stance on delegation. It would also foster normative values of good government that underlie the structural Constitution, including public accountability, transparency, legitimacy, and rational decisionmaking.

### I. GENERAL PRINCIPLES

The terms “privatization” and “outsourcing”<sup>13</sup> cover a broad spectrum of public-private relationships that exist across the federal government infrastructure. Today, private contractors outnumber federal employees by two to one,<sup>14</sup> performing functions ranging from “the ‘merely’ advisory to the full-fledged assumption of policy-making authority.”<sup>15</sup> Perhaps the most common form of outsourcing is the traditional service contract, whereby a private third party agrees to perform some function that the government would otherwise perform for itself, such as routine building

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13. See generally PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 2 n.4 (2007) (explaining that “[p]rivatization and outsourcing [can] be used interchangeably” and that “outsourcing is defined in terms of contracting-out government services within the United States”).

14. Charles Kenny, *Why Private Contractors Are Lousy at Public Services*, BLOOMBERG BUSINESSWEEK (Oct. 28, 2013, 4:51 AM), <http://www.businessweek.com/articles/2013-10-28/outsourcing-can-be-a-lousy-alternative-to-government-run-services>.

15. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551 (2000).

maintenance. Outsourcing can take many other forms, including industry deregulation, voucher use, government corporations, the sale of government assets to the private sector,<sup>16</sup> and the infusion of market principles into public sector employment.<sup>17</sup>

Even less known and difficult to quantify is the extent to which the government relies on private parties to perform public functions informally—without any exchange of money or contractual agreements. As Edward Snowden’s leaks of classified information revealed, national security and federal law enforcement agencies glean untold terabytes of data from private corporations for the government’s own surveillance purposes.<sup>18</sup> The government has also allowed factions of the private sector to craft national energy and environmental policy.<sup>19</sup> When this happens, the Constitution does not apply to constrain the private exercise of public governance—even though identical actions by government actors would be subject to constitutional scrutiny.<sup>20</sup>

This Part illustrates the arbitrary nature of the foregoing paradox by situating private parties along a constitutional policymaking continuum instead of within a wholly separate, extra-constitutional space. In exercising federal functions, private parties become anatomically related to government actors within a constitutional structure that leads all the way to the President. Yet the normative values underlying the structural Constitution—including accountability, transparency, legitimacy, and

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16. See Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1519, 1525 (2001); Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL’Y 111, 113–17 (2005); Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 266.

17. Jon D. Michaels, *Privatization’s Progeny*, 101 GEO. L.J. 1023, 1026 (2013); see also generally JANINE R. WEDEL, *SHADOW ELITE: HOW THE WORLD’S NEW POWER BROKERS UNDERMINE DEMOCRACY, GOVERNMENT, AND THE FREE MARKET* 74–75 (2009) (discussing ways in which “a host of nongovernmental players do the government’s work, often overshadowing government bureaucracy, which sometimes looks like Swiss cheese: full of holes”).

18. See Craig Timberg & Barton Gellman, *NSA Paying U.S. Companies for Access to Communications Networks*, WASH. POST (Aug. 29, 2013), [http://www.washingtonpost.com/world/national-security/nsa-paying-us-companies-for-access-to-communications-networks/2013/08/29/5641a4b6-10c2-11e3-bdf6-e4fc677d94a1\\_story.html](http://www.washingtonpost.com/world/national-security/nsa-paying-us-companies-for-access-to-communications-networks/2013/08/29/5641a4b6-10c2-11e3-bdf6-e4fc677d94a1_story.html).

19. See Michael Abramowitz & Steve Mufson, *Papers Detail Industry’s Role in Cheney’s Energy Report*, WASH. POST (July 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071701987.html>.

20. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369–70 (2003) (“A foundational premise of our constitutional order is that public and private are distinct spheres, with public agencies and employees being subject to constitutional constraints while private entities and individuals are not.”).

rational decisionmaking—do not readily apply to the full spectrum of public-private relationships implicating the exercise of federal powers.<sup>21</sup>

*A. The Issue: Agency Subdelegations of Legislative Power*

Lawmaking is arguably “the most important power created for our government by the Founders” because it is “linked to the will of the people through the electoral process and other means.”<sup>22</sup> Of course, Congress routinely empowers agencies to implement statutes by promulgating rules with the force of law. Agencies’ rulemaking authority ultimately derives from Congress’s legislative power under Article I of the Constitution.<sup>23</sup> In *Yakus v. United States*,<sup>24</sup> the Supreme Court defined “[t]he essentials of the legislative function” as “the determination of . . . policy and its formulation and promulgation as a defined and binding rule of conduct . . . which conform to standards and will tend to further the policy which Congress has established.”<sup>25</sup> Because of its Article I origins, “a good case can be made that rule making is the most important function that agencies of government perform”—one that is potentially more significant than congressional legislation in terms of volume, specificity, and immediacy.<sup>26</sup> With today’s gridlocked Congress, the significance of rulemaking has intensified, as lobbyists turn to more sophisticated methods for influencing regulatory agencies.<sup>27</sup> When the federal government outsources its delegated rulemaking powers to the private sector, there is even greater cause for constitutional concern because the rulemaking function loses its constitutional bearings.

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21. See Kimberly N. Brown, “We the People,” *Constitutional Accountability, and Outsourcing Government*, 88 IND. L.J. 1347, 1369, 1376 (2013); cf. VERKUIL, *supra* note 13, at 81 (noting that “[d]elegations of government authority to private hands . . . are decisions that potentially transfer sovereignty” and “should come with strings attached that ensure fairness at the individual level and accountability at the political level”).

22. Scott R. Furlong & Cornelius M. Kerwin, *Interest Group Participation in Rule Making: A Decade of Change*, 15 J. PUB. ADMIN. RES. & THEORY 353, 354 (2005).

23. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

24. 321 U.S. 414 (1944).

25. *Id.* at 424.

26. Furlong & Kerwin, *supra* note 22, at 354.

27. *Id.* at 360–61; see also Mary C. Dollarhide, Note, *Surrogate Rule Making: Problems and Possibilities Under the Administrative Procedure Act*, 61 S. CAL. L. REV. 1017, 1039 (1988) (“Lobbyists are able to anticipate rules before they are officially proposed by agencies and can work fast to secure their interests via industrial compromises, self-regulation, or agency lobbying. Lobbyists, therefore, have much greater potential for influencing the development of substantive rules than do most public interest groups. This notion of agency courting is borne out by studies showing that public participation routinely is exceeded by the lobbying efforts of regulated industries.”).

It is difficult to obtain a precise accounting of the amount and extent of rulemaking activities that are being outsourced to the private sector today. The central repository for federal procurement data indicates that it is happening.<sup>28</sup> At least three private firms—Rulemaking Services, LLC, ICF International (“ICF”), and The Regulatory Group, Inc. (“TRG”)—are ready examples. Tens of thousands of tax dollars have been awarded to Rulemaking Services<sup>29</sup> for tasks that include “Regulatory Studies” and “Policy Review/Development Services.”<sup>30</sup> The company describes its staff as “expert drafters” of “proposed rules, final rules, interim final rules, notices, and other rulemaking documents for federal agencies.”<sup>31</sup> For the Department of Veterans Affairs (“VA”), in particular, it provides “support for all of VA’s rulemaking activities, including drafting and reviewing rulemaking documents, preparing VA responses to legislative proposals, preparing legal opinions, and representing VA in litigation.”<sup>32</sup> Rulemaking Services attributes its “considerable success” to working “directly with agency officials to produce documents that accurately reflect agency thinking.”<sup>33</sup>

For its part, ICF<sup>34</sup> offers “a full range of services to assist clients who develop, promulgate, and implement regulations,” including “clear and

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28. See *FPDS-NG FAQ*, FED. PROCUREMENT DATA SYSTEM, [https://www.fpds.gov/wiki/index.php/FPDS-NG\\_FAQ](https://www.fpds.gov/wiki/index.php/FPDS-NG_FAQ) (last visited Oct. 30, 2015) (describing the federal contract data that must be reported to the Federal Procurement Data System (“FPDS”)).

29. See *FPDS-NG ezSearch*, FED. PROCUREMENT DATA SYSTEM, <https://www.fpds.gov/ezsearch/search.do?indexName=awardfull&templateName=1.4.4&s=FPDSNG.COM&q=%22rulemak+services+limited+liability+company%22> (last visited Oct. 30, 2015).

30. *Id.*

31. *Rulemaking Services, LLC*, RULEMAKING SERVICES, <http://www.rulemakingservices.com/index.html> (last visited Feb. 26, 2015). Numerous scholars have discussed how federal agencies outsource rulemaking functions. See, e.g., Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 739 (2014) (discussing how thousands of regulatory standards are incorporated by reference in the Federal Register or the Code of Federal Regulations and are available only by request to private standards drafters at a nontrivial price); Paul R. Verkuil, *The Wait is Over: Chevron as the Stealth Vermont Yankee II*, 75 GEO. WASH. L. REV. 921, 928 (2007) (“The use of consultants to prepare rules for review has become a common practice.”); David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 63 (2013) (discussing the outsourcing of international policymaking).

32. *About Us*, RULEMAKING SERVICES, <http://www.rulemakingservices.com/about.htm> (last visited May 7, 2016).

33. *Rulemaking Services, LLC*, RULEMAKING SERVICES, <http://www.rulemakingservices.com/index.html> (last visited May 7, 2016).

34. The president of Rulemaking Services, LLC previously worked at ICF. *About Us*, RULEMAKING SERVICES, <http://www.rulemakingservices.com/about.htm> (last visited May 7, 2016). He is also a former director of the office of regulatory law in the Office of General Counsel at the U.S. Department of Veterans Affairs. Thomas O. Gessel, *The Frustration of Informal Rulemaking*, READ PERIODICALS (Apr. 1, 2011), <http://www.readperiodicals.com/201104/2317013711.html>.

precise drafting, defensible and transparent analysis, . . . and balancing certainty and predictability with the need to promote innovation.”<sup>35</sup> ICF claims to have expertise reviewing new legislation; analyzing regulatory issues and options; estimating the economic, environmental, and business impacts of proposed regulations; “supporting the development of proposed and final rulemakings”; summarizing and analyzing public comments on agencies’ behalf; facilitating public involvement in the rulemaking process; developing “implementation plans, communications strategies, and training and outreach programs” for federal clients; and “preparing retrospective analyses of existing rules.”<sup>36</sup>

Located in Arlington, Virginia, TRG has provided similar services to federal agencies since 1980, including drafting notices of proposed rulemaking and final rules, analyzing public comments, drafting agency guidance, and training agency employees on “regulation writing.”<sup>37</sup> Assuming TRG’s website accurately represents the work it performs for federal agencies, it is hard to see it as anything other than a private arm of the federal regulatory apparatus that derives its lawmaking powers from Congress.<sup>38</sup>

The private sector’s influence on environmental policymaking has grabbed national headlines in recent years. In November 2010, the National Resources Defense Council (“NRDC”) and three private sector strategists by the names of David Doniger, David Hawkins, and Daniel Lashof began drafting a carbon emissions policy “that was aimed at slashing planet-warming carbon pollution from the nation’s coal-fired power plants.”<sup>39</sup> Doniger and Hawkins are private lawyers formerly employed by the EPA; Lashof is “a climate scientist who is a fixture on

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35. *Strategy, Policy Analysis, + Regulatory Development*, ICF INT’L, <http://www.icfi.com/services/strategy-policy-analysis-regulatory-development> (last visited Feb. 26, 2015).

36. *Id.* Among its long list of federal contracts, ICF provides “Other Management Support Services” for the Nuclear Regulatory Commission. *FPDS-NG ezSearch*, FED. PROCUREMENT DATA SYSTEM, <https://www.fpds.gov/ezsearch/search.do?s=FPDSNG.COM&q=rulemaking+PIID%3A%22NRCDR0308061%22&indexName=awardfull&templateName=1.4.4> (last visited Dec. 2, 2014).

37. *About the Regulatory Group, Inc.*, THE REG. GROUP, INC., [http://www.regulationwriters.com/about\\_us](http://www.regulationwriters.com/about_us) (last visited Nov. 23, 2015).

38. Its clients have included the Department of Agriculture, the Department of Health and Human Services, the Department of Homeland Security, the Department of Justice, the Department of Interior, the Department of Transportation, the Environmental Protection Agency, and the General Services Administration—as well as numerous sub-agencies, such as the Transportation Security Administration, the Drug Enforcement Administration, and the Federal Aviation Administration. *Consulting Clients*, THE REG. GROUP, INC., [http://www.regulationwriters.com/consulting\\_clients](http://www.regulationwriters.com/consulting_clients) (last visited Mar. 29, 2016).

39. Davenport, *supra* note 5.

Capitol Hill” and chief operating officer of an environmental super PAC.<sup>40</sup> From 2010 to 2012, the three men worked with a team of experts to compose a 110-page proposal that sought to effectuate carbon emissions goals by “set[ting] different limits for each state.”<sup>41</sup> In late 2012, they presented their completed proposal to a number of “state regulators, electric utilities, [and] executives.”<sup>42</sup> Mr. Doniger also “briefed . . . the E.P.A. and Mr. Obama’s senior climate adviser at the time.”<sup>43</sup>

In June of 2013, six months after the group circulated their proposal, President Obama issued a Presidential Memorandum directing the EPA to issue regulations addressing carbon pollution from existing power plants upon “direct engagement with . . . leaders in the power sector, labor leaders, non-governmental organizations, other experts, tribal officials, other stakeholders, and members of the public, on issues informing the design of the program.”<sup>44</sup> The memorandum specifically instructed the EPA “to issue proposed [greenhouse gas] regulations, or guidelines . . . for . . . existing power plants by no later than June 1, 2014,” and “issue final . . . regulations, or guidelines . . . by no later than June 1, 2015.”<sup>45</sup> In June of 2014, the EPA proposed what is now known as the CPP,<sup>46</sup> a controversial 650-page rule to curb power plant emissions under the CAA;<sup>47</sup> it was unveiled in final form in August of 2015.<sup>48</sup>

Because the proposed CPP incorporated key aspects of the draft produced by the NRDC and its advisors, critics assailed it as enabling the private sector to “craft[] regulatory policy for the E.P.A.”<sup>49</sup> Doniger, Hawkins, and Lashof have been described “as seasoned and [as] well connected as Washington’s best-paid lobbyists because of their decades of

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Memorandum on Power Sector Carbon Pollution Standards, 78 Fed. Reg. 39,533 (July 1, 2013), available at <https://www.gpo.gov/fdsys/pkg/DCPD-201300457/pdf/DCPD-201300457.pdf>.

45. *Id.*

46. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014) (to be codified at 40 C.F.R. pt. 60); *see also generally* Davenport & Baker, *supra* note 1 (describing the proposed regulation as allowing states to choose from a menu of policy options rather than imposing a uniform standard for reducing power plant carbon emissions).

47. 42 U.S.C. § 7401 et seq. (2014).

48. Jackson, *supra* note 1.

49. Davenport, *supra* note 5 (quoting Dallas Burtraw, an energy policy expert at Resources for the Future, a Washington nonprofit, and Laura Sheehan, a spokesperson for the American Coalition for Clean Coal Electricity, a lobbying group).

experience and the relationships they formed in the capital.”<sup>50</sup> For its part, the NRDC is “one of the country’s most influential environmental groups.”<sup>51</sup> In 2009, it had “at least a half-dozen [of its] former employees” seated in “prime government positions tasked with writing U.S. climate and energy policies.”<sup>52</sup> It has received nearly \$2 million in grant funding from the EPA since.<sup>53</sup>

In response to reporting by The New York Times,<sup>54</sup> the House Oversight and Government Reform Committee and Senate Environment and Public Works Committee Republicans launched an investigation into the NRDC’s influence over the EPA, complaining that “NRDC’s unprecedented access to high-level EPA officials allowed it to influence EPA policy decisions and achieve its own private agenda.”<sup>55</sup> The Republicans sought documents regarding the NRDC’s involvement in drafting the agency’s proposed regulations for carbon emissions from existing power plants.<sup>56</sup> In October of 2014, lawmakers publicly released emails from top EPA officials, including Administrator Gina McCarthy, which evidenced NRDC’s relationship with EPA dating back to 2011—two years before the agency opened up the rulemaking for public input.<sup>57</sup> In one exchange with Administrator McCarthy, David Doniger attached a multi-page presentation showing that the CPP “would achieve reasonable-cost reductions from the existing fossil power plant fleet on a continuing

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50. *Id.* EPA Administrator Gina McCarthy rejected as “preposterous” any implication that EPA staff “‘just cut and pasted’ NRDC’s work ‘and called it a day.’” Erica Martinson, *EPA Chief Pans New York Times Story*, POLITICO (July 10, 2014, 5:21 PM), [http://www.politico.com/blogs/media/2014/07/epa-chief-pans-ny-times-story-191891.html#disqus\\_thread](http://www.politico.com/blogs/media/2014/07/epa-chief-pans-ny-times-story-191891.html#disqus_thread). A reporter who broke the story later conceded that “[t]he task of writing [the regulatory] language [fell] chiefly on the shoulders of . . . the agency’s senior counsel.” Coral Davenport, *E.P.A. Staff Struggling to Create Pollution Rule*, N.Y. TIMES (Feb. 4, 2014), [http://www.nytimes.com/2014/02/05/us/epa-staff-struggling-to-create-rule-limiting-carbon-emissions.html?\\_r=0](http://www.nytimes.com/2014/02/05/us/epa-staff-struggling-to-create-rule-limiting-carbon-emissions.html?_r=0).

51. Darren Samuelsohn, *Environmental Policy: ‘NRDC Mafia’ Finding Homes on Hill*, in EPA, E&E PUBLISHING, LLC (Mar. 6, 2009), <http://www.eenews.net/stories/75217>.

52. *Id.*

53. Press Release, H. Comm. on Oversight and Gov’t Reform, House Oversight, Senate EPW Launch Investigation into Improper NRDC Influence over EPA (Sept. 2, 2014), *available at* <http://oversight.house.gov/release/house-oversight-senate-epw-launch-investigation-improper-nrdc-influence-epa/>.

54. See Letter from H. Comm. on Oversight and Gov’t Reform and S. Environment and Public Works Comm. to Gina McCarthy, Administrator, U.S. EPA 1 (Sept. 2, 2014), *available at* <https://oversight.house.gov/wp-content/uploads/2014/09/Joint-LTE-to-EPA-RE-NRDC-9.2.14.pdf>.

55. *Id.*

56. *Id.* at 3.

57. Coral Davenport, *Republicans to Investigate Environmental Group’s Influence on Carbon Rule*, N.Y. TIMES (Oct. 10, 2014), [http://www.nytimes.com/2014/10/11/us/republicans-to-investigate-environmental-groups-influence-on-carbon-rule.html?\\_r=0](http://www.nytimes.com/2014/10/11/us/republicans-to-investigate-environmental-groups-influence-on-carbon-rule.html?_r=0).

basis.”<sup>58</sup> McCarthy agreed to review it and schedule a time for Doniger to brief her as, she reportedly commented, “I would never say no to a meeting with you.”<sup>59</sup>

To be sure, the CPP went through multiple phases of agency review before finding its way into the Federal Register. The EPA’s analysts and experts sought input from hundreds of groups, “including environmental advocates, state regulators, electric utilities and the coal industry.”<sup>60</sup> Under the Administrative Procedure Act (“APA”),<sup>61</sup> the EPA was required to consider the additional public input collected during the comment period.<sup>62</sup> Thus, as Joseph Siegel has observed, the government “retain[ed] ultimate authority to impose its own solutions using traditional processes.”<sup>63</sup>

Reviewing and responding to public comments on a rule drafted by the private sector is substantively different from controlling the content of a legislative rule—and thus the formulation of policy—from its inception, however. When a private party crafts the legal basis for a rule, it is impossible to know “whether this statutory interpretation represented a position that the agency would have come to on its own—much less one that embodied an application of the agency’s putative legal expertise.”<sup>64</sup> Moreover, a separation of powers concern arises when “the exercise of public power, and the creation of public policy, [is conducted] by an entity without democratic credentials or direct political accountability.”<sup>65</sup> To be sure, there is no clear dividing line between regulators’ consideration of legitimate on- or off-the-record lobbying and their offloading of policymaking functions in a manner that is constitutionally suspect. But as the CPP irregularities demonstrate, courts and lawmakers can no longer

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58. Bruce Alpert, *Sen. David Vitter: EPA Emails Show ‘Cozy Relationship’ with Environmental Group*, NOLA.COM (Oct. 14, 2014, 8:17 PM), [http://www.nola.com/politics/index.ssf/2014/10/sen\\_david\\_vitter\\_epa\\_emails\\_sh.html](http://www.nola.com/politics/index.ssf/2014/10/sen_david_vitter_epa_emails_sh.html).

59. *Id.*

60. Davenport, *supra* note 5.

61. 5 U.S.C. §§ 551–596 (2014).

62. *Id.* § 553. Executive Order 13563 also requires that, “[b]efore issuing a notice of proposed rulemaking, each agency . . . shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.” Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,822 (Jan. 18, 2011) (emphasis added).

63. Joseph A. Siegel, *Collaborative Decision Making on Climate Change in the Federal Government*, 27 PACE ENVTL. L. REV. 257, 263 (2009); see also *id.* at 261 (defining collaborative decisionmaking as including processes “where agreement is sought and decisions are made with the government” and noting that it is sometimes referred to as “stake-holder involvement, public involvement, public participation, public-private partnership, deliberative democracy, constructive engagement, and collaborative problem solving”).

64. Robert Choo, *Judicial Review of Negotiated Rulemaking: Should Chevron Deference Apply?*, 52 RUTGERS L. REV. 1069, 1110 (2000).

65. Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 191 (2000).

ignore the constitutional implications of private sector rulemaking. A new paradigm for thinking about the relationship between the public and the private sectors is needed to facilitate the development of law around this overlooked issue.

### B. A Constitutional Policymaking Continuum

Because the Constitution only applies to state action,<sup>66</sup> the government's use of *private* sources to conduct its work evades the doctrinal scrutiny that would otherwise operate to preserve normative government values such as public accountability, legitimacy, transparency, and rational decisionmaking.<sup>67</sup>

The primary means available for keeping private actors who exercise public functions within constitutional constraints is the state action doctrine.<sup>68</sup> In the words of the Supreme Court, the Fourteenth Amendment “affords no shield” against private conduct, “no matter how unfair that conduct may be.”<sup>69</sup> As a consequence, the state action doctrine treats private parties as government actors in suits brought by individual plaintiffs seeking injunctive relief or damages for violations of their constitutional rights.<sup>70</sup> For many reasons, securing a ruling that a private actor is a state actor for purposes of constitutional liability is extraordinarily difficult.<sup>71</sup> The Supreme Court itself has quipped that “[w]hat is ‘private’ action and what is ‘state’ action is not always easy to

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66. See, e.g., *United States v. Jacobsen*, 466 U.S. 109, 113–14 (1984).

67. See Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 TULSA L. REV. 485, 486 (2004) (discussing various theories that account for why the Constitution ensures legitimacy or “respect-worthiness”); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 42 (1995) (discussing accountability to the electorate as a “key consideration” underlying the Constitution’s design); Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623, 626 (2009) (arguing that the Constitution’s drafters had “a strong preference for rational, deliberate decision making over making choices based on feelings or intuition” that was widely accepted in contemporary culture); Katherine Clark Harris, Note, *The Statement and Account Clause: A Forgotten Constitutional Mandate for Federal Reporting*, 32 YALE L. & POL’Y REV. 505, 513 (2014) (observing that “Madison also held the strong belief that transparency was the primary means by which the federal government is held accountable to the people”).

68. Metzger, *supra* note 20, at 1410.

69. *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988); see also generally Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. C.R. L.J. 203, 209 (2001) (discussing U.S. CONST. amend. XIV, which extended the Bill of Rights to the States).

70. Metzger, *supra* note 20, at 1367.

71. See *id.* at 1421 (observing that “current state action doctrine is significantly underinclusive and ill-equipped to identify and thereby control private exercises of government power”).

determine.”<sup>72</sup> Rather, a court’s role is to “sift[] facts and weigh[] circumstances” in individual cases,<sup>73</sup> which leaves a dizzying array of outcomes with few common threads.

Moreover, the state action doctrine places an agency’s decision to hand off government functions to private parties beyond constitutional scrutiny. It approaches judicial review of public-private partnerships from the vantage point of the private sector, to which structural constitutional norms do not apply. A case for state action begins with the assumption that a person or entity exercising government power is purely private. The doctrine asks whether, by assuming duties under the government’s control, the actor morphs from private to public status.<sup>74</sup> In theory, government control over a private actor can become so strong that it transforms into a state actor encumbered by constitutional liability. In the majority of cases, government powers delegated to private parties are exercised extra-constitutionally because the test for state action is so difficult to satisfy. As a result, norms of constitutional structure do not apply to constrain private actors’ exercise of government functions.<sup>75</sup>

By contrast, the law governing Congress’s ability to create quasi-private entities with government powers begins from the vantage point of the government actor operating within the boundaries of the Constitution.<sup>76</sup> Cases addressing the constitutionality of independent agencies inescapably contend with principles of proper constitutional design.<sup>77</sup> If an entity is created as part of the legislative process, it cannot shed its public status under the Constitution—regardless of congressional attempts to decrease the level of government influence over it. For

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72. *Evans v. Newton*, 382 U.S. 296, 299 (1966); see also Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379, 391 (1993) (“No area of constitutional law is more confusing and contradictory than state action.”).

73. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

74. Gillian Metzger summarizes the state action doctrine as having two prongs:

[F]irst, whether “the [challenged] deprivation . . . [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible”; and second, whether “the party charged with the deprivation . . . [is] a person who may fairly be said to be a state actor.”

Metzger, *supra* note 20, at 1412 (alterations in original) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). Professor Metzger notes that, because the first prong is easily satisfied, the key step is the second, which is “often alternatively characterized as determining whether ‘there is a sufficiently close nexus between the state and the challenged action.’” *Id.* at 1412 & n.149 (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999)).

75. See *Brown*, *supra* note 8, at 507–12.

76. See *id.*

77. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (assessing the constitutionality of the independent counsel statute under Article II).

example, although Amtrak was legislatively established as a for-profit corporation, the Supreme Court rejected Congress's attempt to relieve "what the Constitution regards as the Government" of its constitutional obligations by simply deeming Amtrak "private" in the enabling statute.<sup>78</sup>

The Court would be similarly hard-pressed under prevailing law to sanction a congressional attempt to create a private consulting corporation and give it full power to implement a statute extra-constitutionally. In the wake of the 2001 Enron and WorldCom scandals, Congress created an independent agency with a novel structure—the Public Company Accounting Oversight Board ("PCAOB")—and gave it primary responsibility for devising and enforcing auditing standards for the accounting industry.<sup>79</sup> The PCAOB promulgates rules; inspects and investigates firms for violations of federal securities laws; imposes censures, suspensions, and monetary fines; and enjoys subpoena authority, official immunity from liability, and privileges from third party discovery.<sup>80</sup> Yet Congress exempted the PCAOB from the definition of "agency" for purposes of the APA,<sup>81</sup> empowered the SEC—not the President—to appoint and remove the PCAOB's five members, and authorized removal by the SEC only "for good cause shown" after a hearing on the record.<sup>82</sup> Congress also made the PCAOB uniquely independent of legislative pressures by allowing it to fund itself through the collection of fees,<sup>83</sup> to set its own budget,<sup>84</sup> and to afford its members a private sector pay scale with salaries that substantially exceed that of the President himself.<sup>85</sup>

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>86</sup> the Supreme Court struck down a portion of the statute<sup>87</sup> that rendered the PCAOB subject to removal for cause by the SEC. It held that

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78. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995).

79. See Stephen Labaton, *A Push to Fix the Fix on Wall Street*, N.Y. TIMES (Dec. 17, 2006), [http://www.nytimes.com/2006/12/17/weekinreview/17labaton.html?\\_r=0](http://www.nytimes.com/2006/12/17/weekinreview/17labaton.html?_r=0) (describing events leading up to the creation of the PCAOB).

80. 15 U.S.C. §§ 7211(c), 7215 (2014); see also generally Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975 (2005).

81. 15 U.S.C. § 7211(b) ("The Board shall not be an agency or establishment of the United States . . ."). The APA applies only to entities that constitute an "agency," which it defines as "authorit[ies] of the Government of the United States." 5 U.S.C. § 551(1) (2014).

82. 15 U.S.C. §§ 7211(e)(6), 7217.

83. See *id.* § 7219(c)(1) (providing for the collection of "accounting support fees").

84. *Id.* § 7211(c)(7).

85. See *id.* §§ 7211(f)(4), 7219.

86. 561 U.S. 477 (2010).

87. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

the statute's creation of "dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers"<sup>88</sup> because the President is unable to "hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does."<sup>89</sup> Had Congress instead authorized the SEC to devise standards for the accounting industry, and the SEC subsequently hired a private party to craft them, the SEC's relationship with that private party would not have triggered anything approaching the constitutional scrutiny that the PCAOB received.<sup>90</sup> For the same policy reasons that the Court found the PCAOB's structure insupportable, it should develop constitutional doctrine to address this blind spot, as well.

To illustrate the paradox, suppose a private consulting group with expertise in environmental policy (call it "PCC") contracts with the EPA to craft a regulation under the CAA to cut carbon emissions from power plants over the next 15 years. Although PCC's initial contract with the EPA only covers the drafting of a notice of proposed rulemaking ("NPRM"), the EPA later broadens the scope of work to include solicitation and analysis of public comments; private meetings with lobbyists, members of Congress, and public interest groups to solicit input; revisions to the NPRM; and drafting of the final rule. The PCC is also responsible for ensuring the EPA has complied with the myriad other federal statutes that encumber notice and comment rulemaking under the APA,<sup>91</sup> such as the Regulatory Flexibility Act,<sup>92</sup> the Paperwork Reduction Act,<sup>93</sup> the Unfunded Mandates Reform Act,<sup>94</sup> the Small Business Regulatory Enforcement Fairness Act,<sup>95</sup> and numerous Executive Orders affecting rulemaking.<sup>96</sup>

PCC's scope of work would likely violate guidelines for the competitive outsourcing of federal jobs, which the Office of Management

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88. *Free Enter. Fund*, 561 U.S. at 492.

89. *Id.* at 496.

90. See Metzger, *supra* note 20, at 1400 ("A fundamental tenet of constitutional law posits an 'essential dichotomy' between public and private, with only public or government actors being subject to constitutional restraints.").

91. 5 U.S.C. § 551 (2014).

92. *Id.* §§ 601–612.

93. 44 U.S.C. §§ 3501–3521 (2014).

94. 2 U.S.C. §§ 1501–1571 (2014).

95. Pub. L. No. 104-121, 110 Stat. 864 (1996).

96. See, e.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1982); Exec. Order No. 12,498, 3 C.F.R. 323 (1986) (requiring OMB oversight of the regulatory process through its Office of Information and Regulatory Affairs); see also 44 U.S.C. §§ 3501–3521.

and Budget issued in 1976.<sup>97</sup> Circular A-76 forbids the outsourcing of “inherently governmental” functions, which it defines to include activities that determine, protect, or advance US interests by military action or contract management; that significantly affect the life, liberty, or property of private persons; or that exert ultimate control over the disposition of federal property.<sup>98</sup> But the EPA could erroneously classify PCC’s work under Circular A-76, and judicial review of that decision is largely unavailable.<sup>99</sup> And because Congress did not create PCC, there would be no judicial review of its EPA contract for compliance with the separation of powers and related principles of constitutional structure.

The paradox created by the foregoing scenario—that important constitutional values come into play only when Congress attempts to privatize government, and not when an agency does—stems from the futile line-drawing that underlies prevailing doctrine as to the Constitution’s scope. A better and more realistic approach would recognize that the public and private sectors intersect in myriad and complex ways, and that the Constitution’s relevance should not hinge on which branch of government—Congress or the executive—established the public-private partnership in question. In fact, given that Congress has the constitutional power to “make all laws which shall be necessary and proper for carrying into execution . . . [all] powers vested by this Constitution in the Government of the United States, or in any department or officer thereof,”<sup>100</sup> one would expect that its decisions about what kind of entity is best situated to implement its legislative mandates would receive relatively less—not more stringent—constitutional scrutiny.

The recognition that government lies along a constitutional continuum and not along a sharp public-private divide is of immense practical importance. In addition to independent agencies and wholly-owned government corporations, the federal government umbrella includes numerous other entities, such as corporations partly-owned by the federal government, federally-chartered corporations that are privately owned,<sup>101</sup>

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97. Paul R. Verkuil, *Outsourcing and the Duty to Govern*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 310, 326 (Jody Freeman & Martha Minow eds., 2009) [hereinafter “GOVERNMENT BY CONTRACT”] (citing OMB, Circular A-76, Attachment A, Part B).

98. Verkuil, *supra* note 97, at 326. An agency’s decision of what is “inherently governmental” is effectively not reviewable. VERKUIL, *supra* note 13, at 126. Although an “interested party” can lodge a legal challenge, Article III standing problems can preclude judicial review.

99. See VERKUIL, *supra* note 13, at 128.

100. U.S. CONST. art. I, § 8, cl. 18.

101. Beermann, *supra* note 16, at 1517; see also generally Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1228–31 (2000) (“While they share similar characteristics with the independent agencies

government-sponsored enterprises (“GSEs”) like Fannie Mae and Freddie Mac,<sup>102</sup> self-regulatory organizations (“SROs”) such as the New York Stock Exchange,<sup>103</sup> as well as numerous offices, boards, commissions, and foundations with all different sorts of government ties.<sup>104</sup> This impressive collection of quasi-government establishments is characterized by varying degrees of executive branch control and accountability; while GSEs are not subject to the Freedom of Information Act (“FOIA”), for example, certain—but not all—federal corporations are treated as agencies within the meaning of the APA.<sup>105</sup>

If the various arrangements by which the many public, private, and quasi-public actors exercising governmental power are plotted on a constitutional graph or continuum rather than within separate public and private spaces, it becomes immediately evident that no crisp line exists between the public and the private spheres. To be sure, cabinet-level agencies would reside on one end of this continuum and purely private actors with no government affiliations on the other. But between those

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... [public corporations’] corporate structure is the feature that sets them apart from the independent agency.”).

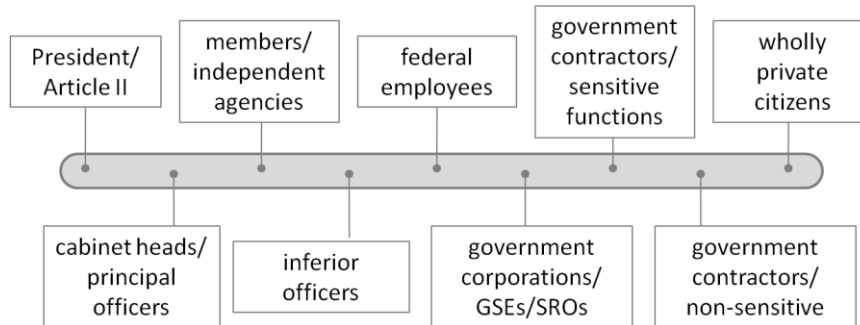
102. A government sponsored enterprise “is a federally chartered, privately owned, privately managed financial institution that has only specialized lending and guarantee powers and that bond-market investors perceive as implicitly backed by the federal government.” Richard Scott Carnell, *Handling the Failure of a Government-Sponsored Enterprise*, 80 WASH. L. REV. 565, 570 (2005).

103. Private entities self-regulate through “industrial codes and product standards,” which agencies incorporate in government regulations. Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 401 (2003). For its part, the SEC has repeatedly stated that “as a general matter, self-regulatory organizations . . . are not state actors and thus are not subject to the Constitution’s due process requirements.” In the Matter of Timothy H. Emerson, Jr. for Review of Action Taken by FINRA, Exchange Act Release No. 60,328 (July 17, 2009), at 11; see also William I. Friedman, *The Fourteenth Amendment’s Public/Private Distinction Among Securities Regulators in the U.S. Marketplace—Revisited*, 23 ANN. REV. BANKING & FIN. L. 727, 746 (2004) (noting that “courts have acknowledged the government’s symbiotic relationship with the SROs in their joint regulation of the securities markets; and yet they have been unwilling to extend the protections of the Constitution to parties adversely affected by the SROs’ activities”).

104. Breger & Edles, *supra* note 101, at 1199; see also *generally id.* at 1228–34 (discussing government corporations and GSEs generally).

105. 5 U.S.C. § 552 (2014); Breger & Edles, *supra* note 101, at 1229–30; see also Shapiro, *supra* note 103, at 390.

poles lies a vast array of “quasi” entities.<sup>106</sup> A rough illustration of such a normative continuum is as follows:<sup>107</sup>



This visual depiction of the relationship between public and private actors engaged in identical federal regulatory work demonstrates that all such actors bear a relationship to the structural Constitution. The separation of powers exists to protect individual liberty, which remains at risk if the power of the people is exercised by biased, unaccountable individuals. There is no point along the continuum at which the public nature of the functions performed magically disappears or becomes constitutionally insignificant. The continuum thus necessitates a realistic assessment of whether normative values of good government—grounded in the separation of powers—are preserved in the array of quasi-private governmental structures that dot the federal government today. It also highlights a blind spot in prevailing constitutional doctrine—one that

106. In his dissenting opinion in *Free Enterprise Fund v. PCAOB*, Justice Breyer emphasized that federal statutes broadly delegate a host of powers and responsibilities to government officials and that “[t]hose statutes create a host of different organizational structures.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 520–21 (2010) (Breyer, J., dissenting). He explained:

[S]ometimes they vest it in multimember or multiagency task groups; sometimes they vest it in commissions or advisory committees made up of members of more than one branch; sometimes they divide it among groups of departments, commissions, bureaus, divisions, and administrators; and sometimes they permit state or local governments to participate as well.

*Id.* at 521 (citations omitted). In making the point that “it is not surprising that administrative units comes in many different shapes and sizes,” Justice Breyer did not mention that such administrative units increasingly include private companies. *Id.*

107. The point here is to illustrate the continuum concept, not commit to a particular order or comprehensiveness of relationships. See Brown, *supra* note 8, at 510–11, 511 n.112; cf. Steven L. Schwarcz, *Private Ordering*, 97 Nw. U. L. REV. 319, 324 (2002) (describing a continuum of rulemaking that is classified by the amount of governmental participation involved, with one end reflecting “rules of law originated and put into force by sovereign governments” and “rules that are adopted entirely by private actors” at the other).

shrouds the private sector in an intellectually corrupt veil of extra-constitutionality.<sup>108</sup>

### C. Baseline Values

So far, this Article has argued that the Court's treatment of private parties as per se operating outside the scope of the Constitution—regardless of the governmental nature of their work—leaves unrealized important normative values of good government. This Subpart spells out what some of those values are—to wit, accountability, transparency, legitimacy, and rational decisionmaking—and explains how, in contrast to their federal counterparts, private actors exercising government power systematically evade them.

#### 1. Accountability

A central component of governance is political accountability. To be accountable is to be answerable, explainable, and reckoning for one's actions.<sup>109</sup> Under the Constitution, government accountability presumes that the source of federal power—the people—must have some say in how it is exercised.<sup>110</sup> The Framers' decision to create a unitary executive underscores the importance of accountability to the public in the Constitution's structure.<sup>111</sup> Madison explained in Federalist No. 37 that "[t]he genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted [sic] with it should be kept in dependence on the people."<sup>112</sup> For government

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108. See Brown, *supra* note 8, at 511–12.

109. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 50 (1989).

110. See Brown, *supra* note 21, at 1370.

111. Memorandum Opinion for the General Counsels of the Federal Government: The Constitutional Separation of Powers Between the President and Congress, 20 OP. O.L.C. 124, 135 (1996) [hereinafter *Constitutional Separation of Powers*].

112. THE FEDERALIST NO. 37, at 181 (James Madison) (Ian Shapiro ed., 2009). Public accountability has been described further as encompassing the:

sense of individual responsibility and concern for the public interest expected from public servants[,] . . . the various institutional checks and balances by which democracies seek to control the actions of the governments[,] . . . the extent to which governments pursue the wishes or needs of their citizens . . . regardless of whether they are induced to do so through processes of authoritative exchange and control[,] . . . [and] the public discussion between citizens on which democracies depend . . . .

Richard Mulgan, 'Accountability': An Ever-Expanding Concept?, 78 PUB. ADMIN. 555, 556 (2000).

actors, “the key accountability relationships . . . are those between the citizens and the holders of public office.”<sup>113</sup>

Moreover, as Madison famously stated in Federalist No. 51, the system of separated powers was designed so that “[a]mbition must be made to counteract ambition.”<sup>114</sup> Madison described the underlying “policy” of the separation of powers as “divid[ing] and arrang[ing] the several offices in such a manner as that each may be a check on the other.”<sup>115</sup> Because the legislature posed a risk of amassing too much power, it was split into two houses “on [the] ground that each House will keep the other in check.”<sup>116</sup> Individual members of Congress do not always make decisions for the good of the nation as a whole, and can become mired in internal politics that prompt legislation to serve individual ends. Lawmaking by Congress is checked through the presidential veto and judicial review. Although the unitary President can act decisively without becoming enmeshed in internal politics, he can also act arbitrarily, and as such his power is limited to the veto, commanding armies, negotiating treaties, and nominating public officials.<sup>117</sup>

The Constitution does not create an administrative bureaucracy, and unlike Congress, agencies occupy quasi-legislative, quasi-judicial, and executive postures without any direct electoral check.<sup>118</sup> Thus, numerous scholars have occupied themselves with questions of accountability within the administrative state.<sup>119</sup> The constitutional and statutory law bearing on the attenuated political accountability for executive branch agencies, moreover, is deep. In the New Deal era, the Supreme Court famously thwarted congressional attempts to delegate its Article I legislative power to the executive branch on the rationale that Congress had set “no criterion

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113. Mulgan, *supra* note 112, at 556.

114. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009).

115. *Id.*

116. *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (citing THE FEDERALIST NO. 63 (James Madison)).

117. See Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 305 (2009).

118. Executive Departments are mentioned in the Opinions Clause. See U.S. CONST. art. II, § 2 (“[The President] may require the opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . .”); see also *id.* (“[Executive] [a]ppointments are not herein otherwise provided for, and which shall be established by Law . . .”).

119. See generally Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1747–50, 1754 (2009) (describing debate between presidential “unitarians” who “emphasize accountability as an important constitutional principle” and others who believe that the Constitution “adopts a framework of joint, rather than single or simple accountability” and analyzing the “major functional question regarding the administrative state,” in other words, “whether it permits end-runs around the accountability protections that would apply were Congress or the other named branches performing the activities delegated to it”).

to govern the President's course."<sup>120</sup> Yet it swiftly established that Congress has the constitutional authority to delegate its legislative power to the executive branch so long as its enabling legislation includes an "intelligible principle" to guide the exercise of discretion.<sup>121</sup>

For its part, Congress responded to public concern over the accountability of New Deal agencies<sup>122</sup> by enacting the APA in 1946.<sup>123</sup> The APA remains the primary statutory source for public disclosure, public involvement in rulemaking, and judicial review of administrative decision-making today.<sup>124</sup> William Funk explains that, like the Constitution, the APA "does not indicate a rejection of the need for strong government for the proper functioning of modern society, but rather a healthy disrespect for the motives and abilities of men placed in power."<sup>125</sup> The APA "uses procedural mechanisms to check the power granted," such as mandatory notice of proposed rules and the solicitation and consideration of public comments, "while not denying the need for the power."<sup>126</sup> Thus, much like the Constitution, the APA advances normative values of good government, including accountability to the political branches (and thus to the public), fairness, transparency, regularity, expertise, and reasoned decisionmaking.<sup>127</sup> The statute has remained largely untouched since its passage, with the Supreme Court taking up the task of construing its provisions in a manner that effectuates these public policy objectives.<sup>128</sup>

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120. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 415 (1935); see also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

121. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

122. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1590–91 (1996).

123. Administrative Procedure Act, 5 U.S.C. § 551 (2014).

124. *Id.* The APA's basic purposes are (1) "[t]o require agencies to keep the public currently informed of their organization, procedures and rules"; (2) "to provide for public participation in the rule making process"; (3) "to prescribe uniform standards for the conduct of formal rulemaking [and adjudication]"; and (4) "to restate the law of judicial review." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

125. William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55, 90 (1987) (calling the APA "a compromise piece of legislation designed to constrain the discretion of agencies while legitimating their remaining discretion through procedural regularity and judicial oversight").

126. *Id.*

127. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 693 (2007).

128. Richard J. Pierce, Jr., *The APA and Regulatory Reform*, 10 ADMIN. L.J. AM. U. 81, 81–82 (1996) (noting that the APA "has proven to be remarkably durable").

After a second wave of government expansion in the early 1970s,<sup>129</sup> government began to shift from bureaucratic administration to business-like management, with private parties functioning as “the new agents of the state.”<sup>130</sup> In fiscal year 2016 alone, the federal government paid over \$113 billion to private contractors,<sup>131</sup> which have been known to formulate federal policy, interpret laws, administer foreign aid, manage nuclear weapons sites, interrogate detainees, and control borders.<sup>132</sup> A new canon of privatization scholarship emerged, with some commentators “embrac[ing] self-regulation”<sup>133</sup> and others decrying the privatization trend as deeply problematic.<sup>134</sup>

Privatization has triggered novel questions of “accountability, and the extent to which delegation adequately constrains administrative action within the rule of law.”<sup>135</sup> Yet unlike the law governing federal agencies, constitutional doctrine has not kept pace with privatization. The post-New Deal Court struck down a number of statutory delegations of legislative power to private hands,<sup>136</sup> only to later uphold legislation authorizing private individuals to engage in regulatory efforts on the rationale that public officials ultimately retained review authority.<sup>137</sup> The

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129. R. Shep Melnick, *The Conventional Misdiagnosis: Why “Gridlock” Is Not Our Central Problem and Constitutional Revision Is Not the Solution*, 94 B.U. L. REV. 767, 772 (2014) (referencing “the expansion of the government agenda in the 1960s and 1970s”).

130. Avishai Benish, *Outsourcing, Discretion, and Administrative Justice: Exploring the Acceptability of Privatized Decision Making* 3 (Jerusalem Papers in Regulation & Governance, Working Paper No. 64, 2014).

131. See *Overview of Awards—FY 2016*, USA SPENDING, <https://www.usaspending.gov/transparency/Pages/OverviewOfAwards.aspx> (last visited Mar. 22, 2016).

132. See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 138 (2005) (discussing the privatization of foreign affairs); Freeman, *supra* note 15, at 551–52 (discussing the pervasiveness of private actors in “regulation, service provision, policy design, and implementation”).

133. Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 J. DISP. RESOL. 269, 272 (describing “the legal scholarship of the new governance”).

134. See, e.g., Simon Chesterman, *‘We Can’t Spy . . . If We Can’t Buy!’: The Privatization of Intelligence and the Limits of Outsourcing ‘Inherently Governmental Functions,’* 19 EUR. J. INT’L L. 1055, 1056–57 (2008) (noting that controversy over private military and security companies coalesces around cost, self-dealing, corruption, accountability, and secrecy); Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in GOVERNMENT BY CONTRACT, *supra* note 97, at 110–27 (2009) (elaborating on same); VERKUIL, *supra* note 13, at 1 (“The government exercises sovereign powers. When those powers are delegated to outsiders, the capacity to govern is undermined.”).

135. Bingham, *supra* note 133, at 273.

136. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down statute authorizing local coal boards to determine coal prices and employee wages and hours). The Court based its decision on the Commerce and Due Process Clauses. *Id.* at 297–304.

137. See Metzger, *supra* note 20, at 1438–45.

Court has never clarified the nature of government oversight required to render a private delegation constitutional. If an agency transfers significant governmental authority to a private party, no constitutional doctrine addresses whether an official's "rubber stamp" suffices to render the delegation constitutional.<sup>138</sup> Additionally, private contractors are not appointed by the President. The APA, the FOIA, and other process-oriented statutes apply only to federal agencies.<sup>139</sup> Private parties under contract with the federal government are not subject to the same pay, political activity, and labor restrictions that apply to government employees.<sup>140</sup> As a consequence, although private parties exercising government functions lie along a constitutional continuum with degrees of separation from the President, there are few administrative or constitutional law mechanisms establishing their accountability to the populace they serve.<sup>141</sup>

## 2. Transparency

A second hallmark of good governance is transparency. To be sure, the Constitution contains no public right of access to information regarding the activities of government.<sup>142</sup> But transparency is reflected as a normative value in the Constitution's express requirements that the President report on the state of the Union<sup>143</sup> and that Congress keep a "Journal of its Proceedings, and from time to time publish the same."<sup>144</sup> Lawmaking takes place in public view; the legislature mediates numerous

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138. See generally VERKUIL, *supra* note 13, at 109–10. The Department of Justice's Office of Legal Counsel has construed *Buckley v. Valeo*, 424 U.S. 1, 140–41 (1976), to hold that "private individuals may not determine the policy of the United States, or interpret and apply federal law in any way that binds the United States or affects the legal rights of third parties" under the Constitution. *Constitutional Limits on "Contracting Out" Department of Justice Functions Under OMB Circular A-76*, 14 OP. OFF. LEGAL COUNSEL 94, 99 (1990). "Properly appointed federal officials must maintain both legal and effective control over the direction of United States policy . . ." *Id.*

139. See 5 U.S.C. § 551(1) (2014).

140. Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 338 (2004).

141. See David H. Rosenbloom & Suzanne J. Piotrowski, *Outsourcing the Constitution and Administrative Law Norms*, 35 AM. REV. PUB. ADMIN. 103, 104–05 (2005).

142. Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 932 (2006); see also *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."). Adam Samaha observes, however, that "[t]hree justices dissented [in *Houchins*], stressing their opposition to total denial of public access to information about jail operations." Samaha, *supra*, at 942 n.151 (citing *Houchins*, 438 U.S. at 29–39 (Stevens, J., dissenting)).

143. U.S. CONST. art. II, § 3.

144. U.S. CONST. art. I, § 5, cl. 3.

competing interests and must reach a compromise in order to move forward.

First Amendment jurisprudence supports the notion that without transparency, responsive and adaptive government cannot exist. It is “well established that the Constitution protects the right to receive information and ideas.”<sup>145</sup> The Court has characterized the First Amendment as “assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>146</sup> The ability of the people to speak and debate freely renders government responsive and accountable to the people.<sup>147</sup> The Supreme Court has repeatedly construed the Free Speech Clause as enabling the citizenry to correct government through wide-open debate.<sup>148</sup>

Despite the normative value placed on transparency under the Constitution, the public has limited access to information revealing the full extent of private sector influence on government. Jody Freeman and Martha Minow describe federal contracts made “literally off the books.”<sup>149</sup>

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145. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (“[W]here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases.”); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”); *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (“The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official’s fitness for office is relevant.”); Samaha, *supra* note 142, at 941 (footnotes omitted) (“One can logically read the Amendment as promoting a system of communication in which audiences possess interests in parity with speakers. In fact, the Court had long accepted listeners’ First Amendment interests. And the judiciary was indicating that ‘political speech’ and ‘robust’ debate on ‘public issues’ were at the core of its concerns.”).

146. *Roth v. United States*, 354 U.S. 476, 484 (1957) (citing a 1774 letter by the Continental Congress in 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774)); *accord* *Mills*, 384 U.S. at 218–19.

147. *See, e.g.*, THE FEDERALIST NO. 84 (Alexander Hamilton); *Mills*, 384 U.S. at 219; *cf.* *Gravel v. United States*, 408 U.S. 606, 640–41 (1972).

148. *See, e.g.*, *Gravel*, 408 U.S. at 640–41 (observing that the First Amendment protects not just speakers but listeners—a protection that aids public access to information about government and thus its ability to hold government accountable); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (observing that “free political discussion” serves “the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, [which] is a fundamental principle of our constitutional system”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964) (citing *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)) (noting that the First Amendment protects “uninhibited, robust, and wide-open” dissemination of ideas because public debate ensures that government can be changed).

149. Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, in GOVERNMENT BY CONTRACT, *supra* note 97, at 1, 3.

Although Acquisition.gov<sup>150</sup> is the leading public website for government contracting information, its information is coded for contractors, not lay citizens, and does not include a central repository of federal contracting documents.<sup>151</sup>

Administrative law places no public disclosure requirements on private contractors.<sup>152</sup> The APA's FOIA provisions do not cover records related to the private sector's federal government work.<sup>153</sup> Nor does the Federal Advisory Committee Act ("FACA")<sup>154</sup> apply to require disclosure of information regarding their role in government policymaking. In 2001, then-Vice President Dick Cheney met with big oil companies to formulate national energy policy that was "designed to help the private sector, and, as necessary and appropriate, State and local governments," as well as to "promote dependable, affordable, and environmentally sound production and distribution of energy for the future."<sup>155</sup> As with the CPP, parts of that effort under President George W. Bush "became law and parts . . . are still being debated."<sup>156</sup> Critics claimed that the task force produced a package of "incentives for the energy industry . . . at the expense of the environment and public health."<sup>157</sup>

Environmental and citizen groups sued the Vice President under the FACA, seeking disclosure of the participants' identities and meeting minutes. The statute requires entities qualifying as "advisory committees" to make public the "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by" the committees.<sup>158</sup> The Court of Appeals for the D.C. Circuit held that the FACA did not apply to Cheney's so-called "task force" members because "there is nothing to indicate that

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150. ACQUISITION.GOV, <https://www.acquisition.gov> (last updated Mar. 16, 2016).

151. *See id.*

152. Rosenbloom & Piotrowski, *supra* note 141, at 104.

153. Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (2014)); *see also* VERKUIL, *supra* note 13, at 90 (noting that the FOIA is a "force for public legitimacy" that does not apply to documents held by private contractors).

154. 5 U.S.C. App. § 2 (2014).

155. Eric Dannenmaier, *Executive Exclusion and the Cloistering of the Cheney Energy Task Force*, 16 N.Y.U. ENV'T'L L.J. 329, 330 (2008) (quoting NAT'L ENERGY POLICY DEV. GROUP, NATIONAL ENERGY POLICY: RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA'S FUTURE viii (2001)).

156. Dana Milbank & Justin Blum, *Document Says Oil Chiefs Met with Cheney Task Force*, WASH. POST (Nov. 16, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/15/AR2005111501842.html>.

157. Press Release, Nat'l Res. Defense Council, NRDC Offers Responsible Alternative to Bush Energy Plan (May 17, 2001), *available at* <http://www.nrdc.org/media/pressReleases/010517.asp>.

158. 5 U.S.C. App. § 10(b) (2014).

non-federal employees had a right to vote . . . or exercise a veto.”<sup>159</sup> The incident demonstrates that, for entities residing at the private end of the constitutional policymaking continuum, achieving public transparency is a tenuous proposition, regardless of the political proclivities of the person in the White House—and even if identical tasks performed by federal employees would be subject to public disclosure requirements.

### 3. *Legitimacy*

A third aspect of good government is legitimacy. Legitimacy refers to the source or “justification of a government’s authority to rule over its people.”<sup>160</sup> “[G]overnment is said to be ‘legitimate’ if the people to whom its orders are directed believe that the structure, procedures, acts, decisions, policies, officials, or leaders of government possess the quality of ‘rightness,’ propriety, or moral goodness—the right, in short, to make binding rules.”<sup>161</sup> Legitimacy is related to how successful government is at making a “normative case” for a particular policy or decision.<sup>162</sup> It is “whatever is added to convert power into authority,” but “also can refer to perceptions: whether there is a belief that something is okay.”<sup>163</sup>

The legitimacy of the United States government derives from its constitutional authority and the democratic mandates of Congress and the sitting President.<sup>164</sup> Congress has the power to make laws and is accountable for the results at the voting booth. The Appointments Clause renders the President and his appointees accountable for the execution of the laws; Senate confirmation of the President’s appointments triggers public awareness.<sup>165</sup> Furthermore, the federal government’s legitimacy rests on the belief that public servants are susceptible to political—and

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159. *In re Cheney*, 406 F.3d 723, 730 (D.C. Cir. 2005).

160. Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 126 (2000).

161. ROBERT A. DAHL, *MODERN POLITICAL ANALYSIS* 41 (2d ed. 1970); see also Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596, 601 n.29 (1999).

162. Ku, *supra* note 160, at 126.

163. Schwarcz, *supra* note 107, at 323.

164. Michael Herz, *Some Thoughts on Judicial Review and Collaborative Governance*, 2009 J. DISP. RESOL. 361, 365–66.

165. U.S. CONST. art. II, § 2, cl. 2; THE FEDERALIST NO. 77, at 517 (Alexander Hamilton) (Ian Shapiro ed., 2009).

thus electoral—influence<sup>166</sup> and that they are not financially motivated to achieve certain outcomes.<sup>167</sup>

Neither the formal mandates of constitutional structure nor the democratic process legitimates private parties' exercise of public functions. The private sector is not technically bound by the Constitution (with the exception of the Thirteenth Amendment) and its members are not democratically elected. And unlike government actors, private sector employees are not motivated to act for the primary benefit of the public good but are charged with maximizing profits for their employers.<sup>168</sup> Inevitably, conflicts of interest impact private actors' ability to champion the objectives of good government over the need to generate revenue for their stakeholders. A private corporation hired to make individual public benefits determinations for a fixed contract price, for example, will feel pressure to truncate its adjudication methods to cut costs—even if that means a less accurate or fair process for individual claimants.

Moreover, government contractors are not within the general purview of the federal conflict of interest laws.<sup>169</sup> Although the Federal Acquisition Regulation<sup>170</sup> governs the process by which the government purchases goods and services, its conflict of interest provisions do not take into consideration whether a contractor's aims are "at odds with the 'public interest,'" and its rules can be waived for contracts deemed essential.<sup>171</sup> Thus, even though many private contractors exercise powers identical to those of public actors, existing constitutional and statutory law does relatively little to foster legitimacy on the private end of the constitutional policymaking spectrum.

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166. Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 54 (2008).

167. Federal criminal laws accordingly prohibit executive branch employees from participating personally and substantially in matters that will affect their own financial interests. 18 U.S.C. § 208 (2014).

168. See Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133, 185 (2012) ("Corporations' fiduciary duty to their shareholders requires them to breach contracts when doing so would maximize profit.").

169. Jeffrey Lovitky, *The Problems of Government Contracting for Consulting Services*, 14 PUB. CONT. L.J. 332, 345 (1983).

170. 48 C.F.R. ch. 1 (2016).

171. Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 898 (2000) (citing Organizational Conflicts of Interest, 48 C.F.R. pt. 2009.5 (1999)).

#### 4. Rational Decisionmaking

Lastly, good governance reflects rational decisionmaking, which is inherent in the Constitution's structure. The first state constitutions established strong legislatures that closely represented the people by concentrating power in the lower assembly.<sup>172</sup> Constituents were empowered to "'instruct' their representatives."<sup>173</sup> As a result, early state legislatures were critiqued as captured by "selfish factions and demagogic leaders" who "enacted ill-advised laws" at the expense of the public good.<sup>174</sup>

Mistrusting the people's proclivity towards popular rule by factions, the Framers opted instead for a republic, which runs power through a small number of wiser government representatives.<sup>175</sup> Because this republic covers an extremely large population, opinions are diverse, making it relatively difficult for a majority faction to take hold.<sup>176</sup> The Framers thus "relied on elected representatives to defuse, to compromise, and, at best, to prevent the abuse of government power from motives of personal self-interest or majoritarian passion."<sup>177</sup>

This nod towards rational decisionmaking is reflected in the fact that the APA contains detailed procedural requirements for legislative rulemaking and formal adjudication and in the Supreme Court's construction of the statute's standards for judicial review.<sup>178</sup> In *Motor Vehicles Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*,<sup>179</sup> the Court rejected the government's argument for "rational basis" review under the APA, holding instead that "the agency must examine the relevant data and articulate a satisfactory

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172. Martin S. Flaherty, *Relearning Founding Lessons: The Removal Power and Joint Accountability*, 47 CASE W. RES. L. REV. 1563, 1581–82 (1997) (quoting GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776–1787 163 (1969)).

173. *Id.* at 1582.

174. *Id.* at 1583; see also Michael W. Dowdle, *Public Accountability: Conceptual, Historical, and Epistemic Mappings*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 3–4 (Michael W. Dowdle ed., 2006) [hereinafter "PUBLIC ACCOUNTABILITY"] (noting early critiques of "patronage-based politics").

175. The Founders offered vague definitions of the term "republic" at times. Alexander Hamilton defined a republic as a government that "requires that the sense of the majority should prevail," THE FEDERALIST NO. 22, at 109 (Alexander Hamilton) (Ian Shapiro ed., 2009), and James Madison defined it as "a government in which the scheme of representation takes place," THE FEDERALIST NO. 10, at 51 (James Madison) (Ian Shapiro ed., 2009).

176. THE FEDERALIST NO. 10 (James Madison).

177. See Hans A. Linde, *Who is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 730 (1994).

178. See 5 U.S.C. §§ 553, 554, 706 (2014).

179. 463 U.S. 29 (1983).

explanation for its action including a rational connection between the facts found and the choice made.”<sup>180</sup>

Under outsourcing regimes, contract terms—and not statutory procedures for rational decisionmaking—govern private actors’ performance. Judicial review for rationality and fairness is virtually nonexistent. Although private tort and contract law might apply to abuses by government contractors, immunity defenses stymie lawsuits.<sup>181</sup> Only the government can sue private contractors under the Contract Disputes Act.<sup>182</sup> In addition, agencies can contract out of statutory protections in the negotiating process<sup>183</sup> and often lack the resources or motivation to pursue common law remedies.<sup>184</sup> The False Claims Act<sup>185</sup> enables *qui tam* suits to recover penalties from private contractors for fraud but contains formidable barriers to judicial review.<sup>186</sup>

The lack of judicial oversight of privatized government is particularly acute when federal agencies engage stealth factions of the private sector in the policymaking process. In those circumstances, the meager statutory frameworks for review of federal contracting decisions do not even apply. Moreover, when the government formulates policy alongside a finite segment of the community and to the exclusion of other interested groups, it undermines the constitutional plan for representative democracy—heightening the possibility that agencies will become “captured” by

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180. *Id.* at 43 & n.9 (internal quotation marks omitted).

181. See, e.g., *Bartell v. Lohiser*, 215 F.3d 550, 557 (6th Cir. 2000) (applying immunity to private foster care contractor in action under federal disability laws); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 76–77 (2d Cir. 1998) (applying immunity to private insurance company in Medicare dispute); cf. Richard J. Pierce, Jr., *Outsourcing Is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216, 1228 (2008) (arguing that private contractors should not be immunized for government work performed).

182. 41 U.S.C. §§ 7101–7109 (2014).

183. But cf. Wendy Netter Epstein, *Contract Theories and the Failures of Public-Private Contracting*, 34 CARDOZO L. REV. 2211, 2254, 2256 (2013) (arguing a mandatory duty to act in furtherance of the public interest should be implied in all government outsourcing contracts and that “members of the public for whose benefit the service was being provided—and who are harmed when service provision is poor—should be permitted to sue as third-party beneficiaries for breach of the public interest duty”); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003) (arguing that contracts should reflect public law values through a process of “publicization”).

184. See Jody Freeman, *Extending Public Accountability Through Privatization*, in PUBLIC ACCOUNTABILITY, *supra* note 174, at 83, 97–98 (explaining how both the executive and legislative branches may lack the motivation to hold private actors accountable).

185. 31 U.S.C. §§ 3729–3733 (2014).

186. See Laura A. Dickinson, *Public Values/Private Contract*, in GOVERNMENT BY CONTRACT, *supra* note 97, at 356.

factions and abdicate their primary obligation to serve the public good.<sup>187</sup> A doctrinal shift is needed to account for the tension that privatized government creates within the constitutional policymaking continuum.

## II. DOCTRINAL RESPONSES TO STRUCTURAL DISRUPTIONS TO THE SEPARATION OF POWERS

This Part discusses the foundational constitutional doctrine bearing on structural disruptions in the separation of powers and highlights an anomaly created by agency subdelegations of legislative power to the private sector. When Congress delegates its legislative powers, the nondelegation doctrine applies to monitor adherence to principles of constitutional structure. Yet if agencies—as recipients of such powers—subdelegate them to private actors, none of the separation of powers principles that governed Congress’s initial delegation apply. The other doctrinal mechanism for judicial review of “first-order” delegations of legislative authority—*Chevron* and its progeny—similarly fails to account for “second-order” delegations of policymaking authority by agencies to the private sector.

### A. The Delegation Doctrines

The nondelegation and private delegation doctrines spring from the structural principles underlying the Constitution’s design. The Supreme Court stated in *J.W. Hampton, Jr., & Co. v. United States* that the Constitution “divide[s] the governmental power into three branches” and imposes a rule that “in the actual administration of the government Congress . . . should exercise the legislative power, the President . . . the executive power, and the Courts or the judiciary the judicial power.”<sup>188</sup> By

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187. See Daniel Carpenter & David A. Moss, *Introduction*, in *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* 13 (2014) (Daniel Carpenter & David A. Moss eds., 2013) (“*Regulatory Capture* is the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.”); Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, “Agency Capture,” and Airline Security*, 10 AM. U. J. GENDER SOC. POL’Y & L. 381, 388 (2002) (describing agency capture as “an attempt to promote the ‘private’ interest of the regulated group at the expense of some broader interest of the public as a whole, which would otherwise have been the primary concern of the regulatory agency”); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1052 (1997) (“[C]apture theory . . . suggests that aggressive judicial oversight and control of agencies is needed in order to counteract the distortions of the administrative process introduced by interest group capture and other pathologies.”).

188. 276 U.S. 394, 406 (1928).

constitutional design, therefore, no single branch can exercise too much power over the governed, and each branch operates as a check on the power of the other branches.<sup>189</sup> The Supreme Court has accordingly scrutinized legislation creating novel government structures<sup>190</sup> to ensure that no one branch aggrandizes its power at another's expense<sup>191</sup> and that executive branch agencies remain susceptible to some measure of presidential control.<sup>192</sup>

The nondelegation doctrine similarly functions to confine constitutionally vested legislative power in Congress.<sup>193</sup> It derives from John Locke's social contract theory, which binds citizens to "the laws enacted by democratic legislatures exercising the power delegated to it by the people."<sup>194</sup> The Constitution has no inherent powers; "the only legitimate fountain of power" derives from the people.<sup>195</sup> Thus, only the people's elected representatives may exercise its powers.<sup>196</sup> In theory, the nondelegation doctrine "ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our government most responsive to the popular will."<sup>197</sup>

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189. *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of [the] separation of powers is to protect the liberty and security of the governed.").

190. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 6 (1994).

191. See *Buckley v. Valeo*, 424 U.S. 1, 120–24 (1976).

192. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 506–07 (2010).

193. See *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. . . . Congress generally cannot delegate its legislative power to another Branch."); see also *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

194. Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 927 (2006) (citing JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 52–65 (C.B. Macpherson ed., Hackett Publishing Co., Inc. 1980) (1690)).

195. Flaherty, *supra* note 172, at 1586 (quoting WOOD, *supra* note 172, at 550). "[B]y placing sovereignty in the people, both liberal theory and the Constitution make the political sovereign the source of delegated, not inherent, powers." Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 407 (2006).

196. See LOCKE, *supra* note 194, at 74–75. But see Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1037 (2007) (observing that adherents of the "prodelegation school" think that Congress can delegate legislative power under the Necessary and Proper Clause and that, "[w]hile Article I, Section 7 outlines one method of making law, it never decrees that it is the only means of making law").

197. *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

The nondelegation doctrine formally emerged in the nineteenth century,<sup>198</sup> reaching its prominence in post-New Deal litigation around the propriety of the burgeoning administrative state.<sup>199</sup> In *Panama Refining Co. v. Ryan*,<sup>200</sup> the Court struck down a provision of the National Industrial Recovery Act (“NIRA”)<sup>201</sup> that empowered the President to manage a statutory prohibition on interstate shipment of petroleum because that Congress had set “no criterion to govern the President’s course.”<sup>202</sup> In *Schechter Poultry Corp. v. United States*,<sup>203</sup> it found unconstitutional another NIRA provision authorizing private trade and industrial groups, subject to the President’s approval, to draft codes of fair competition governing the sale of chickens.<sup>204</sup> Congress, the Court explained, is “not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”<sup>205</sup>

Since the NIRA cases, the nondelegation doctrine has failed to fulfill its constitutional potential as a means of confining legislative power to the Congress, despite its prominence as what Gary Lawson calls “the foundation of American representative government.”<sup>206</sup> Less than a decade later, the Court in *Yakus v. United States* “completely shifted to valuing congressional flexibility and freedom over a strict application of the nondelegation doctrine.”<sup>207</sup> At issue was a statute delegating to an

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198. Initially, the Supreme Court upheld delegations of lawmaking authority in the face of such challenges. See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 6, 43 (1825) (upholding constitutionality of Congress’s delegation to the judiciary the authority to establish procedures for service of process and execution of judgments because such power was conferred pursuant to “general provisions to fill up the details”); *Field*, 143 U.S. at 693 (holding that delegation of authority to the President to suspend tariffs for imports was constitutional as the President was acting as “the mere agent of the law-making department to ascertain and declare the event upon which [Congress’s] expressed will was to take effect”); see also *United States v. Grimaud*, 220 U.S. 506, 518 (1911) (upholding constitutionality of regulations promulgated by the Secretary of Agriculture regarding the use of federal grazing lands, subject to criminal penalties, as the agency “confine[d] [itself] within the field covered by the statute . . . in order to administer the law and carry the statute into effect”).

199. See, e.g., *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); Metzger, *supra* note 20, at 1438–42 (discussing nondelegation cases in the Supreme Court following the New Deal).

200. 293 U.S. 388.

201. 15 U.S.C. § 703.

202. *Panama Refining*, 293 U.S. at 415.

203. 295 U.S. 495.

204. *Id.* at 521–53, 521 n.4.

205. *Id.* at 529. Within its separation of powers doctrine, the Supreme Court has been more hawkish about striking down attempts by one branch to aggrandize its power at the expense of another. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 120–24 (1976).

206. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332 (2002); see also Freeman, *supra* note 184, at 88 (arguing that despite the nondelegation doctrine, Congress has the power to delegate “broad powers that afford private actors considerable discretion”).

207. Garry, *supra* note 194, at 932–33.

administrative agency the power to fix commodities prices in response to wartime inflation. Emphasizing the need for legislative “flexibility,” the Court drew the constitutional line at “an absence of standards for the guidance of the Administrator’s action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed.”<sup>208</sup> Because standards existed in the statute, no unconstitutional delegation of legislative power occurred.

The Court has repeatedly reaffirmed Congress’s broad authority to delegate so long as its enabling legislation includes an “intelligible principle” to guide the exercise of discretion,<sup>209</sup> sustaining delegations with legislative directives that are as vague as acting “in the public interest.”<sup>210</sup> The Court has justified its stance by parsing some delegations as more “executive” in nature than others. “[P]owers which are strictly and exclusively legislative” cannot be delegated, whereas “those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details” can be.<sup>211</sup> Because the line between the two “has not been exactly

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208. *Yakus v. United States*, 321 U.S. 414, 426 (1944).

209. See *Loving v. United States*, 517 U.S. 748, 771–72 (1996); *Mistretta v. United States*, 488 U.S. 361, 379 (1989). The Court applied the intelligible principle test to uphold several legislative delegations before *Schechter Poultry Corp.* and *Panama Refining Co.* See *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 284 (1933) (sustaining agency’s power to set rules regarding issuance of radio station licenses); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 25–27 (1932) (upholding the Interstate Commerce Commission’s statutory authority to regulate mergers and acquisitions of railroads).

210. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001) (citing *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943); *N.Y. Cent. Sec. Corp.*, 287 U.S. at 24–25) (“[W]e have found an ‘intelligible principle’ in various statutes authorizing regulation in the ‘public interest.’”; see also *Mistretta*, 488 U.S. at 413, 416 (Scalia, J., dissenting) (“What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a ‘public interest’ standard?”). Justice Scalia nonetheless suggested in *Mistretta v. United States* that “the doctrine of unconstitutional delegation” of legislative and policymaking power is so “essential to democratic government” that “[o]ur members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.” *Mistretta*, 488 U.S. at 415. Nor, he added, could some lawmakers hand off their constitutional duties, such as voting on bills. See *id.* at 417. “By a parity of reasoning,” Professor Verkuil has argued, “the President cannot turn the executive power over to the Vice President and retire in office.” Verkuil, *supra* note 195, at 425. He thus contends that the powers exercised by principal officers who were confirmed by the Senate and have taken oaths to uphold the Constitution are similarly nondelegable. *Id.* The President can delegate to subordinates under the Subdelegation Act, with limits (i.e., he can only delegate to officers of the United States). *Id.* at 426 (citing 3 U.S.C. §§ 301–302 (2014)). By the same token, the statute limits the President’s ability to delegate to lesser officials or outside parties. See *id.* The Act notwithstanding, Professor Verkuil argues that “[t]he President could never claim an inherent power to delegate official duties to private hands.” *Id.* at 427–28.

211. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825); see also generally Alexander & Prakash, *supra* note 196, at 1041–42 (describing four different views of what Congress does when it delegates power, including the “Formalist Account [which] regards conventional delegations as

drawn,”<sup>212</sup> the regulatory state operates under a substantial amount of legislative ambiguity,<sup>213</sup> prompting Justice Thomas to query whether “delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”<sup>214</sup>

The intelligible principle test may be understood as a pragmatic reflection of the Court’s belief that necessity “fixes a point beyond which it is unreasonable and impractical to compel Congress to prescribe detailed rules.”<sup>215</sup> In *Mistretta v. United States*, the Court blunted its rhetoric to suggest that “‘Congress generally cannot delegate its legislative power to another Branch.’”<sup>216</sup> By the Court’s account, this “general” separation of powers interdiction must give way to “a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>217</sup> Thus, Congress is constitutionally free to “obtain[] the assistance of its coordinate Branches” in fulfilling its constitutional mandate,<sup>218</sup> particularly “where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program” in question.<sup>219</sup>

The question of whether Congress can delegate legislative power directly to the *private* sector—bypassing the executive branch altogether—

delegations of rulemaking authority, without any actual delegation of legislative power,” and their adherents).

212. *Wayman*, 23 U.S. at 43; *see also* *Bowsher v. Synar*, 487 U.S. 714, 733 (1986) (“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”); *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (“[W]hen Congress had legislated and indicated its will, it could give to those who were to act under such general provisions ‘power to fill up the details’ by the establishment of administrative rules and regulations . . . .”); *Field v. Clark*, 143 U.S. 649, 693 (1892) (upholding delegation where the President was acting only as “the mere agent of the law-making department to ascertain and declare the event upon which [Congress’s] expressed will was to take effect”); *see also generally* *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (noting that the authority to enforce the laws and to appoint agents to do so are executive functions); *Myers v. United States*, 272 U.S. 52, 117 (1926) (same).

213. Garry, *supra* note 194, at 940.

214. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring); Mark Seidenfeld & Jim Rossi, *The False Promise of the “New” Nondelegation Doctrine*, 76 NOTRE DAME L. REV. 1, 5–6 (2000) (“Once the reality that officials must be allowed to exercise such discretion is recognized, there is no principled way for the judiciary to draw a line between allowed and prohibited delegations of rulemaking authority.”).

215. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559–60 (1976) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

216. *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (emphasis added) (citing *Field*, 143 U.S. at 692).

217. *Id.* at 372.

218. *Id.*

219. *Lichter v. United States*, 334 U.S. 742, 785 (1948).

was addressed most prominently in *Carter v. Carter Coal Co.*<sup>220</sup> In *Carter*, the Court struck down the Bituminous Conservation Coal Act, which authorized coal miners and producers to establish wages and maximum labor hours for mine workers.<sup>221</sup> The statute required no governmental imprimatur before the provisions took effect. “This is legislative delegation in its most obnoxious form,” the Court wrote, “for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”<sup>222</sup> Grasping for a public-private dividing line, the Court reasoned that “[t]he difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function . . . .”<sup>223</sup>

To be sure, delegations to the executive branch are not delegations to the President per se, but to an administrative bureaucracy. The administrative bureaucracy is larger, more nuanced, and more complex than Congress. Agency officials are not directly accountable at the voting booth and only tangentially through the President. As Alexander Hamilton wrote in Federalist No. 70, “a plurality in the executive . . . tends to conceal faults, and destroy responsibility.”<sup>224</sup>

Private parties, by contrast, are not politically accountable, even through the President. Their terms and duties are of limited duration.<sup>225</sup> Unlike a federal officer, for whom “a superior can fix and then change the specific set of duties,” private actors “hav[e] those duties fixed by a contract.”<sup>226</sup> And although private actors are made accountable to some degree by reputation, their respective constituencies are narrow and not disinterested.<sup>227</sup>

Legal commentators have accordingly called private delegations more troubling “than the broadest delegations to public agencies.”<sup>228</sup> Since the

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220. 298 U.S. 238 (1936).

221. *Id.* at 310–11.

222. *Id.* at 311. The Court further suggested that the delegation violated due process to the extent that it allowed private parties to regulate competitors. *Id.* This argument is problematic to the extent that it applies procedural due process protections to a legislative versus adjudicative decision. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915) (holding that “a general determination” affecting a large number of people in unexceptional ways is not bound by due process).

223. *Carter*, 298 U.S. at 311.

224. THE FEDERALIST NO. 70, at 358 (Alexander Hamilton) (Ian Shapiro ed., 2009).

225. *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867).

226. *Constitutional Separation of Powers*, *supra* note 111, at 141 (citing *Hartwell*, 73 U.S. at 393).

227. Schwarcz, *supra* note 107, at 335 n.97.

228. Freeman, *supra* note 15, at 583–84 (citing Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 69 n.17 (1990); David M. Lawrence, *The Private Exercise of Governmental*

New Deal cases, however, the Supreme Court has consistently upheld delegations to agencies and private parties alike.<sup>229</sup> In *Currin v. Wallace*, it found constitutional a statutory scheme that afforded private industry an “effective veto” over government regulations affecting tobacco markets.<sup>230</sup> And in *Sunshine Anthracite Coal Co. v. Adkins*,<sup>231</sup> it upheld a statute allowing private coal producers to propose minimum coal prices to a government commission on the grounds that the industry merely “function[ed] subordinately to the Commission,” which retained the ultimate authority to implement legislative standards.<sup>232</sup>

The Court had a recent opportunity to revisit the private delegation doctrine in *Department of Transportation v. Ass’n of American Railroads*.<sup>233</sup> On appeal was a decision of the D.C. Circuit finding unconstitutional a portion of the Passenger Rail Investment and Improvement Act of 2008 (“PRIIA”)<sup>234</sup> that authorizes Amtrak—a congressionally-created government corporation—to jointly develop passenger rail performance measures with the Federal Railroad Administration. The statute provides further that if such measures are not timely promulgated, “any party involved in the development of those standards may petition the Surface Transportation Board to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.”<sup>235</sup> Deeming Amtrak “private” for delegation purposes, the D.C. Circuit applied the maxim that “[f]ederal lawmakers cannot delegate regulatory authority to a private entity” and struck down the PRIIA as unconstitutional.<sup>236</sup> It reasoned that, unlike Amtrak, the private parties in

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Power, 61 IND. L.J. 647, 649–50 (1986)); cf. Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931, 979 (2014) (questioning whether a private delegation doctrine exists separate from the nondelegation doctrine).

229. See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472–74 (2001) (holding that the phrase, “requisite to protect the public health,” was sufficiently determinate to guide the Environmental Protection Agency’s establishment of national ambient air quality standards under the Clean Air Act); *Currin v. Wallace*, 306 U.S. 1 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

230. 306 U.S. 1 (upholding statute that required two-thirds of regulated industry to approve regulations before they could take effect).

231. 310 U.S. 381.

232. *Id.* at 399.

233. 135 S. Ct. 1225 (2015).

234. Pub. L. No. 110-432, 122 Stat. 4848, 4907 (2008).

235. *Id.* at 4917.

236. *Ass’n of Amer. R.R.s v. Dep’t of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated*, 135 S. Ct. 1225.

*Currin* and *Adkins* did not “stand on equal footing with a government agency” under the respective statutes in question in those cases.<sup>237</sup>

The Supreme Court reversed on the grounds that Amtrak is a governmental entity and remanded the case for consideration, *inter alia*, of whether the statute violates the private delegation doctrine.<sup>238</sup> Writing for the Court, Justice Kennedy emphasized the transparency and accountability mechanisms that necessarily bind Amtrak as a government actor, and linked those features to “[t]he structural principles secured by the separation of powers,” which “protect the individual.”<sup>239</sup> In separate concurring opinions, both Justice Alito and Justice Thomas opined that the PRIIA violates the private delegation doctrine. For Justice Alito, the problem was the lack of political accountability for regulatory activity under the statutory scheme, as “[l]iberty requires accountability.”<sup>240</sup> “If the arbitrator can be a private person,” he wrote, “this law is unconstitutional.”<sup>241</sup> Justice Thomas ventured further, questioning the constitutionality of the entire federal regulatory apparatus on the theory that “the Constitution categorically forbids Congress to delegate its legislative power to any other body.”<sup>242</sup>

Although the private delegation doctrine technically concerns itself with the scope of Congress’s authority to outsource legislative power, *executive branch* handoffs of its delegated authority to private parties are just as constitutionally intolerable under Justices Alito and Thomas’s reading of Article I. In Justice Alito’s words, “[w]hen it comes to private entities . . . there is not even a fig leaf of constitutional justification” for declining to enforce a black letter nondelegation doctrine.<sup>243</sup> Taken together, the concurring opinions in *Association of American Railroads* suggest that if the case returns to the Supreme Court for resolution of the private delegation question, there will be support for its revival in ways that could apply to cabin privatization through the courts.

For now, when private parties draft legislation, the primary rationale behind nondelegation—ensuring that “the will of Congress has been

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237. *Id.* at 671 n.5.

238. *Ass’n of Amer. R.R.s*, 135 S. Ct. at 1233–34.

239. *Id.* at 1233 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011)).

240. *Id.* at 1234 (Alito, J., concurring).

241. *Id.* at 1237.

242. *Id.* at 1246 (Thomas, J., concurring).

243. *Id.* at 1237 (Alito, J., concurring). “Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress,” Justice Thomas added, “the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government.” *Id.* at 1252 (Thomas, J., concurring).

obeyed”—must be enforced elsewhere in constitutional doctrine.<sup>244</sup> As explained below, the other doctrinal lens for confining agencies’ exercise of legislative power—*Chevron* and its progeny—is similarly indifferent to private sector policymaking on the people’s behalf. This constitutional infirmity renders painstakingly constructed separation of powers doctrine inapposite in the modern administrative state.

### B. *Chevron and Its Progeny*

Even if Congress’s delegations are constitutional under prevailing law, the nondelegation and private delegation doctrines have nothing to say about subdelegations of policymaking authority by federal agencies to the private sector. Private sector lawmaking is excluded from constitutional scrutiny even though the power exercised derives from the same political sovereign—the people. The separation of powers implications of such delegations-within-delegations must be captured, if at all, by *Chevron*. Yet like nondelegation, *Chevron* doctrine fails to account for policymaking by the private sector at the behest of agencies to which Congress delegated rulemaking authority in the first instance.

Before *Chevron*, courts operated under a “general principle of deference.”<sup>245</sup> When agencies acted under broad grants of legislative authority to prescribe rules and regulations, courts were disinclined to defer to agency constructions of statutes.<sup>246</sup> Deference was appropriate only when Congress specifically delegated power “to define a statutory term or prescribe a method of executing a statutory provision”<sup>247</sup> and agencies “implement[ed] the congressional mandate in some reasonable manner.”<sup>248</sup> Even then, this deference principle merely “set the framework for judicial analysis; it d[id] not displace it.”<sup>249</sup> Courts “were allowed to substitute judgment on agency interpretations that could be characterized as ‘questions of law.’”<sup>250</sup>

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244. *Yakus v. United States*, 321 U.S. 414, 426 (1944).

245. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982); Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1257 (2007) (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and noting that, “[p]rior to *Chevron*, the courts relied upon a host of factors to determine the appropriate level of deference owed to an agency’s interpretation in any given case”).

246. See, e.g., *Vogel Fertilizer Co.*, 455 U.S. at 24.

247. See *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981); see also Garry, *supra* note 194, at 942.

248. *United States v. Correll*, 389 U.S. 299, 307 (1967).

249. *United States v. Cartwright*, 411 U.S. 546, 550 (1973).

250. William R. Andersen, *Against Chevron—A Modest Proposal*, 56 ADMIN. L. REV. 957, 958 (2004).

*Chevron* altered this judicial prerogative by requiring that courts defer to agencies' interpretations of ambiguous statutes the agencies are charged with administering.<sup>251</sup> At issue in *Chevron* was the propriety of an EPA rule that defined the statutory term "stationary source" to mean the entirety of a power plant rather than individual structures within a plant that emit pollution.<sup>252</sup> The Court set forth a two-step inquiry for judicial review of an agency's interpretation of a statute that it is charged with administering: first, "whether Congress has directly spoken to the precise question at issue"; if so, the agency must apply the clear mandate of Congress.<sup>253</sup> Second, if a statute is ambiguous, the question becomes whether the interpretation of the statute adopted by the agency is "reasonable." If so, the court must defer to that interpretation.<sup>254</sup> This rule applies "even to pure questions of law, about which courts might appear to have a strong claim of superior expertise."<sup>255</sup> *Chevron* thus "move[d] an essential legislative function—the ability to make policy through the power to interpret statutes—squarely into the President's domain."<sup>256</sup> An agency can pick amongst a range of competing meanings of statutory text and corresponding policy options, knowing that courts must uphold its choice. As a result, agencies can "reshape the political decisions made in the legislative process."<sup>257</sup>

*Chevron's* mandate of judicial deference to an agency's interpretation of ambiguous statutory language follows from the Court's doctrinal compromise on nondelegation.<sup>258</sup> Agencies can legislate so long as there is an intelligible principle to guide their discretion. *Chevron* established a method for identifying the extent of that discretion under a given statute. In examining when to extend deference to decisions less formal than notice-and-comment rulemaking, the Court in *United States v. Mead Corp.*<sup>259</sup> and *Barnhart v. Walton*<sup>260</sup> expanded agencies' policymaking authority even further.

Like nondelegation, *Chevron* is a prudential doctrine that responds to the practical limitations on Congress's ability to monopolize

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251. See Garry, *supra* note 194, at 922.

252. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

253. *Id.* at 842.

254. *Id.* at 845.

255. Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 744 (2004).

256. Garry, *supra* note 194, at 947 (internal quotation marks omitted).

257. *Id.*

258. *Id.* at 923 ("The evolution of the nondelegation doctrine essentially necessitates the *Chevron* doctrine.").

259. 533 U.S. 218 (2001).

260. 535 U.S. 212 (2002).

policymaking. Its modest goal is to ensure fidelity to the text and spirit of an enabling statute, however vague, and “to ensure that the administrative agency stays within the zone of discretion committed to it by its organic act.”<sup>261</sup> In *Chevron*, the Court premised its deference requirement on three rationales: (1) agencies have specialized expertise that exceeds that of courts and even Congress; (2) agencies are more politically accountable than courts; and (3) agencies received the power to fill in the gaps of ambiguous statutes directly from Congress.<sup>262</sup> None of these rationales support deference to an agency’s adoption of the private sector’s construction of legislation that the agency is charged with administering.

The first rationale for *Chevron* deference embraces the view that agencies have more particularized expertise in the subject matter of statutes they are charged with administering than courts do. In *Chevron*, the Court observed that Congress might have “consciously desired the Administrator to strike the balance” by regulation, “thinking that those with great expertise and charged with responsibility for administering the provision” at issue would be better able to reconcile competing policies than Congress itself.<sup>263</sup> In his contemporaneous explanation of the New Deal, James Landis characterized agencies as responsive to society’s need for government regulation to an extent that exceeds the capabilities of Congress; unlike Congress or the courts, agencies are experts in their respective fields of lawmaking.<sup>264</sup> Professor Funk has construed this analysis as implying that “agencies faced problems capable of objective solution, that politically neutral administrators could determine finite and correct answers to the problems of modern industrial society.”<sup>265</sup>

To be sure, individuals in the private sector may have equivalent or even superior expertise in certain subjects as compared to government employees.<sup>266</sup> But their incentive to make policy decisions in a manner that maximizes their own profit—even if such actions conflict with the legislative mandates of Congress—undermines the expertise rationale for

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261. Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 33 (1983).

262. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 865–66 (1984).

263. *Id.* at 865.

264. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1–16, 23–24, 45–56 (1938).

265. Funk, *supra* note 125, at 90.

266. Regulators’ adoption of privately drafted standards is not uncommon in certain industries. See Shapiro, *supra* note 103, at 401–02 (discussing, for example, the Occupational Safety and Health Administration’s adoption of protective health standards written by the American Conference of Governmental and Industrial Hygienists and the Security and Exchange Commission’s requirement that financial statements be prepared in accordance with accounting principles that were historically provided by private accounting associations).

deference to policy decisions made by private contractors.<sup>267</sup> When private regulatory committees are dominated by industry, their work “results in lowest-common-denominator regulatory standards.”<sup>268</sup> Scholars have observed, for example, that “the private sector often fails to accommodate health or safety considerations satisfactorily” when it is delegated responsibility for setting standards.<sup>269</sup> Once private parties exercise regulatory power in self-interested ways, agencies may lack the political capital or superior expertise to second-guess them.<sup>270</sup> Moreover, a private industry’s steady push for reductions in the scope of regulation belies a bias that is inconsistent with objective expertise.<sup>271</sup> Thus, the *Chevron* Court’s expertise rationale for deference does not readily translate into deference for policymaking by private parties.

The second rationale for *Chevron* deference—that agencies are politically accountable—is even less transferrable to the private sector. The *Chevron* Court reasoned that agency officials, through their link to the President, have greater accountability to the general public than does the judiciary.<sup>272</sup> Thus, “an agency to which Congress has delegated policymaking responsibilities may . . . properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”<sup>273</sup> Judges cannot. “While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.”<sup>274</sup>

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267. *Id.* at 404–05, 407, 426 (“[S]elf-regulation is more likely to reflect the political power of the self-regulated industry than the product of rational decisionmaking by an agency.”). Negotiated rulemaking lessens this problem because it includes a variety of parties with affected interests. *See id.* at 411–12.

268. *Id.* at 427.

269. *Id.* at 407–08 (quoting Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1380–83 (1978), and citing THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, *WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION* 283 (1993)).

270. *Id.* at 405, 411.

271. *See* David A. Moss & Daniel Carpenter, *Conclusion: A Focus on Evidence and Prevention*, in *PREVENTING REGULATORY CAPTURE*, *supra* note 187, at 456 (“Today, . . . firms regularly aim to weaken regulation to reduce the costs of compliance . . .”).

272. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (“[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”).

273. *Id.* at 865.

274. *Id.* Although it is technically true that agency officials are more accountable to the populace than federal judges because the unelected judiciary is appointed for life, the line of accountability from career agency employees to the President is quite attenuated. Moreover, numerous scholars have questioned whether agency employees are in fact more susceptible to industry capture than top-down political influence. Capture occurs when regulatory agencies are so heavily influenced by the very industries they are charged with regulating that they regulate in ways that benefit those industries

Private parties, by contrast, are not beholden to the democratic process. Private contractors are unelected and unappointed, residing outside the bureaucratic umbrella of Article II. They are not bound by the same legal and constitutional constraints that apply to government employees. The public has no legal mechanism for rendering private contractors' actions transparent or subjecting their decisions to judicial review. Private contractors are held accountable—if at all—via judicial enforcement of contract terms in actions brought exclusively by the government. The *Chevron* Court's second rationale for agency deference thus does not support deference to the private sector's resolution of policy ambiguities in federal legislation.

The third rationale for *Chevron* deference turns on presumed congressional intent, which is the Court's theory of choice for justifying deference to agencies post-*Chevron*.<sup>275</sup> According to the *Chevron* Court, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."<sup>276</sup> If there is no such explicit conferral of authority to make rules with legislative force, the Court explained in *United States v. Mead*, courts should infer from an "agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law."<sup>277</sup> In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Court put it in delegation terms: "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in a reasonable fashion."<sup>278</sup> Thus, *Chevron* allows Congress to pass a legislative matter onto an agency without clear definition of the limits of the agency's discretion on the theory that Congress wants it that way.

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rather than in the public interest. See Moss & Carpenter, *supra* note 271, at 455–56 (suggesting that industry pressure to reduce regulation, or corrosive capture, is more common than industry efforts to regulate); see also Nancy Watzman, *Rulemaking in the Dark: Little Disclosure When Big Food Lobbies the FDA*, SUNLIGHT FOUND. (Sept. 26, 2013, 7:14 AM), [http://sunlightfoundation.com/blog/2013/09/26/Rulemaking\\_in\\_the\\_dark\\_FDA/](http://sunlightfoundation.com/blog/2013/09/26/Rulemaking_in_the_dark_FDA/) (stating that, in thirty-three meetings over a two-year period, industry group representatives were present at FDA meetings four times as often as consumer groups, culminating in food safety rules that the American Bakers Association called "a major victory" for its members).

275. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 863 (2001).

276. *Chevron*, 467 U.S. at 843–44.

277. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

278. 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 865–66).

Scholars have critiqued *Chevron* as a violation of the separation of powers, both because it unduly circumscribes courts' role to "say what the law is"<sup>279</sup> and because it empowers agencies to make law—otherwise a job for Congress.<sup>280</sup> *Chevron*'s deference to agency constructions of vague language is also at odds with the nondelegation doctrine's requirement of an intelligible principle, which ostensibly tolerates the transfer of power only "so long as it will be adequately controlled."<sup>281</sup> With *Chevron*, ambiguity in legislation enhances agency power to make policy. An intelligible principle must be sufficiently *ambiguous* to trigger *Chevron* deference—at least to the extent that such deference is justified by presumed congressional intent.<sup>282</sup> This intersection between *Chevron* and the intelligible principle standard underscores that policymaking by any entity other than Congress has profound constitutional implications.

*Chevron*'s reliance on legislative intent to justify deference to agencies' policy judgments does not support deference to *private parties*' performance of congressionally-delegated policymaking functions. Agencies—like Congress—are representatives of the public interest, a role that "does not permit [them] to act as an umpire blandly calling balls and strikes for adversaries appearing before [them]."<sup>283</sup> The public is entitled to "receive active and affirmative protection at the hands of the [agency]" as a byproduct of its delegated constitutional power.<sup>284</sup> Private parties are not similarly constrained by public interest norms when they design public policy in the first instance. Their incentives are necessarily self-serving and possibly in conflict with the best interests of the broader populace. In outsourcing regulatory power to private entities, therefore, agencies compromise their ability to fulfill their role as representatives of the public interest.

To be sure, an agency is positioned to adjust a regulation that is privately drafted to take into account the public interest before a rule

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279. Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 787 (1991) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

280. See Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 742 (2007).

281. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1989); see also Garry, *supra* note 194, at 951.

282. See Garry, *supra* note 194, at 952.

283. *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965). But see Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 414 (2000) ("The purpose of the regulatory process is not to implement a government-defined conception of the public good, but rather to supply benefits demanded by groups on behalf of their members' private interests.").

284. *Scenic Hudson Pres. Conference*, 354 F.2d at 620.

becomes final. Because legislative rules are subject to the APA's notice and comment or formal rulemaking procedures before they can have the force of law, the rulemaking process necessarily operates to counteract private sector bias with the imprimatur of good government. Michael Herz has suggested, however, that "[t]his argument is quite flawed, a classic, mistaken greater-includes-the-lesser argument."<sup>285</sup> Such "claims of rational justifications for rules are often smokescreens for interest group horse-trading, with the agency playing mediator, orchestrator, or auctioneer."<sup>286</sup> Paul Verkuil points out, moreover, that overworked agency officials increasingly delegate the task of summarizing comments to private parties and simply "sign[] off on the results."<sup>287</sup> This temptation to rubber stamp the work of private contractors means that countervailing public interest norms may not meaningfully influence the rulemaking process when private parties do the initial drafting. Thus, "[t]he responsibility for knowing the record before decisions are made cannot be delegated if the agency wants to retain true decision power and discharge its public responsibilities."<sup>288</sup>

Moreover, agencies are prone to adhere to the policy judgments made in draft rules that are put open for public comment. This so-called "anchoring effect" on agencies means that "[d]efects in the antecedent process cannot be so easily dismissed."<sup>289</sup> When private parties are responsible for policy judgments in the first instance, agencies are apt to make "after-the-fact rationale[s] attempting to justify decisions made" at the early stages of a rulemaking—"for reasons we can never know."<sup>290</sup> Empirical studies support this conclusion. Unless there is public consensus that a proposed rule should be changed, agencies tend to side with the comments that support the initial draft.<sup>291</sup> As a consequence, interested parties must "get[] heard prior to an agency setting its proposal in stone, as is likely the case with the publication of a formal notice of proposed rule

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285. Herz, *supra* note 164, at 376 (discussing phenomenon in the context of negotiated rulemaking).

286. Peter H. Schuck & Steven Kochevar, *Reg Neg Redux: The Career of a Procedural Reform*, 15 THEORETICAL INQUIRIES L. 417, 431 (2014).

287. Verkuil, *supra* note 31, at 928.

288. *Id.*

289. Herz, *supra* note 164, at 376; *see also* James C. Cooper & William E. Kovacic, *Behavioral Economics and Its Meaning for Antitrust Agency Decision Making*, 8 J.L. ECON. & POL'Y 779, 788 (2012) (discussing anchoring or "confirmation bias" in the context of antitrust policymaking).

290. Funk, *supra* note 125, at 79 (discussing phenomenon in the context of negotiated rulemaking).

291. Furlong & Kerwin, *supra* note 22, at 353, 356 (citing Marissa Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 2 J. PUB. ADMIN. RES. & THEORY 245 (1998)).

making.”<sup>292</sup> And “[o]nce this occurs, . . . inertia makes it more difficult for an interest group to influence the agency to make major changes.”<sup>293</sup>

Thus, like the nondelegation doctrine, *Chevron* deference does not account for private sector influence on policymaking, which as a consequence operates beyond the scope of judicial review.<sup>294</sup> The next Part offers an alternative approach to *Chevron* and nondelegation that recognizes the constitutional significance of the private sector’s furtive influence on the rulemaking process. In short, when rules are organized and drafted in the first instance by entities other than the agency delegatee identified in the enabling legislation, judicial review must be more—not less—searching.

### III. THE CASE FOR ENHANCED JUDICIAL REVIEW OF AGENCY SUBDELEGATIONS OF LEGISLATIVE POWER

This Part urges a more rigorous application of the private delegation doctrine and *Chevron* to rulemakings that are conducted by private parties without the express consent of Congress. To the extent that agency subdelegations of policymaking power are *not* grounded in statutory text, they would seem perforce to violate both the nondelegation and *Chevron* doctrines. Thus, in “its role as protector of the constitutional design,”<sup>295</sup> the Supreme Court should develop a private *subdelegation* doctrine that requires congressional authorization for agency handoffs of legislative authority to the private sector.

Additionally, or in the alternative, the Court should decline to apply *Chevron* deference to rulemakings that are heavily influenced by unrepresentative segments of the private sector. Courts are better suited than extraconstitutional, private actors to render definitive interpretations of vague legislation. Such adaptations of the nondelegation and *Chevron*

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292. *Id.* at 363; see also David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 259 (2001) (noting that high level ratification of proposed rules is often automatic, for many reasons, making it difficult to reverse course). But see Schuck & Kochevar, *supra* note 286, at 430 (“If a negotiated rule really did flout the public interest or meaningfully depart from norms of reasoned decision-making, we should expect notice and comment procedures and judicial review to detect and reject it.”).

293. Furlong & Kerwin, *supra* note 22, at 363.

294. Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 225 (2012) (stating that “[w]hen we see an agency . . . adopting regulatory policies favored by regulated entities,” the situation “open[s] the door for the agency or regulated entities to defend the agency’s policy choices as the best the agency could do under its mandate to protect the public”).

295. Barbara Hinkson Craig & Robert S. Gilmour, *The Constitution and Accountability for Public Functions*, 5 GOVERNANCE 46, 50 (1992).

doctrines would foster normative principles of good government—including public accountability, transparency, legitimacy, and rational decisionmaking—when public power is exercised on the private end of the constitutional policymaking continuum.

#### A. A Private Subdelegation Doctrine

The nondelegation and private delegation doctrines grapple with a tension between workability and accountability; that is, how to develop legal doctrine that reflects the layered nature of modern government while ensuring fidelity to the separation of powers. This tension defines the battleground for constitutional analysis of unorthodox quasi-governmental structures today, including policymaking by private parties. The leading doctrines for addressing the constitutionality of private lawmaking—the nondelegation and *Chevron* doctrines—resolve that tension by reference to express or presumed congressional intent. A private *subdelegation* doctrine should likewise confine policymaking to the political branches of government unless Congress expressly authorizes private sector rulemaking.

Development of a subdelegation doctrine is sensible for several reasons. First, the Constitution's separation of powers embodies a recognition that, "without th[e] check of judicial review, agencies could essentially become judges of their own cases, which the framers clearly opposed."<sup>296</sup> To be constitutionally permissible, therefore, delegation requires judicial review.<sup>297</sup> Yet judicial review requires legislative standards. Even under the lax intelligible principle test, the Court has adhered to the notion that a total "absence of standards for the guidance of [an agency's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed," is unconstitutional.<sup>298</sup> If Congress authorizes an agency to make policy under

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296. Garry, *supra* note 194, at 946 n.163. "If the [rulemaking] process is nothing but a massive delegation of government authority to the private sector, then judicial policing of the outcomes is vital." Herz, *supra* note 164, at 367.

297. Herz, *supra* note 164, at 367 ("The strenuousness of review should be tied to the risk of illegality, which is especially high . . . when there is the momentum of stakeholder consensus supporting a particular outcome.").

298. *Yakus v. United States*, 321 U.S. 414, 426 (1944); *see also* *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 474 (2001) (stating that Congress cannot "provide[] literally no guidance for the exercise of discretion"); *cf. Whitman*, 531 U.S. at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)) (internal quotation marks omitted) (noting that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law").

a particular statute, the agency's power is limited to what Congress allows it to do. If Congress does not authorize agencies to subdelegate governmental authority to the private sector, or if it fails to provide statutory boundaries to govern the private exercise of that authority, courts cannot meaningfully exercise judicial review. Without legislative authorization, agencies' decisions to outsource their policymaking powers are constitutionally infirm.

Second, a subdelegation doctrine would enforce the existing presumption that, for the nondelegation doctrine to work, Congress must delegate to particularized recipients. Just as the nondelegation doctrine is confined to delegations *by* Congress, the intelligible principle standard only applies to delegations *to* particular executive branch agencies. The doctrine assumes that congressionally-delegated authority is exclusive to the agency specifically identified in a statute. This is why, say, the Federal Trade Commission cannot promulgate environmental or labor laws with the force of law—those tasks are delegated to the Environmental Protection Agency and the Department of Labor, respectively. In *Mistretta v. United States*, the Court explained that a delegation is “constitutionally sufficient if Congress clearly delineates the general policy, *the public agency which is to apply it*, and the boundaries of this delegated authority.”<sup>299</sup> The Third Circuit has likewise construed the intelligible principle test as requiring “that Congress identify the recipient of the delegated authority.”<sup>300</sup> Given that private parties are less democratically accountable than federal agencies—and thus more structurally attenuated from Congress itself—it makes little sense to preclude the Federal Trade Commission from issuing securities regulations while allowing the regulated industry to issue such regulations at the behest of the Securities Exchange Commission. Moving from accountable government agents to unaccountable private ones deflects from democratic decisionmaking, which is at the heart of the constitutional requirement that Congress delegate intelligible principles.

Third, a subdelegation doctrine would ensure that Congress's constitutionally protected power remains in the hands of the legislative branch. In the words of Justice Kagan and Judge Barron, “[a]ll the constitutional structure suggests is that Congress has control over the allocation of authority to resolve statutory ambiguity.”<sup>301</sup> This idea finds support in *Whitman v. American Trucking Ass'ns*, in which Justice Scalia

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299. 488 U.S. at 372–73 (emphasis added) (internal quotation marks omitted).

300. *United States v. Cooper*, 750 F.3d 263, 272 (3d Cir. 2014).

301. Barron & Kagan, *supra* note 292, at 222.

wrote a majority opinion upholding the CAA's delegation of power to the EPA to promulgate national ambient air quality standards that "are requisite to protect the public health."<sup>302</sup> Because the text of Article I "permits no delegation of [legislative] powers," he explained, "Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"<sup>303</sup> He rejected the suggestion that "an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."<sup>304</sup> An agency cannot "declin[e] to exercise some of that power" it was delegated.<sup>305</sup> That choice—"that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority."<sup>306</sup> Justices Thomas and Stevens each wrote separately to take issue with whether legislative power per se is delegable, but effectively agreed that Congress holds the reigns when it comes to delegating policymaking authority—and must retain that hold in its enabling legislation.<sup>307</sup>

If agencies cannot *decline* to exercise delegated power, it follows that they cannot unilaterally decide to give that power to a private third party, either. To be sure, in his concurring opinion in *Whitman*, Justice Stevens read the Vesting Clauses as devoid of express delegation limits.<sup>308</sup> Yet his analysis is consistent with the majority's view that it is Congress's prerogative to dictate the terms whereby—and by whom—a statute is implemented.<sup>309</sup> The legislative power is vested in the Congress, a political branch of government. Thus, only Congress can decide whether extra-constitutional actors may exercise that power.

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302. *Whitman*, 531 U.S. at 465 (quoting 42 U.S.C. § 7409(b)(1)).

303. *Id.* at 472 (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

304. *Id.*

305. *Id.* at 473.

306. *Id.*

307. Justice Thomas complained that the Constitution itself contains no reference to "intelligible principles," and warned of a "delegated decision [that] is simply too great for the decision to be called anything other than 'legislative.'" *Id.* at 487 (Thomas, J., concurring). For his part, Justice Stevens urged "frank[] acknowledg[ement] that the power delegated to the EPA is 'legislative,'" but reasoned that it is nevertheless "constitutional because [it is] adequately limited by the terms of the authorizing statute." *Id.* at 488 (Stevens, J., concurring). Refusing to "pretend, as the Court does, that the authority delegated . . . is somehow not 'legislative power,'" he argued that nothing in the Vesting Clauses "purport[s] to limit the authority of either recipient of power to delegate authority to others." *Id.* at 488–89. "Surely," he reasoned, "the authority granted to members of the Cabinet and federal law enforcement agents is properly characterized as 'Executive' even though not exercised by the President." *Id.* at 489.

308. *Id.* at 489 (citing *Bowsher v. Synar*, 478 U.S. 714, 752 (1986)).

309. *See id.* at 472 ("Congress confers decisionmaking authority upon agencies . . .").

Fourth, agency subdelegations of legislative power to private parties raise conflict-of-interest concerns of constitutional weight, which do not exist when Congress or federal agencies make policy on their own. The Supreme Court has repeatedly indicated that the coercive power of private interests is antithetical to the legislative function under the Constitution. In *Schechter Poultry*, the government argued that the NIRA provisions in question were constitutional because the privately-drafted codes the statute authorized would “consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems.”<sup>310</sup> The Court rejected this argument on the rationale that it is not Congress’s role to support the objectives of private industry, which is inherently biased: “would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries?”<sup>311</sup> The Court deemed it “obvious” that “[s]uch a delegation . . . [would be] utterly inconsistent with the constitutional prerogatives and duties of Congress.”<sup>312</sup>

In *Carter v. Carter Coal Co.*,<sup>313</sup> the Court cast its concern over self-interested private regulators in due process terms. It drew a “fundamental” distinction “between producing coal and regulating its production” under the statute at issue in *Carter*, with “[t]he former . . . a private activity” and “the latter . . . necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor.”<sup>314</sup> Hence, the Court reasoned, “a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property,” rendering “[t]he delegation . . . a denial of rights safeguarded by the due process clause of the Fifth Amendment.”<sup>315</sup>

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310. A.L.A. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (internal quotation marks omitted).

311. *Id.*

312. *Id.*

313. 298 U.S. 238 (1936).

314. *Id.* at 311.

315. *Id.*; see also *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) (“A potential conflict arises . . . whenever government delegates licensing power to private parties whose economic interests may be served by limiting the number of competitors who may engage in a particular trade.”); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICAAN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 153 (2000) (stating that the private delegation doctrine

The *Carter* Court's nod to due process has yet to rematerialize in private delegation doctrine.<sup>316</sup> Yet the notion that private parties' inevitable drive to regulate for their own benefit and at the expense of competitors and/or the public applies with even greater force to agency subdelegations of regulatory authority to the private sector. The logic of *Carter* accordingly suggests that, at a minimum, agency decisions to outsource regulatory power to private industry should be grounded in express legislative authorization.

Thus, by enabling judicial review of agency decisions to subdelegate legislative power to private parties, a subdelegation doctrine would serve the separation of powers in a manner that is entirely consistent with the longstanding, congressionally-focused approach to nondelegation. Likewise, as described below, *Chevron* should be applied to require that agencies exercise their rulemaking powers in a manner that adheres to legislative intent—including when they outsource delegated functions to the private sector.

### B. *Chevron Step Zero*

Absent a private subdelegation doctrine, *Chevron* represents the sole mechanism for judicial oversight of what Judge Posner of the Seventh Circuit has called the “abdication of regulatory authority to the regulated, the full burgeoning of the interest-group state, and the final confirmation of the ‘capture’ theory of administrative regulation.”<sup>317</sup> Under the APA, regulators can freely communicate with the regulated community and other interest groups in the rulemaking process, enabling affected parties to invest in the final product at its nascent stages.<sup>318</sup> This Article does not advocate for additional procedural encumbrances on the rulemaking

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“is, in fact, rooted in a prohibition against self-interested regulation”); Lawrence, *supra* note 228, at 659.

316. It is one of the issues the Court identified for consideration by the D.C. Circuit on remand in *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225, 1234 (2015). The D.C. Circuit ruled on this matter on April 29, 2016, reversing the ruling of the lower court, finding that the PRIIA violates the Fifth Amendment's Due Process Clause by “authorizing an economically self-interested actor to regulate its competitors,” and the Appointments Clause by “delegating regulatory power to an improperly appointed arbitrator.” *Ass'n of Am. R.R.s v. Dep't of Transp.*, No. 12-5204, slip op. at 3 (D.C. Cir. Apr. 29, 2016). The court declined to reach the question of whether “a government corporation whose board is only partially comprised of members appointed by the President [is] constitutionally eligible to exercise regulatory power.” *Id.*

317. *USA Grp. Loan Servs., Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996).

318. See *Action for Children's Television v. FCC*, 564 F.2d 458, 477 (D.C. Cir. 1977) (recognizing “Congress’ intent not to prohibit or require disclosure of all ex parte contacts during or after the public comment stage” of informal rulemakings under the APA).

process, which can frustrate legislative objectives and foster inefficiencies. It asserts, rather, that courts should reclaim their role of “say[ing] what the law is”<sup>319</sup> to account for the private sector’s increasing influence in the rulemaking process.

To restate the basics, *Chevron*’s two-part test holds that if statutory language is clear under step one, Congress did not delegate policymaking authority in the first instance. This step ensures fidelity to statutory parameters, the structural Constitution, and the judicial prerogative of upholding the rule of law. Delegation occurs only when statutory ambiguity exists.<sup>320</sup> If agencies issue rules with the force of law pursuant to such ambiguity, their policymaking receives deference under step two.

No deference occurs, however, if an agency is not acting in a way that operates as a substitute for the legislative process.<sup>321</sup> The Court has stated that “[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”<sup>322</sup> For administrative actions that are less formal than notice and comment or formal rulemakings, judges must search for congressional authorization for agencies to make policy with the force of law.<sup>323</sup> Specifically, courts conduct a “step zero” analysis to determine if Congress intended the agency to receive policymaking deference by virtue of processes that are not grounded in express statutory authorization.

Because deference runs—if at all—only to agencies to which Congress delegates rulemaking authority, the Court should construe *Chevron* step zero to decline deference to rules that reflect policy crafted by the private sector.<sup>324</sup> In this way, step zero would function to replace the nondelegation doctrine’s role in preserving structural safeguards under the Constitution when public power is exercised along the right side of the constitutional policymaking continuum. Alternatively, courts should apply

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319. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

320. Cass Sunstein has thus called *Chevron* a prodelegation canon. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 329–30 (2000).

321. *United States v. Mead Corp.*, 533 U.S. 218, 218, 229 (2001).

322. *Id.* at 230.

323. See Garry, *supra* note 194, at 956.

324. If this element were incorporated into the *Chevron* analysis, agencies would be incentivized to include in the administrative record facts demonstrating how the policy reflected in the final rule was crafted. Cf. Damien M. Schiff, Sackett v. EPA: *Compliance Orders and the Right of Judicial Review*, 2012 CATO SUP. CT. REV. 113, 136 (“When the agency knew that it could not be hailed into court for its compliance orders, it had no incentive to shore up its administrative record; now that such a result is possible, the EPA has a real incentive to do its homework before acting.”).

*Chevron* step one to construe legislative silence as precluding agency authority to delegate policymaking to the public sector in response to the “broader criticism of the growth and power of the modern administrative state—e.g., that Congress has lost control through the nondelegation doctrine, and that courts have lost control through *Chevron*.”<sup>325</sup>

In reverting to a search for congressional intent, step zero replaces nondelegation’s role in preserving the Constitution’s structural safeguards, including its retention of policymaking power in the most democratic branch of government: the legislature. If there is a clear legislative mandate as to how a particular statute should be implemented, *Chevron* requires judicial review of the resulting regulation in order to ensure agency adherence to congressional intent. If there is no such legislative mandate or an agency uses a less formal process to make policy, step zero holds agencies accountable within the boundaries of their delegated authority by enabling courts to ultimately clarify what the law is when agencies do not exercise authority to make policy with the force of law.<sup>326</sup>

When rulemaking is conducted largely by the private sector, “the need for careful judicial scrutiny is particularly appropriate due to . . . the potential for collusion among those who are present to distort statutory terms.”<sup>327</sup> In the typical notice and comment process, “[b]usiness oriented groups overwhelm an ‘overstretched’ agency staff with ‘[a] continuous barrage of letters, telephone calls, meetings, follow-up memoranda, formal comments, post-rule comments, petitions for reconsideration, and notices of appeal.’”<sup>328</sup> The agency takes these inputs into consideration in formulating policy in drafts of legislative rules or nonlegislative guidance. “[I]f most of the information submitted to an agency reflects an industry view of regulatory issues,” however, “regulators are likely to be over-influenced by this experience, leading them to form generalizations that undermine their capacity to visualize other policy alternatives.”<sup>329</sup> Psychological studies suggest that “people are subject to an availability heuristic, which causes them to overestimate the probability of events

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325. Garry, *supra* note 194, at 946 n.163.

326. This is so even if *Skidmore* deference—which affords courts discretion as to whether to take into account an agency’s policymaking choices—applies. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

327. Choo, *supra* note 64, at 1071.

328. Shapiro, *supra* note 294, at 238 (quoting Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325 (2010)).

329. *Id.*

based on the information most immediately available to them.”<sup>330</sup> Thus, agency personnel are prone to adhere to the policy alternatives that they accept at the outset of a rulemaking. Judicial review serves to counteract such actual or perceived bias that may be embodied in a final rule at the expense of broader public interests reflected in the plain language of the statute.

Absent robust judicial review, moreover, agencies can “effectively turn their backs on their statutory mandates” by outsourcing their rulemaking functions.<sup>331</sup> In negotiated rulemaking—a close cousin of the type of private sector policymaking embodied in the CPP<sup>332</sup>—“agencies try at times to cajole warring outside interest groups into signing off on compromises that are not legally, much less technically, appropriate.”<sup>333</sup> As a consequence, “[i]ssues of statutory construction [a]re resolved more through a process of political bargaining than disinterested legal reasoning or expertise[,] . . . contrary to *Chevron*’s intent.”<sup>334</sup> Agencies function as “mere participants” in the rulemaking process, and no longer manifest the expertise rationale for *Chevron* deference.<sup>335</sup> Negotiated rules can thus “no longer be presumed to reflect either the agency’s own expertise or choice of the ‘best’ policy, based on instrumentally rational decisionmaking.”<sup>336</sup> Courts have declined to apply *Chevron* deference when the record fails to reflect how an agency employed its own expertise in making a policy decision.<sup>337</sup>

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330. *Id.* (citing SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 121 (1993)).

331. Rena Steinzor & Scott Strauss, *Building a Consensus: Agencies Stressing ‘Reg Neg’ Approach*, *LEGAL TIMES*, Aug. 3, 1987, at 21.

332. The Negotiated Rulemaking Act of 1990 authorizes agencies to bring interested parties together to draft a proposed rule. Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 561–570 (1994)). Congress has also specifically directed certain agencies to engage in negotiated rulemaking. See Choo, *supra* note 64, at 1074 n.30 (compiling statutes).

333. Steinzor & Strauss, *supra* note 331, at 21.

334. Choo, *supra* note 64, at 1097.

335. *Id.*

336. *Id.*

337. See *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 812 (D.C. Cir. 2007) (observing that “[w]e will defer to the Commission’s judgment in technical matters within its expertise, but only when the Commission has in fact exercised its judgment,” and finding that agency did not warrant deference with respect to economic analysis); *Pub. Citizen Health Research Grp. v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986) (refusing to defer to agency finding regarding short-term chemical exposure in the work place); see also Choo, *supra* note 64, at 1102 (arguing that resulting regulations “carry particularly questionable democratic legitimacy, and courts should not exacerbate this problem by extending *Chevron* deference to them”); cf. *Cent. Arizona Water Conservation Dist. v. EPA*, 990 F.3d 1531, 1540 n.8 (9th Cir. 1993) (observing that “the ‘expertise model’ does not necessarily mandate judicial deference”).

Private sector rulemaking undermines the democratic rationale for *Chevron* deference to the extent that it produces rules that fail to serve the public interest. If rules drafters are not neutral, expert, or detached in the same way as public officials are presumed to be, “law becomes nothing more than the expression of private interests mediated through some governmental body.”<sup>338</sup> Agency rulemaking loses its public interest objective,<sup>339</sup> subtly transforming public law into a set of “private law relationships.”<sup>340</sup> “[C]ourts can no longer presume that regulations formulated through private interest group bargaining embody either the agency’s conception of the public interest, or an application of legal, technical, or policy expertise that is worthy of judicial deference.”<sup>341</sup> Outsourced rulemaking is even more problematic than negotiated rulemaking because only a subset of interests is represented in the drafting process.

With government policymaking becoming more privatized, doctrine must develop to counteract courts’ tendency to apply *Chevron* “without regard to a rule’s negotiated origins.”<sup>342</sup> Just as step zero requires courts to determine the level of deference to afford policymaking that is not grounded in express statutory authorization, step zero should operate to sort out whether policymaking that results from agencies’ unilateral subdelegations to the private sector should receive judicial deference. Because private sector policymaking does not itself bear the characteristics of government action that Congress intended to have the force of law, it should not receive deference under *Chevron* step zero.

The scant Supreme Court cases amounting to the step zero canon shore up the conclusion that agency policymaking should not receive *Chevron* deference to the extent that it derives from substantial private sector influence. In *United States v. Mead Corp.*, the Court refused to apply *Chevron* deference to letter rulings made by forty-six offices of the US Customs Service because they did not “bespeak the legislative type of activity that would naturally bind more than the parties to the ruling.”<sup>343</sup> The tariff classifications applied only to the particular importers to whom they were issued.<sup>344</sup> The Court justified its decision not to apply *Chevron*

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338. William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1375 (1997).

339. Choo, *supra* note 64, at 1100.

340. Funk, *supra* note 338, at 1386.

341. Choo, *supra* note 64, at 1071.

342. *Id.* at 1081.

343. 533 U.S. 218, 232 (2001).

344. *Id.* at 233.

by broadly referencing “the great variety of ways in which the laws invest the Government’s administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress.”<sup>345</sup>

The private sector’s influence on bureaucratic policymaking likewise demands review of notice and comment rulemakings that is grounded in congressional intent. In *FDA v. Brown & Williamson Tobacco Corp.*,<sup>346</sup> the Court denied the FDA *Chevron* deference despite a seemingly broad grant of rulemaking authority. Finding that Congress did not delegate to the FDA the authority to regulate tobacco as a drug, the Court invalidated a regulation painstakingly promulgated by notice and comment. “[N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable,” the Court reasoned, “an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.”<sup>347</sup> The “common sense” that guided the Court in *Brown & Williamson* “as to the manner in which Congress is likely to delegate a policy decision of . . . economic and political magnitude to an administrative agency”<sup>348</sup> virtually forecloses the possibility that Congress ever means to impliedly delegate lawmaking power to private parties.

In *Barnhart v. Walton*,<sup>349</sup> the Court applied additional factors in the step zero analysis in affording *Chevron* deference to the Social Security Administration’s denial of disability benefits. The Court looked to “the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time” to conclude that the agency’s interpretation of the underlying statute fell within its “lawful” interpretative authority.<sup>350</sup> The *Barnhart* factors thus justify deference only where the rationales underlying *Chevron* itself exist (i.e., studious consideration of longstanding policy questions within a particular agency’s expertise).

These factors hardly apply to agency rulemakings that are conducted by the private sector. If the propriety of deference is framed as a question of congressional intent under *Chevron*, deference can only run to an

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345. *Id.* at 236.

346. 529 U.S. 120 (2000).

347. *Id.* at 161 (internal quotation marks omitted).

348. *Id.* at 133.

349. 535 U.S. 212 (2002).

350. *Id.* at 217, 222.

executive branch agency. Congress cannot be presumed to defer to private sector expertise when a statute delegates rulemaking power to government actors. Nor can courts reasonably conclude under *Barnhart* that Congress intended for longstanding agency rulemaking practices to be supplanted by the successful lobbying efforts of particular non-governmental actors. Just as the Customs decisions in *Mead* were not without consideration of all affected interests in mind, policymaking derived from private influence is a poor proxy for the generalized, representative decision-making that the most democratic branch of government—Congress—is designed to produce. Private parties function without transparency and out of self-interest rather than in service of the broader public good. As such, rulemaking driven by special interests should not have the same binding effect as policymaking that germinates within the constitutional structure of government.

Under step zero, therefore, *Chevron* deference should be conditioned on a finding that agency officials—and not the private sector—made the policy reflected in a regulation. For rules drafted in the first instance by private actors, courts should employ de novo review for consistency with legislative objectives. The Court has already carved out exceptions to *Chevron* deference (e.g., agency lawyers do not get deference for arguments made in the course of litigation);<sup>351</sup> private sector rulemaking could simply be added to this list.<sup>352</sup>

Moreover, in order to trigger a *Chevron* deference analysis under step zero, agencies would by necessity include in the administrative record information regarding the drafting process—much like they construct the administrative record with an eye towards arbitrary and capricious review.<sup>353</sup> Courts would then determine if a rule embodies a policy deal struck between an agency and certain interest groups to the exclusion of others.<sup>354</sup> If the record fails to demonstrate that a rulemaking was driven

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351. See *United States v. Mead Corp.*, 533 U.S. 218, 228, 238 n.19 (2001); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988).

352. Cf. Choo, *supra* note 64, at 1085, 1087 (making the same point regarding negotiated rulemaking, and noting that the architect of negotiated rulemaking had argued that there should be little to no judicial review of the results).

353. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971). Although the Supreme Court held in *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978), that courts cannot add procedural requirements to the APA, the D.C. Circuit has held that *Vermont Yankee* is not inconsistent with *Overton Park*'s requirement that, "in order to allow for meaningful judicial review, the agency must produce an administrative record that delineates the path by which it reached its decision." *Occidental Petroleum Corp. v. SEC*, 873 F.3d 325, 338–39 (D.C. Cir. 1989). The same analysis would apply here.

354. See Seidenfeld, *supra* note 283, at 457 n.199.

by internal agency expertise rather than private sector influence, the result would simply be less deference to the policy contained in the final rule. Agencies could decide for themselves whether to limit ex parte influence in the rulemaking process or establish a more inclusive, collaborative process in order to avoid more stringent judicial review. By bolstering judicial review for such considerations, step zero would tie rulemakings back to Congress's intent in delegating power to an agency in the first instance. This is, at bottom, a decision about "which political branch will have the authority to control the outcome of an issue."<sup>355</sup>

Courts could alternatively confine subdelegations of policymaking to the private sector under step one of the *Chevron* analysis by finding what Lisa Shultz Bressman calls "clarity in ambiguity."<sup>356</sup> *Chevron's* congressional intent rationale assumes that Congress understands that, in transferring policymaking power to the executive branch, it protects its own interests by virtue of the fiscal, statutory, and constitutional oversight mechanisms that apply to federal agencies. Such checks do not apply to the private sector. Thus, even if it is appropriate to infer congressional intent to defer to agency policymaking from vague statutory language, ambiguity does not necessarily translate into deference to policymaking conducted by private parties that an agency unilaterally imports into the rulemaking process. In fact, the opposite inference—no deference—should apply if Congress is silent regarding the propriety of private sector influence. In other words, "[b]y denying agencies the discretion to interpret ambiguous terms as they see fit, the Court effectively may block the delegation of policymaking authority."<sup>357</sup> In *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court struck down an agency interpretation under *Chevron* step two on the rationale that it lacked "some limiting standard, rationally related to the goals of the [statute]."<sup>358</sup> Likewise, absent an indication of congressional intent that agencies may defer to factions of the private sector in rulemakings, it would be up to the judiciary to fill gaps in legislative policy.

To be sure, it is difficult—if not impossible—to accurately discern the extent to which private sector influence impacts routine notice and comment rulemakings; the empirical evidence regarding the very existence

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355. Ku, *supra* note 160, at 140; see also Schwarcz, *supra* note 107, at 338.

356. Lisa Schultz Bressman, Schechter Poultry at the Millenium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399, 1411 (2000).

357. *Id.* at 1412.

358. 525 U.S. 366, 388–89 (1999).

of regulatory capture is mixed.<sup>359</sup> Scholars have nonetheless urged more public transparency regarding the extent of industry influence in rulemakings to test their fidelity to legislative directives.<sup>360</sup> *Mead*'s "unstructured, case-by-case inquiry into whether deference to an agency interpretation 'makes best sense'" provides a platform for such judicial review.<sup>361</sup>

### C. Baseline Values Revisited

The Court has stood by the foundational premise that the Constitution's structure forbids the respective branches from delegating a certain subset of their federal powers to any other entity. A formalist reading of the Vesting Clauses thus leaves scant leeway for the exercise of legislative power outside the boundaries of the Constitution.<sup>362</sup> As a practical matter, the Court has instead taken a functional approach to separation of powers doctrine, including nondelegation and *Chevron*. Similarly, a functional approach to constitutional structure supports a framework for analysis of subdelegations of legislative authority to the private sector even though, from a formalist perspective, the private sector is beyond the Constitution's reach.

Specifically, a private subdelegation doctrine and expanded application of *Chevron* step zero would bring private lawmaking within the ambit of legal and political oversight that applies to government actors, enabling courts to reclaim their role of policing delegations of vested constitutional power.<sup>363</sup> As explained below, such doctrinal shifts would relieve the strain on core values underlying the Constitution's design that privatized lawmaking creates.<sup>364</sup>

#### 1. Accountability

This Article has argued that courts should construe *Chevron* step zero as denying deference to rules that embody private sector constructions of ambiguous statutory language. By tethering deference to a particular agency specified in an enabling statute, such an approach would promote

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359. Barron & Kagan, *supra* note 292, at 239–40.

360. *See id.* at 253.

361. *Id.* at 225.

362. Krent, *supra* note 228, at 68.

363. Ku, *supra* note 160, at 77.

364. This Article makes no claims as to the normative value of outsourcing policymaking to the private sector.

“accountable and disciplined decision making, in much the way the congressional nondelegation doctrine is meant to do in another context.”<sup>365</sup>

The Constitution sets forth a procedural framework for the definition and allocation of the people’s power to self-govern. People accept the Constitution because it establishes a “specifically constituted, democratically deliberative lawmaking system to which all primary legal content is constantly accountable.”<sup>366</sup> It assumes that voters can identify which branch and which government actor is responsible for a particular action. When rulemaking functions are outsourced by contract or via informal lobbying efforts, government actors abdicate their constitutional responsibilities, leaving the public without democratically accountable actors in core policymaking roles.

The Supreme Court has repeatedly rejected politicians’ attempts to shirk responsibility for policymaking by handing it off to other entities and muddying lines of accountability.<sup>367</sup> In *Printz v. United States*,<sup>368</sup> Justice Scalia wrote for the Court that “[t]he Constitution . . . contemplates that a State’s government will represent and remain accountable to its own citizens.”<sup>369</sup> Because the Brady hand gun statute allowed Congress to evade public accountability for its effects, Congress could take credit for “‘solving’ problems” related to handguns without raising federal taxes, while at the same time putting states “in the position of taking the blame for its burdensomeness and for its defects.”<sup>370</sup> As the Court elsewhere explained, “where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”<sup>371</sup> So, too, where agencies subdelegate policymaking power to private actors, lines of political accountability are blurred. The unavailability of judicial review exacerbates this problem.

A private subdelegation doctrine would enhance government accountability by empowering courts to confine outsourcing of legislative-type functions and require that policymaking retain its democratic

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365. Barron & Kagan, *supra* note 292, at 238, 241. Justice Kagan and Judge Barron have accordingly argued that *Chevron* should apply only if “statutory delegates” make policy decisions. *Id.* at 236, 237 (defining statutory delegate as “the officer to whom the agency’s organic statute has granted authority over a given administrative action,” often the secretary of the department).

366. Frank I. Michelman, *W(h)ither the Constitution?*, 21 CARDOZO L. REV. 1063, 1071 (2000).

367. See Brown, *supra* note 110, at 1379–80 (discussing *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), among others).

368. 521 U.S. 898.

369. *Id.* at 920 (citing *New York*, 505 U.S. at 168–69; *United States v. Lopez*, 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring)).

370. *Id.* at 930.

371. *New York*, 505 U.S. at 168.

moorings. Likewise, by deferring to courts' reading of legislative ambiguity over that of unrepresentative segments of the private sector, a revised approach to *Chevron* step zero would enhance democratic accountability. Agencies would be forced to make public the process by which rules are drafted—and by whom—enabling candid debate over the propriety of *agencies'* decisions to adopt private sector policy objectives. Unilateral decisions to employ democratically unaccountable actors to make policy would thus finally be subject to judicial review.

## 2. Transparency

Accounting for private sector influence in judicial review of agency policymaking would also enhance public transparency. To be sure, agencies can engage in *ex parte* discussions when they make policy under the APA.<sup>372</sup> The President can also select or reject his advisors without external oversight.<sup>373</sup> Inherent in his constitutional role is an “executive privilege” to keep certain information secret “among governmental employees.”<sup>374</sup> But there is a difference between “closely-held executive deliberations” and “public dialogue” about policies affecting the populace at large.<sup>375</sup> In *Citizens United v. Federal Election Comm’n*, the Court acknowledged the constitutional importance of transparent government, explaining that “transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>376</sup>

For Congress’s part, the FACA recognizes the importance of imposing transparency requirements on certain policy forums within the executive branch.<sup>377</sup> In *Brown & Williamson Tobacco Corp.*, the Court explained that “the meaning of one statute may be affected by other Acts,

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372. Approximately eighty-six percent of interest groups contact agency staff informally before a proposed rule is published in the Federal Register. Furlong & Kerwin, *supra* note 22, at 362–63.

373. See Gia B. Lee, *The President’s Secrets*, 76 GEO. WASH. L. REV. 197, 242 (2008) (questioning whether presidential confidentiality leads to better decision-making, notwithstanding “the structural features of presidential decision making—including the centralization of presidential decision making in a single individual, the hierarchical organization of the President and his advisors, and the President’s discretion to select only advisors that share his views”).

374. See Dannenmaier, *supra* note 155, at 334, 344 (citing *McClelland v. Andrus*, 606 F.2d 1278, 1287 (D.C. Cir. 1979)); see also *United States v. Nixon*, 418 U.S. 683, 705–06 (1974) (recognizing executive privilege against public disclosure of “communications between high Government officials and those who advise and assist them in the performance of their manifold duties” and that “[t]he President’s need for complete candor and objectivity from advisers calls for great deference from the courts”).

375. Dannenmaier, *supra* note 155, at 335.

376. 558 U.S. 310, 371 (2010).

377. 5 U.S.C. App. §§ 1–16 (2014).

particularly where Congress has spoken subsequently and more specifically to the topic at hand.”<sup>378</sup> An approach to *Chevron* step zero that embraces judicial review of the process by which agencies draft policy for consistency with congressional prerogatives to delegate to executive branch agencies is consistent with the legislative objectives underlying the FACA, which the Court has described as “opening many advisory relationships to public scrutiny except in certain narrowly defined situations.”<sup>379</sup> Under current statutory and constitutional doctrine, private sector influence over the rulemaking process occurs largely in the shadows. Judicial application of *Chevron* step zero to effectively require agencies to make public the extent to which they have allowed private parties to exercise congressionally-delegated policymaking functions would further the FACA’s legislative objective, which mirrors the Constitution’s implicit valuing of open government.

### 3. Legitimacy

Additionally, the development of a subdelegation doctrine and a reading of *Chevron* step zero as enabling judicial scrutiny of private sector influence in the rulemaking process would enhance government legitimacy in at least three ways: by making rulemaking more inclusive, by lessening bias in the regulatory process, and by tethering agency lawmaking to constitutional structures.

First, judicial review of private sector influence on rulemaking would render final rules more democratically inclusive. Legitimacy in agency rulemaking derives from the authorizing statute and the process for developing rules, including public participation. Public participation functions as “a substitute for the electoral process that bestows constitutional legitimacy on legislation.”<sup>380</sup> It also informs lawmakers about what policy outcome is in the public interest. For these reasons, policymaking is democratically legitimate only if it is inclusive; otherwise, there is no reason to prefer agency decisionmaking to that of federal judges who, despite having “no constituency” and functioning outside “either political branch of the government,”<sup>381</sup> operate with political independence by virtue of their life tenure and salary protections.<sup>382</sup>

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378. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000).

379. *Pub. Citizen v. Dep’t of Justice*, 491 U.S. 440, 463 (1989).

380. Furlong & Kerwin, *supra* note 22, at 354.

381. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

382. Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. REV. 609, 659 (2002) (“The apparent purpose of the life-tenure provision of Article III is to

Inclusiveness is also embedded in the legislative objectives of the APA itself. The statute's legislative history indicates that "[i]n the 'rule making' (that is, 'legislative') function[,] with certain exceptions, agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration before the issuance of general regulations."<sup>383</sup> Indeed, a contemporary scholar remarked eight years after the APA's passage that the law "was the culmination of a generation of effort on the part of students of American administrative law who felt that administrative power was . . . not sufficiently safeguarded and sometimes put to arbitrary and biased use."<sup>384</sup>

Second, judicial construction of interstitial gaps in legislation is more legitimate than private sector policymaking because private parties are beholden to their own stakeholders' interests. Legitimacy "relies on the notion that value judgments are made by [government] policy makers, and that managers and street-level workers are only implementing the policy."<sup>385</sup> With outsourcing, "the government is not only purchasing services but also 'purchasing' private sector logic and ethos in service delivery" (i.e., "market culture and values").<sup>386</sup> Sometimes private interests converge with those of the public, but sometimes they do not. To the extent that private parties operate out of self-interest, rulemakings that are heavily influenced by factions of the private sector lack the legitimacy of exclusively governmental lawmaking.<sup>387</sup> By applying principled canons and rule of law values to private lawmaking, courts can impose the "distributional goals"<sup>388</sup> that APA rulemaking is designed to serve.

Third, unlike private parties, federal judges derive legitimacy from the formal constitutional structures that establish the federal courts within the separation of powers.<sup>389</sup> Legitimacy assumes that those exercising public

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ensure the political independence of the federal judiciary.").

383. S. REP. NO. 79-752, at 193 (1945).

384. Bernard Schwartz, *The Administrative Procedure Act in Operation*, 2 N.Y.U. L. REV. 1173, 1173 (1954); see also ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26 (1947).

385. Benish, *supra* note 130, at 6.

386. *Id.* at 7.

387. See Schwarcz, *supra* note 107, at 338; Funk, *supra* note 125, at 94 (arguing that negotiated rulemaking undermines the public interest and the legitimacy of administrative action); cf. *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973) (holding that members of the Alabama Board of Optometry had a pecuniary interest that constitutionally disqualified them from passing on charges of unprofessional conduct by competitors).

388. Schwarcz, *supra* note 107, at 322.

389. Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 371 (1990).

power have “the right . . . to make binding rules.”<sup>390</sup> When the executive branch departs from the Constitution’s structure by outsourcing constitutionally derived functions, the government’s overall legitimacy is reduced.<sup>391</sup> The private sector has no independent source of power to affect the general population. By confining the exercise of the people’s power to constitutionally vested branches of government, a private subdelegation doctrine and invigoration of *Chevron* step zero to account for private sector lawmaking would greatly enhance legitimacy.

#### 4. Rational Decisionmaking

Finally, by counteracting the incentives of private industry to formulate policy that is self-serving and suboptimal for the public as a whole, enhanced judicial review of private influence on rulemakings would foster rational decisionmaking in government.

A common thread in public choice theory is an assumption that “[t]he individual will order his behavior so as to maximize the likelihood of achieving his individually defined goals.”<sup>392</sup> Private interest groups or lobbyists will accordingly push for regulatory policies that advance the financial interests of their constituents, with insufficient regard for the welfare of the public at large.<sup>393</sup> Unlike Congress as a whole, individual bureaucrats are not constitutionally bound to publicly reach a measure of consensus. They are more vulnerable to influence by private interests than a collective Congress. When a private party is tasked with giving content to a rule, therefore, public power is subverted in furtherance of “private gain with a net loss in aggregate welfare and/or unjustifiable wealth transfers between groups.”<sup>394</sup> The result is bad government.<sup>395</sup>

By tying private sector policymaking to statutory language that reflects the consensus of a bicameral legislature, a subdelegation doctrine and revised approach to *Chevron* step zero would counteract self-interestedness, thus fostering government decisionmaking that better serves the broader populace.<sup>396</sup> The Supreme Court has characterized

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390. DAHL, *supra* note 161, at 41; *see also* Bodansky, *supra* note 161, at 601 n.29.

391. Ku, *supra* note 160, at 127, 129 (noting that self-regulatory regimes derive some legitimacy from their respective constituencies).

392. Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 563 (2002).

393. *Id.* at 568.

394. *Id.* at 570.

395. *Id.*

396. *See id.* at 569.

disinterestedness in government as having deep-seated normative implications. In *Young v. United States*,<sup>397</sup> it reversed a conviction for criminal contempt because it was secured by private lawyers appointed by the court. The Court explained that a private party might prosecute a weak case or pass over a strong one if either course “promises financial or legal rewards for the private client.”<sup>398</sup> Like federal prosecutors, agencies are “the representative[s] . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest [is] . . . that justice shall be done.”<sup>399</sup> Allowing regulated entities to occupy a privileged position in the rulemaking process undermines this goal. Because “[p]ublic confidence in . . . disinterested conduct . . . is essential” when “expansive powers and wide-ranging discretion” are involved,<sup>400</sup> courts should be given the doctrinal tools to address private sector impact on rational and disinterested policymaking.

#### CONCLUSION

This Article has urged the expansion of the nondelegation and *Chevron* doctrines to account for the private end of the constitutional policymaking continuum it describes. To the extent that executive branch agencies either contractually outsource or informally insource policy decisions formulated by factions of the private sector, courts should review the nature and scope of such influence to ensure compatibility with congressional intent and to foster constitutional norms of good government.

To be sure, private sector influence on agency rulemakings is so well entrenched in the modern federal bureaucracy that any attempt to fashion mechanisms for judicial review will be met with suspicious reluctance. The line between legitimate lobbying and constitutionally grounded policymaking is difficult to identify. Courts would have to develop the doctrine incrementally over time. Through its functionalist approach to delegation doctrine, the Court has long acknowledged the impracticalities of cabining legislative power to the precise terms of Article I’s Vesting Clause. Expanding existing doctrine to capture private lawmaking is of a piece with the pragmatic spirit of the Court’s existing separation of powers jurisprudence. Private lawmaking, in short, has inescapable constitutional implications that currently evade democratic and judicial scrutiny. The

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397. 481 U.S. 787 (1987).

398. *Id.* at 805.

399. *Id.* at 803 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

400. *Id.* at 813.

development of a private subdelegation doctrine and a more nuanced approach to *Chevron* step zero would begin to address this constitutional blind spot, thus holding out important public law values—public accountability, transparency, legitimacy, and rational decisionmaking—as more important than notions of agency prerogative.