

PROVOCATIONS #10

ABDICATION

*How Congress Abandoned its Legislative Power
and Subverted Constitutional Republicanism*

Kevin Portteus



CLAREMONT INSTITUTE
CENTER FOR THE AMERICAN WAY OF LIFE

AMERICA'S 250TH ANNIVERSARY

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FOREWORD

In the final attempt to cripple civil order among the American colonies, the Royal Governors fled from their posts. Legislatures would be left powerless and laws would cease to be enforced. And by “loosening the bands of government” the depredation of her enemies would force the accumulation of all political power into the arms of military occupation. 250 years later, in the spirit of our former governors, our congressmen have fled from their responsibilities of legislating. And with the consolidation of political power in other branches of government, we are once again on the precipice of what Madison called “the definition of tyranny.”

The Center for the American Way of Life has published our provocations to engage the highest levels of Congress and the Executive on ways we can reclaim and save the American way of life. As Americans continue celebrating

our country's great achievements, we are excited to continue this special series of *Provocations* by turning the American mind to Congress, providing the institution with a reminder of her principled foundations, the progressives' erosion of her legislative prerogative, and set the targets that will shape the next 250 years of our country and beyond.

We are proud to continue our series with the incisive scholarship of Dr. Kevin Portteus. Dr. Portteus has spent two decades researching Congress, her enablement of the administrative state, and how this enablement has fundamentally altered the American constitutional republic.

We hope this edition in the *Provocations* series will continue the legacy of guiding those in the highest ranks of our government, and we hope this edition will inspire a new generation of Americans to see beyond the triflingly incompetencies to the constitutional crisis of a Congress that no longer legislates.

Annalyssa Rogers

Acting Executive Director

CENTER FOR THE AMERICAN WAY OF LIFE



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At the time of this writing, Congress was engaged in its favorite activity: not legislating. The leadership in the Senate is doing everything in its power to avoid voting on the SAVE America Act. The measure was passed by the House of Representatives, but Majority Leader John Thune (R-South Dakota) refuses to take action to allow it to reach a real, meaningful vote, claiming that “the votes aren’t there.”¹ Meanwhile, Pew Research Center reports that 83% of Americans support voter ID,² the central feature of the SAVE America Act, and Gallup places that support at 84%.³ On the other hand, the primary concern of the House of Representatives seems to be making sure that the American taxpayer never discovers how much of his money has been spent settling sexual harassment lawsuits against members of that august body. In this instance partisanship evaporated as massive majorities in

both parties came together to protect members and the institution from scrutiny.⁴ The 357-65 vote was sandwiched between revelations regarding alleged sexual misconduct by GOP Representative Tony Gonzales and Democratic Representative Eric Swalwell. Individually, members of both chambers and both parties seem to enjoy engaging in securities transactions that would arguably land the rest of us in prison. Thanks to the internet and some enterprising individuals, one can even build a portfolio and investment strategy based on former Speaker Nancy Pelosi's immensely successful trading activity.⁵ Perhaps that's unfair. In general, however, the reality of the modern Congress is that it does not legislate. Even when Congress legislates, they do not legislate. They may enact bills, which we call laws, but most of these enactments are not laws, properly understood.

That Congress is not legislating does not mean that legislative policy is not being made. The federal government still legislates, but it overwhelmingly takes forms other than laws enacted by Congress according to the process set forth in the Constitution. This past year, despite Congress only enacting 38 laws,⁶ every other institution in Washington has stepped into the breach, each in its own way. President Trump has issued a hurricane of executive orders.⁷ The *Federal Register*, that scintillating daily digest of the administrative state, surpassed 61,000 pages in 2025⁸ (which is actually down from over 107,000 pages in 2024).⁹ Meanwhile, the federal judiciary continued to involve itself with legislative policy decisions as it has for decades. Through both positive action conferring legislative power on others, and the failure to address important issues through legislation, legislative power has steadily passed from its constitutionally-designated home to other actors.

The importance of this change in the American political system cannot be understated. Delegation—the abdication by Congress of its core legislative function—is the key to understanding both the modern Congress and the crisis of constitutional government in America. This essay will attempt to examine this change and its consequences. First, it will consider the nature of legislative power, and how the Constitution institutionalized that power. Second, it will explain how and why Congress turned its back on legislating. Third, it will discuss the way in which delegation of legislative power has transformed Congress, leading to institutional failure on a massive scale. Fourth, it will show how delegation of legislative power has produced a very real transformation in the character of the American regime as a whole. Finally, it will consider prospects for rolling back delegation, and with it the restoration of constitutional republicanism in America.

Congress and the Legislative Power

In his landmark 1960 study of the presidency, *Presidential Power*, Richard E. Neustadt wrote that “The Constitutional Convention of 1787 is supposed to have created a government of ‘separated powers.’ It did nothing of the sort. Rather, it created a government of separated institutions *sharing* power.”¹⁰ In this vision of the American political order, “power” is an amorphous mass, which the various institutions are set to squabbling over by the Constitution. Neustadt’s conception of separation of powers is not completely without merit. By facilitating institutional conflict, the authors of the Constitution created a system that would prevent any one institution from accumulating all power in its hands, which James Madison declares in *Federalist* 47 to be “the very definition of tyranny.”¹¹ Moreover, it is true

that the Constitution provides mechanisms by which each branch of the government may involve itself in the activities of other branches, at least to a limited extent.

Neustadt, however, has an incomplete grasp of the constitutional system of separation of powers. Madison also maintains that only “after discriminating in theory, the several classes of power, as they may in their nature be legislative, executive, or judicial,” can we then proceed to create separate institutions to exercise that power.¹² The separation of powers is predicated on the assumption that each power is fundamentally different *in its nature* from the other powers. To legislate is to exercise a kind of power that is distinct from the power to execute, and both are different from adjudication. The uniqueness of each institution is, in turn, a reflection of that insight. The institutions of government under the Constitution were each deliberately constructed to facilitate the proper exercise of the power associated with that institution; they were not thrown together and then told to spar with the other institutions for control of the federal government. In the case of Congress, this fact is embodied in the first substantive provision of the Constitution: “All legislative Powers herein granted shall be vested in a Congress of the United States.”¹³ Congress is entrusted with a specific power: the legislative power, or the power to make laws.

To understand this grant of power, however, we must try to recapture the Founding Fathers’ understanding of the nature of law, an understanding which draws on a natural law tradition stretching back at least to Thomas Aquinas, and includes political theorists like John Locke, Jean Jacques Burlamaqui, and Samuel Pufendorf. In *Federalist* 62, Madison asserts that “Law is defined to be a rule of action”¹⁴, while Alexander Hamilton similarly holds in *Federalist* 75 that “the essence of the legislative power is to

enact laws, or in other words to prescribe rules for the regulation of society.”¹⁵ A decade earlier, the people of Essex, Massachusetts declared that “The legislative power is employed in making laws, or prescribing such rules of action to every individual in the state, as the good of the whole requires, to be conformed to by him.”¹⁶ A law, properly understood, communicates to its subject, in an authoritative way, what he must do (I must pay my taxes), and must not do (I must not burn down my neighbor’s house). By implication, law also communicates to the subject what he may do, but is not required to do. Nothing in the law either commands or forbids me taking my family to Disney World, so that is left to my discretion.

By making these decisions, law also protects those who are subject to the law. Madison holds that “laws are necessary, to mark with precision the duties of those who are to obey them, and to take from those who are to administer them a discretion, which might be abused.”¹⁷ Law must be sufficiently clear and precise that a reasonably intelligent person can read it and know his rights and obligations under the law. This is reflected in Madison’s admonition in *Federalist* 62 that laws should not be “voluminous,” “incoherent,” “repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is to-day can guess what it will be tomorrow.”¹⁸ By doing so, good legislation also restrains other, non-legislative, governmental actors in the exercise of their authority. If the law defines, with reasonable precision, the rights and duties of its subjects, then executive and judicial branch officials are restrained from exercising their own powers in ways that effectively impose rules of action outside of the Constitution’s legislative process. Good law serves the purposes of the separation of powers by preventing executive

and judicial branch officials from legislating. Law, properly understood, binds both subjects and officials.

As the powers of government are fundamentally distinct “in their nature,” each power under the Constitution has a distinct characteristic associated with it. In the case of the legislative power, that characteristic is “deliberation.” In *Federalist* 70, Hamilton praises a “numerous legislature” (as opposed to a “single executive”) as “best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.”¹⁹ Later in the essay, Hamilton argues that, while a numerous legislature is sometimes hampered from taking decisive action, the benefits of deliberation in a legislature outweigh its drawbacks.²⁰ Madison would affirm this view in 1796, stating that “this House, in its Legislative capacity, must exercise its reason; it must deliberate; for deliberation is implied in legislation.”²¹

In the *Nicomachean Ethics*, Aristotle speaks about deliberation at some length. Deliberation is a particular kind of thought; “we deliberate,” he says, “about things that are up to us and are matters of action.”²² Deliberation begins with thinking about matters within our control. We may think about what lottery numbers we wish to pick, but we do not deliberate upon them, for the winning numbers are a matter of chance; we cannot reason our way to the correct numbers. Likewise, we do not deliberate about the nature of the cosmos. There is an objective truth to the nature of the cosmos, and we can have knowledge of it, but we do not control it. We deliberate about where we want to go on vacation, what vocation we wish to pursue, or what is the best energy policy for our country. The next step in the deliberative process is choice. “Among the things that are up to us,” Aristotle continues, “the desired thing that has been deliberated upon is what is chosen, choice would be the de-

liberate desire of things that are up to us, for having decided as a result of deliberating, we desire in accordance with our deliberation.”²³ Having thought about the alternatives, we must then choose among them. Deliberation without resultant choice is pointless, and cannot truly be said to be deliberation, for the point of deliberation is to select the best possible course of action.

Ultimately, deliberation is the active form of prudence, or practical judgment. For Aristotle, “someone who is apt at deliberating would be possessed of practical judgment...it is a truth-disclosing active condition involving reason that governs action, concerned with what is good and bad for a human being.”²⁴ In a political context, one must begin with an understanding of what constitutes the good, but it is more than this, for one can have knowledge of the good without being prudent, if one does not direct this wisdom toward human things.²⁵ Working from that understanding, the deliberator must then apply that understanding within a particular context. Given the circumstances that exist at any moment, what is the best policy for the nation to pursue? The deliberator must prioritize competing or mutually exclusive goals and ultimately make a decision about those priorities. As deliberation involves choice, the choice will favor one course of action over another, or seek to balance or compromise between multiple courses of action. A choice reflects the deliberator’s choice about the regime’s priorities and how best to achieve those priorities in a given situation. Aristotle maintains that “the political art is the same active condition as practical judgment... As applied to the city, practical judgment in the overarching sense is the art of lawmaking.”²⁶ Lawmaking is deliberation, resulting in choice, and this is prudence in action.

Consider an example from American history. In 1787, the delegates to the Constitutional Convention were faced

with a dilemma. The institution of slavery is anathema to the principles of the American Founding, so it would seem natural to wish to implement those principles in drafting the Constitution. However, the delegates from the lower South states made clear that any attempt to abolish slavery in the Constitution would cause those states to abandon the Convention and chart their own independent course.²⁷ From the early essays of *The Federalist* to George Washington's Farewell Address, our Founding Fathers attached immense importance to the preservation of the Union.²⁸ Given these realities, how does one balance opposition to slavery with the need to maintain the unity of the new nation? At the Convention in particular, and in antebellum American history in general, Americans deliberated about this problem and made choices about how to reconcile those competing priorities. We may agree with or criticize the path they charted, but in charting that path they were engaged in deliberation, and this deliberation is the essence of the legislative power.

The first substantive provision of the Constitution (after the Preamble) states that "All legislative Power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and of a House of Representatives."²⁹ If a power is vested in the federal government, and the power is legislative in its nature, then that power rests with Congress, which is thus designated as the legislature of the United States.³⁰ In exercising their sovereign power to create a Congress and vest it with legislative power, the people of the United States are authoritatively declaring that Congress should exercise that power. As Locke notes in the *Second Treatise of Government*, "the Legislative cannot transfer the Power of Making Laws to any other hands." The sovereign people have already delegated their sovereignty to Congress, and with Congress

it must remain. The power delegated by the people, Locke continues, is a power “only to make *Laws*, and not to make *Legislators*.”³¹

The Legislative Vesting Clause also tells us that Congress is a bicameral institution: it is composed of two chambers. Negatively, bicameralism embodies a response to concerns about the abuse of legislative power in the states during the period from independence to the framing of the Constitution.³² Positively, however, bicameralism seeks to improve legislative outcomes by subjecting proposed legislation to two different types of deliberation. Each chamber has a unique construction, which encourages deliberation along distinct lines. Members of the House of Representatives serve two-year terms, and all seats are contested simultaneously. Senators, by contrast, serve six-year terms, with only approximately one-third of seats contested in each election cycle. Representatives are elected directly by their constituents, while Senators were originally selected by their state’s legislature. With few exceptions, House members represent fewer people as a Senator’s constituency is his entire state. The eligibility requirements to serve in the House of Representatives are lower than those of the Senate. There are also some differences in what powers each chamber may exercise.

Relative to the Senate, the House of Representatives is designed to be more responsive to public opinion. It is not a direct democratic institution, and the level of responsiveness was far from satisfactory for some opponents of the Constitution, but in general Representatives must be more cognizant of the will of their constituents in their deliberative process. Madison notes in *Federalist* 57 that “the electors are to be the great body of the people”, the eligibility requirements to serve in the House of Representatives are low, and that “the restraint of frequent elections” will “sup-

port in the members an habitual recollection of their dependence on the people.”³³ The Senate, meanwhile, is insulated to a certain extent from the will of the people. It is far from an hereditary body like the British House of Lords, but Senators have the flexibility to take positions that are unpopular in the short term, to act as a brake on public opinion, and to consider the longer-term good of the nation. In Madison’s words,

As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?³⁴

To secure passage and become law, any bill must ostensibly survive both distinct types of legislation, so that it may plausibly claim to be both the will of the people *and* in the public interest.

In *Federalist* 37, Madison admitted that the boundary between legislative power and other powers is difficult to draw with absolute precision, and controversies arose in both Congress and the Supreme Court as to exactly where legislative power begins and ends.³⁵ Nevertheless, legislative power is conceptually distinct from other powers,³⁶ and both the legislative power and its essential character-

istic, deliberation, can be clearly identified and articulated. America's Founding Fathers understood these concepts and incorporated them into the legislative body created by the Constitution. Despite the difficulty in defining the precise contours of the legislative power, Congress and the judiciary made serious efforts to be faithful to the concept in the first century or more of government under the Constitution.³⁷

Progressivism, Delegation, and the Administrative State

The first substantial, modern delegation of legislative power was the Interstate Commerce Act of 1887. Delegation began almost by accident, in response to a concrete problem, and with little theoretical reasoning surrounding it. In *The End of Liberalism*, Theodore Lowi asserts that "the first move... was made only in response to terrifying agrarian agitation and a Supreme Court decision which abolished all state efforts to deal with the problem."³⁸ Widespread concern about the corruption of railroads, especially regarding rates, led to calls for federal intervention. The Act created the Interstate Commerce Commission, and charged the Commission to set "reasonable and just" rates, while prohibiting what the Act called "personal discrimination": the granting of special rates, or free transportation, to favored individuals.³⁹ Lowi explains that "the act was good law, because standards concerned with goals, clientele, and methods of implementation were clear."⁴⁰ The delegation is narrowly tailored and does not confer general regulatory power over the railroads, or over commerce generally.

Like civil service reform, which also began as a popular protest against corruption, the growing Progressive movement latched on to delegation and gave it a principled ar-

gument. The people and their elected representatives, the Progressives maintained, are handicapped in the legislative policymaking process in two main ways. First, policymaking in modern, industrial nations is more complex, and requires more technical knowledge than ever before, and it is precisely this that the people and their representatives lack. In "The Study of Administration", Woodrow Wilson argues that "Directly exercised, in the oversight of the daily details and in the choice of the daily means of government, public criticism is a clumsy nuisance, a rustic handling delicate machinery."⁴¹ Take, for instance, the making of environmental policy. Very little of the electorate knows how much butyl acetate or formaldehyde may safely be present in the ambient air. How much sulfur dioxide can a coal-fired power plant safely emit? Most elected officials are equally in the dark on such matters. Occasionally, someone might win election to a legislature who possesses this kind of knowledge, but few politicians base their campaigns on the possession of said knowledge, and even if they win, their vote counts the same as the most ignorant of their colleagues.

The second problem with allowing the people and their representatives to legislate on complex, technical subjects is that it is hard to keep the overarching goal in view. Everyone wants clean air, but as David Schoenbrod notes, questions like "how clean" and "at what cost" have to be answered.⁴² To clean the air completely would mean effectively repealing the Industrial Revolution. Are we willing to return to a pre-Industrial Revolution standard of living? To achieve a certain level of clean air, are we willing to tolerate massive increases in energy costs? How about rolling blackouts? What are the national security implications of our policies? Are we willing to allow our nation to become dependent on foreign energy sources? If an elected legislator knew that voting for a clean air bill would force the clo-

sure of some factory, power plant, or refinery in his district, potentially impacting thousands of lives and outraging his own constituents, would he do it? Would he, or we, sacrifice our own position or well-being for the sake of an ostensibly nobler goal like environmental protection?

In a complex, modern society, then, another model of legislative policymaking is needed. That model involves partitioning legislative power into two separate activities. In *Progressive Democracy*, Herbert Croly, one of Progressivism's leading intellectuals who was credited with inspiring Theodore Roosevelt's 1912 New Nationalism program, held that

social legislation is coming more and more to demand results rather than prescribe means. Statutes are being passed in the interest of the safety of employees, which merely define safety as such freedom from danger to life and health as the nature of the employment will reasonably permit. The duty of drawing up a set of regulations which will provide sufficient safeguards for the life and health of the operatives intrusted to a commission. All that the legislature does is to declare that industrial employment shall be reasonably safeguarded.⁴³

Wilson explains the division of authority more concisely: "The distinction is between general plans and special means."⁴⁴ The task of the people and their representatives is to declare the purposes, or ends, which they wish to see the state accomplish in a particular policy area. Devising and implementing the means to achieve these ends is to be left to a commission of experts, who can apply technical and scientific expertise to their policy area. In our clean air example, Congress would enact a law articulating the people's will to achieve clean air. An agency would be assigned responsibility for implementing this mandate, which would

be staffed with climatologists, meteorologists, chemists, engineers, physicians, and public health experts. They would produce the rules and regulations to give effect to Congress's "legislation."

This bifurcated model of legislation also makes possible the solution to the problem of narrow, selfish interests influencing policymaking, causing the subversion of progressive social goals. Again, Croly: "The clear-sighted progressives almost unanimously believe in a body of expert administrative officials, which shall not be removed with every alteration in the executive, but which shall be placed and continued in office in order to devise means for carrying out the official policy of the state, no matter what that policy may be."⁴⁵ Administrative policymakers can and should be placed outside of the electoral political process, so that they may deploy their expertise, without concern for how it will play at the next election, or how it may affect individuals. In this manner, the will of the people, as expressed in progressive social legislation, is not subverted in its implementation.

Over time, the federal courts gradually ratified delegation and integrated it into the constitutional order. While it is not quite true that the Supreme Court had never invalidated a statute on non-delegation grounds before the New Deal,⁴⁶ it is true that most major non-delegation cases had been decided in favor of upholding the statute. Nevertheless, on the eve of the New Deal, the Court gave delegation a constitutional doctrine. In *J.W. Hampton, Jr. & Co. v. U.S.* (1928), the Court upheld the flexible tariff provision of the Tariff Act of 1922, which allowed the President to alter the tariff rates for certain imported goods within a specified range, subject to numerous restrictions. If Congress were compelled by the Constitution to set all tariff rates, they would do nothing but legislate import du-

ties. There is nothing wrong with Congress seeking the assistance of other branches. So long as “Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”⁴⁷ The “intelligible principle” test effectively means that, so long as a reviewing judge can reasonably discern what Congress wanted the administrative entity to do, the delegation is legitimate.

The “intelligible principle” test remains the standard for measuring the boundaries of lawful delegation of legislative power to this day. In 1989, the Court affirmed this standard in *Mistretta v. U.S.*, and reaffirmed it in *Whitman v. American Trucking Associations, Inc.*, with Gary Lawson characterizing the Court’s opinion in the latter case as “Go away. See *Mistretta*.”⁴⁸ Seven years after *Hampton*, in *A.L.A. Schechter Poultry Corp. v. U.S.* (1935), the Supreme Court did strike down the National Industrial Recovery Act, partly on grounds of the non-delegation doctrine. The scope of Congress’s delegation of legislative power to the President contained in the NIRA, however, was so shockingly broad that the decision was unanimous and, in a concurrence, the liberal Justice Brandeis characterized it as “delegation running riot.”⁴⁹ In practice, while the breadth of the NIRA’s delegation of legislative power was that law’s downfall, it established the parameters for what constituted acceptable delegation: in effect, any congressional delegation of legislative power that is not as absurd as that at issue in *Schechter* would thenceforth be upheld.

A quick look at some examples of major legislation since that time reveals just how much Congress can transfer its own power and not run afoul of the Constitution under the intelligible standard. The Public Utility Holding Company Act of 1935 commands the Securities and

Exchange Commission to ensure that “the existence of any company in the holding-company system does unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders.”⁵⁰ The Communications Act of the same year authorizes the Federal Communications Commission to issue broadcast licenses as “the public convenience, interest, or necessity will be served thereby.”⁵¹ The Agricultural Adjustment Act of 1938 instructs the Secretary of Agriculture to facilitate “orderly marketing” of agricultural products.⁵² The Americans with Disabilities Act commands that employers and educational institutions may not impose “undue hardships” and must make “reasonable accommodations” for the disabled.⁵³ Finally, the Affordable Care Act states that health care plans must be “quality” and “affordable.”⁵⁴

In none of these instances do these statutes ever provide an adequate explanation for what is meant by these terms. This is not always a fatal defect, as laws often employ “terms of art.” An example would be “due process of law” in the Fifth and Fourteenth Amendments, the meaning of which is never articulated in the Constitution. With due process of law, however, we can draw on centuries of Anglo-American legal tradition and history to know that it includes features like “beyond a reasonable doubt”, adversarial process, and innocent until proven guilty. Conversely, there is no background of legal tradition, history, or anything else to provide context for phrases like “reasonable accommodation” and “unfair and inequitable distribution of voting power.” Those who are subject to the law therefore cannot read the law and know their legal rights and obligations. Instead, these statutes issue instructions to other actors within the government, such as the President, the Federal Communications Commission, the Secretary of Health and Human Services, telling them what rules

they are to craft, and giving them guidance and instruction in the crafting of those rules. Those officials then issue instructions to citizens. Even the federal courts get involved. Employers and educational institutions will wait to get sued for violations of the Americans with Disabilities Act, so that a federal judge can tell them what compliance looks like. These other actors are the real legislators, as they promulgate “rules for the regulation of society.” Congress has abandoned its core legislative function, and the consequences are enormous. Both the legislative process and the legislative institution have become deranged, and the result is a fundamental alteration of the constitutional order.

Institutional Failure

When Congress ceases to be a legislative institution in the sense contemplated by the Constitution, the legislative power passes to others. On the one hand, to look at Congress, hardly anything seems amiss. The institution and its members remain. Members’ offices are hives of activity. Committees meet and hold hearings. Legislation is introduced, pushed through the committee process, brought to the floor, and enacted into law, even if it doesn’t meet the standard of law we’ve articulated here. Debates still happen on the floor in both chambers. Yet the institution has been profoundly transformed.

The key to preserving the system of separation of powers that is the central structural principle of the Constitution lies in the self-interest of officeholders. In *Federalist* 51, Madison famously declares that “Ambition must be made to counteract ambition.”⁵⁵ Each branch was given a set of powers, along with the ability to protect their office against the predations of the other branches. The system then trusts that each officeholder will be sufficiently motivated by the

desire for power to defend their own position, and thus to defend their branch's position, within the system. So long as everyone works to protect their own turf, the system is kept in balance, and tyranny is prevented. With the delegation of legislative power, however, we are confronted with the spectacle of a branch voluntarily ceding huge swathes of its constitutional authority to anyone and everyone else. It forces us to confront the possibility that Madison may have misunderstood human nature, and that the constitutional system may not be reliable.

In fact, Madison's conception of human nature is quite sound, and if the system operated today as it once did, it would still be effective at maintaining the integrity of the three branches and of the constitutional order more generally. What has happened is that delegation has allowed members of Congress to satisfy their ambition by other means, means that were largely precluded by the Constitution, properly understood. Perhaps no one has explicated this phenomenon better than Morris P. Fiorina in his seminal *Congress: Keystone of the Washington Establishment*. Fiorina posits, quite reasonably, that in the main congressmen are motivated by the desire to remain in office.⁵⁶ The problem with legislation is that, in almost every case, taking a stand on a piece of legislation may build support in some quarters, but fosters opposition in others. There is basically no substantive national issue where the entire electorate is on one side. Moreover, even if there is broad consensus on an issue, that consensus will break down rapidly, once the burdens necessary to achieve the broad goal are understood. To recycle an earlier example, we may all want clean air, but support for environmental legislation will fracture once people realize that achieving a certain level of clean air will cost them their job, drive up their cost of living, or wreck their community.

Surviving as an elected representative in this world can be extremely complicated. The member will have cast numerous votes and taken many public positions over the course of his career. These votes and positions therefore provide plenty of fodder for potential challengers, who can offer voters a real alternative to the incumbent. Moreover, some voters are single-issue voters, so the member cannot assuage that voter's unhappiness on that issue by finding common ground on other issues. The member must be a national policymaker, but he must also keep an eye on his district and an ear to the ground of public opinion. He must develop what Richard Fenno termed a "home style" that allows him to balance the two commitments and remain in office.⁵⁷

Delegation offers legislators a way out of this dilemma. Delegation allows the member to take positions on broad issues that are popular with voters. Who could be opposed to clean air? He then votes for legislation, which instructs the bureaucracy, in this case the Environmental Protection Agency, to devise and implement rules that will clean up our air. This is perfectly in line with the Progressive model of legislation, which posits that these detailed rules should be made by independent experts, rather than by the people and their representatives. When Congress legislates in this way, "the legislation is drafted in very general terms, so some agency, existing or newly established, must translate a vague policy mandate into a functioning program, a process that necessitates the promulgation of numerous rules and regulations and, incidentally, the trampling of numerous toes."⁵⁸ Congress transfers to the bureaucracy the odium that will be incurred by whomever makes the difficult choices that impose costs and burdens on others. When environmental regulations cause a factory or refinery to close, or drive up the cost of electricity or automobiles, few vot-

ers make the connection between the congressional mandate and the administrative action. Congress gets credit for the noble, popular goal, while the bureaucracy absorbs the blame for the burdensome rules and regulations that are inevitably necessary to achieve the goal.

Delegation has altered the distribution of incentives for congressmen in a second way. As Fiorina notes, the growth of the administrative state creates ever-increasing opportunities for individuals to get caught in the web of bureaucracy. Malice on the part of the bureaucracy is not required: the mere size and scope of the machine ensures that problems will arise. When they do, the individual needs someone on the inside to help them, and his congressman is perfectly positioned to provide this service. "Congressmen," Fiorina observes, "possess the power to expedite and influence bureaucratic decisions. This capability flows directly from congressional control over what bureaucrats value most: higher budgets and new program authorization."⁵⁹ Helping the congressman's constituent with some minor bureaucratic matter is a small price to pay for the congressman's good will. The congressman also has a significant incentive to help his constituents. By helping his constituents, he builds good will that translates into votes. If he helps one constituent, that constituent tells others, who tell others, and the congressman's reputation grows within his district.

A brief look at the way congressmen allocate staff resources reveals the importance of constituent services. Every member of Congress, besides representing his district, is also the manager of a small bureaucracy of his own, in a way never imagined by his predecessors in the eighteenth or nineteenth centuries. In 1891, the sum total of personal staff of the U.S. Senate was 39, while House members had no personal staff at all. In 1957, those numbers increased to 1,115 and 2,441, respectively. By 2015,

the most recent year, for which data is available, Senators employed 3,917 personal staff, while House members employed a total of 6,030 personal staff. These numbers do not include leadership staff (Senate 173, House 201), officer staff (Senate 846, House 308), committee staff (Senate 951, House 1,164, joint committees 99), or the staff of research entities like the Government Accountability Office (2,989), Congressional Research Service (609), or the Congressional Budget Office (258).⁶⁰ The percentage of personal staff assigned to congressmen's district offices has also increased dramatically. In 1960, members of the two chambers collectively allocated 14% of their personal staff to district offices.⁶¹ By 2016, that number had increased to 47.3% of House personal staff and 43.2% of Senate personal staff. For a brief period (2004-2005) House members employed an absolute majority of their personal staff in their district offices.⁶² The imbalance is even more pronounced when one remembers that a significant part of a member's D.C. staff resources are also dedicated to constituent services.

Delegation of legislative power has fundamentally altered the distribution of incentives for ordinary members of Congress, and members have responded accordingly. When Congress delegates, members get all the electoral benefits of passing popular legislation, while blame for the burdens that legislation imposes are transferred to the bureaucracy. Additionally, members get the added benefit of being able to intervene with the bureaucracy on behalf of their constituents. Fiorina continues, "At the next stage, aggrieved and/or hopeful constituents petition their congressman to intervene in the complex (or at least obscure) decision processes of the bureaucracy. The cycle closes when the congressman lends a sympathetic ear, piously denounces the evils of bureaucracy, intervenes in the latter's decisions, and rides a grateful electorate to ever more impressive elector-

al showings. Congressmen take credit coming and going. They are the alpha and the omega."⁶³ They double the credit while avoiding the blame. It's not hard to see why even the most conservative Republican is averse to legislating, or even to reducing the size and scope of the administrative state. All the incentives run in the other direction. Congress has been out of the business of legislating for so long that it is not unfair to say that, individually and collectively, they have become addicted to not legislating. For the average Congressman, not legislating is highly advantageous.

This system, whereby Congress collectively delegates power, and individual members act as ombudsmen with the federal bureaucracy on behalf of their constituents, has its limits. It is predicated on the notion that Congress will continue to exercise its budgetary authority effectively. The importance of this power has been recognized for centuries in the English-speaking world as a bedrock protection against arbitrary rule. In 1215, King John was forced to accept in Magna Carta that he could not tax his subjects arbitrarily. In the 17th century, the English Parliament withheld additional tax revenue from King Charles I, eventually precipitating the English Civil War and the long struggle of that century, which led to the establishment of parliamentary supremacy. The importance of the power over revenue and appropriations was not lost on earlier generations of Americans. The Constitution declares that no federal money may be spent, except in consequence of an appropriation by Congress, and by specifically vesting the power to originate revenue bills in the House of Representatives, the institution most closely connected to the people.⁶⁴ In 1847, Whig Senator Thomas Corwin of Ohio, an inveterate opponent of the Mexican War, referenced the struggles for supremacy in 17th century England. He argued that Congress's power over revenue and expenditures was *the*

constitutional check on the President's power in war, and maintained that Congress can and should end the war by refusing to fund it.⁶⁵

Throughout the twentieth century, even as Congress delegated ever-increasing amounts of substantive legislative power, it sought to retain its hold on its power over revenue and appropriations. In the Budget and Accounting Act of 1921, Congress had imposed on the President the responsibility for proposing a complete budget for the federal government and providing him with the administrative support to do so in the form of the Bureau of the Budget (later the Office of Management and Budget). Even though Congress still had to approve the President's proposal, by the 1970s many congressmen had concluded that this arrangement gave the President too much control and sought to redress the balance. The result was the Budget Act of 1974, which mandated a congressional budget process and created the House and Senate Budget Committees. The Budget Act also created the Congressional Budget Office, which was intended to provide Congress with expert support comparable to that possessed by the President in OMB.⁶⁶

In the 21st century, however, that process has broken down completely. Congress has not completed the budget process articulated in the 1974 Budget Act in any fiscal year since 1997.⁶⁷ Since then, the federal government has operated, in whole or in large part, on the basis of omnibus bills or continuing resolutions (CRs), short-term stopgap legislation, which generally maintains current funding levels. As Congress uses a "current services estimate" to determine funding levels, this means that federal spending continues to increase to maintain services at their current levels. CRs are generally approved with little or no markup or debate, so Congress effectively exercises no control over how the

money is spent. Eventually, the executive branch and the federal bureaucracy will realize that Congress has abdicated its one remaining control mechanism. When they do, members will lose even the power to help their constituents escape from the clutches of the federal bureaucracy.

With Congress as an institution delegating, and congressional staff resources overwhelmingly dedicated to constituent services, the skills required of members have changed accordingly. To be a successful member of Congress today, it is far less important to be adept as a parliamentarian, a negotiator, or a debater. These are the skills of a legislator: one who persuades, builds coalitions, weighs alternatives, makes choices about those alternatives, and attempts to shepherd legislation through enactment. As Congress does not generally legislate, it is no longer especially necessary or beneficial to be good at legislating. The modern congressman has other functions. First, he is a manager of personnel. As noted above, each congressional office is a little bureaucracy unto itself. He has legislative assistants, research assistants, communications assistants, and interns. Most critically, he has a chief of staff. Who he selects for these positions, especially the chief of staff, and how he manages them are critical to the effectiveness of his constituent services operation, and his office generally. Second, he is a fundraiser. Fundraising prowess marks one out for senior leadership posts, as one is in a position to help members of one's party secure election or re-election, thereby building the party's presence in Congress.⁶⁸ Nancy Pelosi's virtuoso abilities as a fundraiser for the Democratic Party and Democratic candidates ensured her a place at the top of the party's leadership in Congress for as long as she wanted it.⁶⁹

Finally, the member is an ideological spokesman for his constituents. The ancient practice of gerrymandering, combined with the more recent phenomenon of sorting, where-

by voters of similar ideology tend to congregate near each other, means that congressional districts are increasingly homogenous ideologically. Constituents contact their representative, not seeking help with the federal bureaucracy, but to insist that said representative take a strident public position on some issue. In many cases, the representative is happy to do so. It requires little in the way of staffing or financial resources, allows the member to acquire free media time, and is generally a way to build support among constituents that requires little effort. With increasingly homogeneous districts, and considering that Congress is unlikely to legislate on the subject anyway, the member never has to think about compromising or moderating his extreme position.

When delegation of legislative power by Congress became an accepted part of our political system, it fundamentally altered the institution of Congress. From a constitutional perspective, delegation broke the link that once existed between personal interest and constitutional duty, and which Madison emphasizes in *Federalist* 51.⁷⁰ Congressmen can satisfy their ambition in ways that are simultaneously more effective, and less risky politically, than legislating. Instead of legislating, members manage staffs, raise money, and take strident public positions on issues, while their staffs handle the concerns of constituents. Congress is so averse to legislating that it no longer has the wherewithal to exercise the power of the purse, the most basic function of a legislature. Thanks to delegation, Congress as a legislature is a failed institution.

Regime Change

As serious as the problem of institutional failure is, however, delegation has even more profound consequences. In *The End of Liberalism*, Theodore Lowi asserts that, under the power of delegation, we have deviated so far from the Founders' constitutionalism that we have created, in effect, a "Second Republic of the United States."⁷¹ The transformation wrought by congressional delegation of legislative power affects more than Congress; it alters the very nature of the regime. The American regime has been transformed, so that the United States has effectively ceased to be a constitutional republic.

In any political system, knowing where the legislative power is located, and how that power is exercised, is critical for understanding the nature of that regime. In the *Politics*, Aristotle asserts that "The regime is an arrangement of a city with respect to its offices, particularly the one that has authority over all matters. For what has authority in the city is everywhere the governing body, and the governing body is the regime."⁷² Aristotle subsequently differentiates regimes by describing their legislative institutions.⁷³ Regimes, for instance, where the legislative power is vested in the great body of the people he terms democracies, while regimes governed by a small number he regards as oligarchies, with numerous variations and gradations in between. When John Locke describes different forms of government in the *Second Treatise*, he works from the assumption of "the form of government depending upon the placing the supreme power, which is the legislative...."⁷⁴ How and by whom legislative power is exercised largely determines the nature of the regime.

In the Founders' constitutionalism, legislative power is exercised by the people's elected representatives. This use of

representative institutions, rather than allowing the people to legislate directly, denominates our system as a republic, rather than a pure democracy.⁷⁵ Congress, in common with all the other institutions of our government, is a creature of the Constitution. The Constitution defines the structure of Congress: its two chambers, their modes of election, terms of office, eligibility requirements, and legislative process, are all delineated in that charter. The powers of Congress generally, and those that are specific to each chamber, are enumerated. In so doing, the people are voluntarily limiting and regulating themselves in the exercise of their own sovereign power. This limitation is in contrast to the British Parliament, which is both a legislature and a sitting constitutional convention. As the embodiment of the sovereignty of the nation, Parliament can do anything. The American Congress can only legislate on subjects, and in ways, specified in the Constitution.⁷⁶ The Constitution does not therefore simply create a republic; it creates a constitutional republic.

The Progressives despised the Founders' constitutionalism. They saw it as unable to cope with modern policy issues, and as an inaccurate description of the way political systems actually operate.⁷⁷ The Progressive intellectual Frank J. Goodnow argues that, rather than a tripartite system of separation of powers, "political functions group themselves naturally under two heads, which are equally applicable to the mental operations and the actions of self-conscious personalities. That is, the action of the state as a political entity consists in operations necessary to the expression of its will, or in operations necessary to the execution of that will."⁷⁸ These two functions, he would later say, are "politics" and "administration", respectively.⁷⁹ Politics, and the political institutions, were to be brought into ever-closer contact with the will of the people. The President would cease to be

a constitutional executive and be transformed into a popular political leader, the representative of the whole people. His power would be based, not on the Constitution, but on the force of his personality and his ability to cultivate the support of the people for his legislative program, primarily through rhetoric.⁸⁰ Congress, meanwhile, was to be a debating body, where all the minority interests of the society would be represented. Woodrow Wilson saw the British Parliament as a model in this regard. He was particularly enamored of Parliament's practice of cabinet responsibility, whereby the government would resign if and when it lost the support of the majority.⁸¹ At the state level, politics would be brought closer to the people through reforms like the initiative, the referendum, the recall, the direct election of senators, and direct primaries.⁸² The political system was thus to be made markedly more democratic.

There is, however, another side to the Progressive system: administration, and the real power in that system lies here. As described above, the effective legislative power, the power to make rules for the regulation of society, would be transferred from the people's representatives and placed in the hands of experts, who were to be substantially insulated from the electoral political process. Additionally, Goodnow explains that these experts will also exercise the traditional executive and judicial powers, and what he ambiguously terms "administrative" powers.⁸³ Thus, while the countenance of the Progressive system may be more democratic, the reality is anything but. Real power, legislative, executive, and judicial, will be placed in the hands of administrators, who will themselves be placed beyond the control of the people. Where that power will now be vested will reveal the true character of the modern American regime.

Rather than being a flaw or an oversight of the Progressive model of government, this removal of pow-

er away from the people is one of its primary features. Woodrow Wilson said in 1891 that “I believe in the people: in their *honesty* and *sincerity* and *sagacity*; but I do not believe in them *as my governors*.” Democracy, Wilson continues, “rejects the average man and the average training.... It seeks to substitute for the person whom we call ‘the man of the people,’ so far as possible, *the men of the schools*, the trained, instructed, *fitted men*.” For Wilson, “democracy” does not mean that the people govern; they are incapable of governing. It means that the ruling class is not defined by membership in an hereditary social caste, as in aristocratic societies. Anyone, of any background, whose talent and ability may set him apart and catch the eye of some member of the present elite, can hope to ascend into the governing elite, and it is the task of the present elite to identify and cultivate the next generation of rulers. Wilson admits that this is not democratic in the traditional sense of the people deliberating and deciding for themselves. “It is democratic in this sense,” Wilson continues, “*that it draws all governing material from the people,—from such part of the people as will fit themselves to govern.*”⁸⁴ The ruling class is drawn from among the people, but the people themselves are incapable of governing.

Such a process also protects the essential identity of the ruling class. It is not enough that the decision-makers be trained experts who are insulated from electoral politics. They must also be committed Progressives. Herbert Croly explains that “Although the kind of administrator that I am describing must obtain the standing of an expert, he must also be something more than an expert. He is the custodian not merely of a particular law, but of a social purpose of which the law is only a fragmentary expression. As the custodian of a certain part of the social program, he must share the faith upon which the program depends for its

impulse.... He qualifies for his work as an administrator quite as much by his general good faith as by his specific competence.”⁸⁵ They must be ideologically committed to Progressive government, or they are by definition unfit to govern. In his preface to *Unfree Speech*, former Federal Election Commissioner Bradley A. Smith recalls the Left’s opposition to his nomination to the commission. Besides the usual vitriol, Smith notes a comment from then-Vice President Al Gore, who said that “the last thing we need is an FEC commissioner who publicly questions the constitutionality of proposed [campaign finance] reforms, but also the constitutionality of current limitations.”⁸⁶ Smith was clearly an expert on campaign finance law and regulations, and his position on the Commission would have conferred substantial independence from the political process. Gore’s complaint, then, centered on Smith’s lack of commitment to zealous regulation of money in campaigns and elections.

Despite Wilson’s assertion to the contrary, the regime the Progressives are describing is indeed an aristocracy. The political scientist Dwight Waldo, who popularized the term “administrative state”, identified the aristocratic nature of this system in his 1948 book *The Administrative State*. Waldo seeks to address the most basic question in political philosophy: “who should rule?”, and notes that “the gamut of political theory contains many answers” to this question.⁸⁷ The modern administrative state, drawing upon Progressive political thought, advances “the claim...that the conditions of the modern world require a large and skillful body of bureaucrats, administrators, or experts.”⁸⁸ Waldo notes, however, that while this claim has been advanced, it has not been sufficiently examined.⁸⁹ What does it mean to assert that the expert should rule? For Waldo, it means that “those who are to lead us into Democracy’s Promised Land will exercise functions as exalted as Plato’s Guardians,

Machiavelli's Prince, Le Roi Soleil, Comte's Scientists, the Communist Party, or James I."⁹⁰ Ultimately, however, the claim of the administrative state is an argument that some men are inherently more fit to rule than others, and should be able to exercise mostly unfettered authority on the basis of that superior claim to rule. "The reference to Plato, perhaps, is helpful here," Waldo concludes, "what we are dealing with is a theory of a governing class."⁹¹

It is not a traditional aristocracy, which Waldo describes as an aristocracy of "the rich, the well-born, and the able."⁹² The aristocracy of the modern state is not hereditary; it has no dukes, earls, or barons. Instead, it is an aristocracy of the credentialed, those who attended elite universities, those whose training and experience make them the most fit to deal with the complexities of modern government and modern social problems. Aristotle defines aristocracy in the *Politics* simply as the rule of the few, for the sake of the common good. The Progressives, despite claims by some critics to the contrary,⁹³ sincerely believed that an aristocracy of scientific and technical experts, disinterested and devoted to Progressivism and the public good, could govern better than the people could govern themselves. This faith is symbolized in the denominating of Franklin D. Roosevelt's inner circle of advisors as the "Brains Trust", or the labeling of the academic and business experts brought into the federal government during the Kennedy administration as the "Whiz Kids."

The reality is a long way from the Progressive model. Instead of being a technical and scientific elite, a self-selecting aristocracy of the competent, our ruling class has hardened into exactly that: a class. In thinking of the ruling class as a class, however, we should be careful about defining that class. As Dominic Green noted in *The Spectator*, "The gap between the rich and the rest is more than economic. It is

now civilizational.”⁹⁴ Joel Kotkin describes them as comprising the economic elites and the cultural elites, who together dominate our society and government. He compares them to the two social classes, the nobility and the clergy, who dominated *ancien régime* France. On the one hand, he and Green note the growing wealth gap between the elites and everyone else, and the increasingly unbridgeable nature of the gap. On the other hand, the intellectual elite, centered on the universities, are “the ultimate gatekeepers for the upper classes.”⁹⁵ Elite culture is entirely different from the culture of the rest of the country. They live in the same communities, vacation in the same places, go to the same universities, have similar tastes in books, movies, and music, and, perhaps most critically, intermarry.

The Progressives and New Dealers had their bluebloods, to be sure, like the Roosevelts, but it also had men like Rex Tugwell, one of FDR’s original Brains Trusters, who grew up on a farm in Indiana. Ronald Reagan grew up in poverty and went to Eureka College, which is a long way from Harvard. There was a time when one could ascend to the pinnacles of power from relative obscurity, but those days are mostly over. Speaking of her own field, Megan McArdle observes that “The road to a job as a public intellectual now increasingly runs through a few elite schools, often followed by a series of very-low-paid internships that have to be subsidized by well-heeled parents, or at least a free bedroom in a major city.”⁹⁶ In his memoir, *Hillbilly Elegy*, JD Vance recalls that, as he advanced in his education and his career, he became increasingly aware that in the process he had entered a new universe. He didn’t know which spoon to use, what “sparkling” water was, or that chardonnay and sauvignon blanc are different types of white wine.⁹⁷

As the gap grows, the contempt our elites manifest for ordinary people is increasingly palpable, as Angelo Codevilla

noticed in his 2010 essay “America’s Ruling Class and the Perils of Revolution.” Codevilla wrote that “the ruling class’s appetite for deference, power, and perks grows...the ruling class wears on its sleeve the view that the rest of Americans are racist, greedy, and above all stupid...the rulers want the ruled to shut up and obey.”⁹⁸ Increasingly, our elites are unable to mask their contempt. Barack Obama said “it’s not surprising then they get bitter, they cling to guns or religion or antipathy toward people who aren’t like them or anti-immigrant sentiment or anti-trade sentiment as a way to explain their frustrations.”⁹⁹ Hillary Clinton referred to them as a “basket of deplorables.”¹⁰⁰ To Joe Biden, they were simply “garbage.”¹⁰¹ In the aftermath of the 2016 election, many news outlets sent reporters to middle America, to try and discover who actually voted for Donald Trump and why. Will Rahn, an editor at CBS News, said that the results “read like reports from colonial administrators checking in on the natives.” And those are the generous ones; most begin with “the assumption that Trump voters are backward, and that it’s our duty to catalogue and ultimately reverse that backwardness.”¹⁰²

At a more basic level, our elites, for all their pretension at being “the best and the brightest” and their sneering contempt for their supposed inferiors, simply aren’t very good at governing. From botched disaster responses to the inability of our military and foreign policy establishments to win wars or influence people, we have the worst elites. What they excel at is navigating the system and making it work for themselves and their friends. McArdle observes that “this ostensibly meritocratic system increasingly selects from those with enough wealth and connections to first, understand the system, and second, prepare the right credentials to enter it.”¹⁰³ For the most part, only people who are part of the elite social class understand these real-

ities. Thomas Frank, erstwhile liberal and author of *What's the Matter With Kansas?*, noticed this phenomenon in 2016 when he examined the emails of the Democratic National Committee and Hillary Clinton's presidential campaign after they were published on WikiLeaks. Frank describes the way in which everything works for the ruling class: "Everything blurs into everything else in this world.... Executives here go from foundation to government to thinktank to startup. There are honors. Venture capital. Foundation grants. Endowed chairs. Advanced degrees. For them the door revolves. The friends all succeed. They break every boundary."¹⁰⁴ Frank also notices the extent to which they leverage their positions and influence to help their own. The Podesta emails are full of requests from people asking for help, for themselves or for their children, in getting a job, an internship, or an academic appointment. JD Vance slowly realized that "successful people are playing an entirely different game. They don't flood the job market with resumes, hoping that some employer will grace them with an interview. They network."¹⁰⁵ In the world of our elites, relationships are everything.

Aristotle foresaw all of this. In his description of the cycle of regimes in book V of the *Politics*, aristocracy arises when the elites revolt against a tyrannical ruler. Over time, however, the elites, whether those who established the aristocracy or their heirs, begin to realize they can use the system to their own advantage. They have retained the pretense that they constitute an aristocracy of Progressive expertise (such as in Anthony Fauci's declaration that "I am the science"), but in practice they do everything conceivable to ensure that they and their friends monopolize the wealth, power, and positions of the nation. In this way, Aristotle argues, aristocracy deteriorates into oligarchy: the rule of the few, for the sake of themselves, rather than for

the sake of the whole. The Progressives, though they did not intend it, set the nation on this path. Our Founding Fathers bequeathed to us a constitutional republic, a type of regime, which cannot be found in Aristotle's taxonomy. In rejecting the constitutional republic and embracing aristocracy, the Progressives put America right back into that cycle, with predictable results. Delegation was the lynchpin of this transformation.

This isn't even the first time in American history that an oligarchy, purporting to be an aristocracy, has threatened to supplant constitutional republicanism. The slaveholders of the antebellum South understood themselves as an aristocracy: an elite, the most fit to rule. By the end of the antebellum period, Southern society was increasingly identified by its opponents as an oligarchy. A non-slaveholding white from North Carolina, Hinton Rowan Helper, wrote in 1857 that "Nothing short of the complete abolition of slavery can save the South from falling into the vortex of utter ruin. Too long have we yielded a submissive obedience to the tyrannical domination of an inflated oligarchy; too long have we tolerated their arrogance and self-conceit; too long have we submitted to their unjust and savage exactions."¹⁰⁶ Reflecting back on the old South years later, John Sherman, brother of William Tecumseh Sherman, said, "We know what the old south was. It was an oligarchy called a democracy.... The south was very much such a democracy as Rome and Greece were at some periods in their history; a democracy founded upon the privileges of the few and the exclusion of the many.... But it was an able oligarchy."¹⁰⁷ The Republican Party chose that name for itself, in part to showcase their understanding of themselves as attempting to restore republicanism in America.¹⁰⁸ The South had retained the form of republican government while embracing oligarchy in practice, and "The Great Task

of Reconstruction” was to restore republicanism in the defeated southern states.¹⁰⁹ Like the antebellum Southerners, we have retained the forms of republicanism, but with the substance of oligarchy. We still have elections under the Constitution for constitutional offices, but the oligarchy of our ruling class has been superimposed on the Founders’ constitutional order.

Prospects

The foregoing is a rather bleak assessment of the future of Congress specifically, and of constitutional republicanism generally, in America. As it is, there isn’t much reason for Congress to exist. They don’t legislate in the constitutional sense. They lack the independence and expertise to serve as legislators in the Progressive sense. With the decline of effective congressional budgeting, individual members have less leverage with the bureaucracy. There also seems to be little prospect that Congress will be self-motivated to resume its constitutional legislative function. The system is far too deranged, far too detached from the Founders’ constitutionalism, for that to happen. Moreover, the distribution of incentives for the individual congressmen favors preserving, and even expanding, the present regime.

If Congress is to be induced, or compelled, to return to legislating, the motive force will have to come from the outside. The electorate won’t do it; the issue is far too obscure and procedural to resonate with most voters. It’s a variation on the old Washington adage that “if you’re arguing about process, you’re losing.” Put simply, no one cares. Perhaps the President could do it, but only if Congress becomes so unhappy with presidential action that they decide to legislate for themselves. Nevertheless, the advantages of delegation for congressmen are still too great. Even if members of

Congress vehemently oppose the President's policies, there is considerable political advantage to be gained in opposing the President, and in blaming the President when things go wrong. It allows congressmen to rally support, while never having to take responsibility for policymaking themselves.

That leaves the federal courts. Delegation achieved constitutional legitimacy when the Supreme Court effectively neutralized the non-delegation doctrine. The Court could force them to legislate by ending its toleration of delegation. Justice Samuel Alito's curious concurrence in *Gundy v. U.S.* suggests the possibility that the Court might be ready to resurrect the non-delegation doctrine.¹¹⁰ In *Gundy*, the delegation of legislative power was upheld in a 5-3 decision. Alito joined the Court's four liberals in upholding the law, although in his concurrence, he intimated that a future Supreme Court might be willing to reconsider the present dispensation of the non-delegation doctrine. In his concurrence, he intimated that a future Supreme Court might be willing to reconsider the present dispensation of the non-delegation doctrine. At the time the case was argued, Brett Kavanaugh's nomination was still pending, so the implication is that a Court with a 5-4 conservative majority, including Kavanaugh, might revisit non-delegation. Since 2019, however, the Court has not directly pursued this course. More recently, the Court invalidated the decades-old *Chevron* doctrine, which allowed administrative agencies to determine the meaning of their own organic statutes and define the extent of their own power for themselves.¹¹¹ Further rulings of this kind might eventually squeeze administrative discretion to the point where Congress is left with no alternative but to legislate, even if the present interpretation of the non-delegation doctrine is formally retained.

Even if an effective means could be devised to compel Congress to legislate, it remains an open question whether we want them to legislate at all. Congress would collectively have to relearn its core constitutional activity after decades of evading it. Members of Congress have spent their entire careers doing anything but legislating, so they have little or no experience as deliberators. For ordinary citizens, life in a modern administrative state has habituated them to electing congressmen on a basis other than their effectiveness at legislative deliberation and sound policy judgment. If these congressmen were suddenly forced to legislate, and the current electorate were forced to choose legislators, the results would be very, very rough. The future of constitutional republicanism in America, and therefore of American liberty, however, depends upon restoring Congress, as the people's elected representatives, to its constitutional legislative function.



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 16. Theophilus Parsons, "The Essex Result," April 29, 1778, in *The Founders' Constitution*, ed. Philip B. Kurland and Ralph Lerner, vol. 1, Major Themes (Chicago: University of Chicago Press, 1987; repr., Indianapolis, IN: Liberty Fund, 2000), 116.
 17. James Madison, "Vices of the Political System of the United States," April 1787, in Kurland and Lerner, *Founders' Constitution*, 1:168.
 18. James Madison, *Federalist* No. 62, 421.
 19. Alexander Hamilton, *Federalist* No. 70, 472.
 20. Alexander Hamilton, *Federalist* No. 70, 475, "In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority."

21. James Madison to William Loughton Smith, March 10, 1796, in Kurland and Lerner, *Founders' Constitution*, 1:334.
22. Aristotle, *Nicomachean Ethics*, bk. III, chap. 3, 1112a31–32, trans. Joe Sachs (Newburyport, MA: Focus Publishing, 2002), 42.
23. Aristotle, *Nicomachean Ethics*, III.3, 1113a10–13, trans. Sachs, 43.
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27. See Sean Wilentz, *No Property in Man: Slavery and Antislavery at the Nation's Founding* (Cambridge, MA: Harvard University Press, 2018), 80; John Rutledge, remarks at the Federal Convention, August 21, 1787, in *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven, CT: Yale University Press, 1911; 1937), 2:364; John Jay to the President of the English Society for Promoting the Manumission of Slaves, June 1788, in Kurland and Lerner, *Founders' Constitution*, 1:550.
28. John Jay and Alexander Hamilton, *Federalist* Nos. 2–8, 8–50; George Washington, “Farewell Address,” September 19, 1796, in Kurland and Lerner, *Founders' Constitution*, 1:681–83.
29. U.S. Constitution, art. I, sec. 1.
30. We might also add that a power, which appears legislative in its nature, may be withheld from Congress if it is explicitly vested in another branch as part of the larger system of separation of powers.
31. John Locke, *Second Treatise*, sec. 141, in *Two Treatises of Government*, ed. Peter Laslett (New York: Cambridge University Press, 1960; repr. 1988), 362–63.
32. Charles C. Thach, *The Creation of the Presidency, 1775–1789: A Study in Constitutional History* (Baltimore: Johns Hopkins Press, 1922; repr., Indianapolis: Liberty Fund, 2007), 14–23; Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago: University of Chicago Press, 1994), 6–13; Madison, “Vices of the Political System of the United States,” April 1787, in Kurland

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33. James Madison, *Federalist* No. 57, 385–86.
 34. James Madison, *Federalist* No. 63, 425.
 35. “Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.” James Madison, *Federalist* No. 37, 235.
 36. James Madison, *Federalist* No. 48, 332.
 37. House of Representatives, Post Office Bill, December 6–7, 1791, and January 3 and 5, 1792, in Kurland and Lerner, *Founders' Constitution*, 3:20–28; *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825); *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51 (1825).
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 39. 24 Statutes at Large 379.
 40. Lowi, *The End of Liberalism*, 96.
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52. Agricultural Adjustment Act of 1938, § 311(a), 52 Stat. 31, 45.
53. Americans with Disabilities Act of 1990, § 101(9)–(10), 104 Stat. 327, 331.
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