ESSAY

DELEGATION TO NONEXPERTS

EVAN C. ZOLDAN†

When a legislature delegates authority to an agency or a private party, the delegate typically has expertise in the subject matter of the delegation. But, while delegation to experts is the rule, a legislature can also delegate authority to an institution without expertise in the areas it regulates. This Essay evaluates the phenomenon of delegation to nonexperts. It concludes that the accountability concerns that infect delegation generally are more acute in the context of nonexperts. Conversely, the self-dealing concerns associated with private delegates are minimal for nonexpert delegates. Finally, the risk is considerable that nonexpert delegation will lead to arbitrary regulation. These conclusions should inform how our legislatures delegate authority and how courts review actions taken by nonexpert delegates.

INTRODUCTION

The ambitious policy goals we set for our governments demand that they develop a great deal of expertise. We want drinking water to be clean and prescription drugs to be safe, but we don't expect legislators themselves to spend years learning about water chemistry and pharmacology before they legislate. It is unrealistic to expect members of a popularly elected body to have the breadth and depth of knowledge needed to address emergent social problems in a timely and effective way. Instead, we trust that bodies acting on the legislature's behalf, like administrative agencies, have the technical

† Professor of Law, University of Toledo College of Law. My thanks for helpful comments from Christopher J. Walker, Kenneth Kilbert, and Gregory M. Gilchrist. Thanks also to the University of Toledo College of Law for its support for this project.

knowledge—including knowledge of chemistry, engineering, economics, and law—necessary to accomplish the goals the legislature entrusts to them.[1]

Normally, our expectations about agency expertise are justified. The Centers for Disease Control and Prevention (CDC) employ epidemiologists to monitor public health.[2] And the Federal Highway Administration employs civil engineers to design roads and bridges.[3] Across the government, in fact, agencies employ an army of experts, from economists to medical doctors to nuclear physicists.[4] With this level of expertise available to the agencies, it is not surprising that legislatures leave so much policymaking authority in their hands.

How, then, should we react when the legislature entrusts policymaking authority to *nonexperts*? Does delegation to nonexperts raise the same concerns as delegation generally? What additional concerns does it raise? These are the questions that this Essay answers.

Now is the right time to consider the consequences of delegation to nonexperts. As COVID-19 infections rage, the country is locked in a fierce debate about how much deference experts deserve. While most Americans report having at least "a fair amount" of confidence that scientists act in the public interest,[5] a strong strain of populist[6] (or even nihilist)[7] sentiment rejecting expertise has informed public policy during the pandemic. What's more, as this popular debate has unfolded, some high-ranking government

1 *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1179 (1999) (describing functional advantages of delegation).

2 *See* Sara M. Benson, *Guidance for Improving the Federal Response to Foodborne Illness Outbreaks Associated with Fresh Produce*, 65 FOOD & DRUG L.J. 503, 506 (2010) (describing the role of CDC epidemiologists in tracing foodborne illness).

3 *See Bridges & Structures*, U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., https://fhwa.dot.gov/bridge [https://perma.cc/7LC9-2ES3] (last updated June 22, 2020) (describing engineering teams employed by the Federal Highway Administration).

4 *See e.g.*, Fiona Hill, *Public Service and the Federal Government*, BROOKINGS INST. (May 27, 2020), https://www.brookings.edu/policy2020/votervital/public-service-and-the-federal-government/ [https://perma.cc/BEZ6-FFZB] ("[F]ederal government professionals and administrators form a standing force, a permanent cadre of experts that maintains the continuity of core U.S. government operations . . . .").

5 CARY FUNK, MEG HEFFERON, BRIAN KENNEDY & COURTNEY JOHNSON, PEW RSCH CTR., TRUST AND MISTRUST IN AMERICANS' VIEWS OF SCIENTIFIC EXPERTS, 6-7 (2019), https://www.pewresearch.org/science/2019/08/02/trust-and-mistrust-in-americans-views-of-scientific-experts [https://perma.cc/T5ZU-XBA2] (providing data about public trust in scientific experts).

6 Scott Leigh, *Time to End Populism's War on Expertise*, BOS. GLOBE (Apr. 7, 2020, 4:55 PM), https://www.bostonglobe.com/2020/04/07/opinion/time-end-populisms-war-expertise [https://perma.cc/K9GY-7A8X] (connecting the continued COVID-19 crisis to popular rejection of scientific expertise).

7 Ross Douthat, *In the Fog of Coronavirus, There Are No Experts*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/2020/04/07/opinion/coronavirus-science-experts.html [https://perma.cc/K4UT-7H79] (opining that there are no experts on coronavirus).

officials have sought notoriety by conspicuously ignoring the advice of experts[8] or actively undermining their credibility.[9]

Clashes over the role of expertise in policy formulation are fought with increasing frequency in the Supreme Court as well. In a number of contexts, the Court recently has signaled a willingness to limit the influence of agency expertise, both by emphasizing political accountability over agency independence and by deemphasizing the role of agencies in statutory interpretation.[10] But, the Court's most momentous rebalancing of political accountability and expertise may still be yet to come. The federal nondelegation doctrine, meant to restrain overbroad delegations, has been dormant for more than eight decades, leading most scholars to declare it dead.[11] In its 2019 decision in *Gundy v. United States*,[12] however, the Supreme Court radically altered the prognosis of the nondelegation doctrine. In *Gundy*, the Court narrowly upheld a broad delegation of authority to the Attorney General to make key policy decisions about the application of a federal statute.[13] However, four justices expressed a willingness to reinvigorate the nondelegation doctrine to strike down a congressional delegation of authority.[14] With Justice Kavanaugh expected to join their ranks the next time the Court takes up a nondelegation issue,[15] the likelihood of a revival of the doctrine is high for the

8 Press Release, White House, Press Briefing by Vice President Pence and Members of the White House Coronavirus Task Force (July 14, 2020), https://www.whitehouse.gov/briefings-statements/press-briefing-vice-president-pence-members-white-house-coronavirus-task-force-baton-rouge-la/ [https://perma.cc/A35N-TYUE] ("We don't want CDC guidance to be a reason why people don't reopen their schools . . . .").

9 Aaron Blake, *'We Just Need Some More Optimism': Rand Paul's Crusade Against Anthony Fauci Takes a Curious Turn*, WASH. POST (June 30, 2020), https://www.washingtonpost.com/politics/2020/06/30/we-just-need-some-more-optimism-rand-pauls-crusade-against-anthony-fauci-take-curious-turn/ [https://perma.cc/BH9C-S3BC] (describing Rand Paul's public attack on Anthony Fauci).

10 *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (invalidating the structure of CFPB, further concentrating executive power in the president); Kisor v. Wilke, 139 S. Ct. 2400, 2415 (2019) (reaffirming that courts must not defer reflexively to agency interpretations); Lucia v. S.E.C., 138 S. Ct. 2044 (2018) (holding that S.E.C. Administrative Law Judges are officers who must be appointed in accordance with the Appointments Clause rather than through a civil service process); King v. Burwell, 576 U.S. 473, 486 (2014) (holding that Congress did not intend to assign "a question of deep 'economic and political significance'" to an agency because it did not do so expressly (internal citation omitted)).

11 *See* Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 145 (2005) ("The most recent attempt to revive the [nondelegation] doctrine was resoundingly rejected by the Supreme Court, and . . . Congress routinely delegates policy decisions of comparable or greater importance to administrative agencies.").

12 Gundy v. United States, 139 S. Ct. 2116 (2019).

13 *Id.* at 2130.

14 *Id.* at 2130-31 (Alito, J., concurring); *id.* at 2131 (Gorsuch, J., dissenting).

15 Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (expressing an interest in revisiting the nondelegation doctrine in future cases); *see also* Evan C. Zoldan, Gundy v. United States*: A Peek into the Future of Government Regulation*, THE HILL (June 21, 2019, 12:24 PM), https://thehill.com/opinion/judiciary/449687-gundy-v-united-states-a-peek-into-the-future-of-government-regulation [https://perma.cc/9H5R-U7H5].

first time since 1935.[16] As it works out the contours of the revived nondelegation doctrine in the coming years, the Court should consider the unique characteristics of delegation to nonexperts. Moreover, these characteristics should inform both policymakers deciding how to delegate authority and lower courts deciding how to review actions taken by nonexpert delegates.

Part II describes the familiar phenomenon of delegation to experts, including agency delegation and delegation to private parties. Agency delegation is often criticized for diminishing political accountability and for harming liberty interests. Critics of private delegations reiterate the concern about accountability and add a concern about self-dealing.

Part III introduces the concept of delegation to nonexperts, which, until now, has not been identified by courts or scholars as a distinct form of delegation. Although atypical, the legislature can delegate authority to institutions without expertise in the subject matter of the delegation. Delegation to nonexperts does not occur simply when an agency takes the *views* of nonexperts into consideration.[17] Rather, delegation to nonexperts takes place when a body that lacks institutional expertise in the subject matter of the delegation is vested with authority by the legislature. To illustrate the concept of delegation to nonexperts, Part III describes the composition and functions of the recently created Michigan Environmental Rules Review Committee, a body with significant rulemaking authority but with limited institutional expertise in the subject matter over which it has responsibility.[18]

Part IV evaluates delegation to nonexperts by contrasting it with agency and private delegation. The concern that agency and private delegates lack sufficient political accountability is even more pronounced in the case of nonexpert delegates. By contrast, the self-dealing concern that attends private delegations is diminished for delegation to nonexperts. Finally, and most importantly, delegation to nonexperts is apt to lead not merely to inexpert regulation, but to arbitrary regulation.

Part V concludes by laying out a path for future research. This Essay provides only a brief sketch of delegation to nonexperts and does not purport to be the last word on the subject. Future work in the area of delegation to nonexperts should include: how delegation to nonexperts relates to the suspicion of expertise in fields like medicine, science, and law; whether a revived nondelegation doctrine should apply to delegations to nonexperts;

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

17 *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment.").

18 *See* S. 652 § 65(2), 99th Leg., Reg. Session (Mich. 2018) (requiring qualifications for each voting member of the Michigan Environmental Rules Review Committee).

and whether delegation to nonexperts risks damaging the ability of agencies to regulate by diminishing their reputations as experts.

II. DELEGATION TO EXPERTS

Although counterintuitive, it is entirely rational for a legislature to give up some of its power by vesting authority in other actors. Among other reasons,[19] the legislature often delegates authority to take advantage of the delegate's subject-matter expertise.[20] Unlike legislators, whose time and attention can be stretched thin because of obligations to constituents and electoral demands, a delegate that devotes "extended time and attention to specific problems" can develop expertise in the particular subject matter of the statutes it interprets and enforces.[21] For example, the Food and Drug Administration relies on a staff that includes scientists with expertise in chemistry and pharmacology[22] when reviewing applications for new drugs under the Food, Drug, and Cosmetic Act (FDCA).[23] Similarly, Congress uses the term "drug" throughout the FDCA but delegates the definition of this key term to the United States Pharmacopeia,[24] a private group composed of members from academia, consumer and manufacturer groups, and scientific associations, which sets quality, purity, and strength standards for medicines.[25]

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19 Other reasons include efficiency and deflection of responsibility. *See* Rossi, *supra* note 1 at 1179 (noting the cost-effectiveness of delegation). *See generally* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015) (arguing that, through delegation, Congress can take credit for addressing problems and then shift the blame to agencies for creating regulatory costs).

20 Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 179 (1989).

21 Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 401 (2006).

22 David W. Jordan, *International Regulatory Harmonization: A New Era in Prescription Drug Approval*, 25 VAND. J. TRANSNAT'L L. 471, 482 (1992) ("The FDA staff, representing various scientific disciplines, including medicine, pharmacology, and chemistry, reviews the data in the application.").

23 *See* 21 U.S.C. § 355(a) (requiring submission and approval of application before new drugs may be introduced into interstate commerce).

24 *See id.* § 321(g)(1) (providing that "drug" means "articles recognized in the official United States Pharmacopoeia [sic]").

25 *What is the U.S. Pharmacopeia?*, U.S. PHARMACOPEIA (Aug. 4, 2015), https://qualitymatters.usp.org/what-us-pharmacopeia [https://perma.cc/7B3E-4UML] (explaining that "USP sets quality, purity, strength, and identity standards for medicines" and its members "come from academia, health care, governmental agencies" and other industries).

Delegation of authority to experts has been widely[26] (though not universally)[27] criticized. The criticisms that are leveled against delegation vary with the status of the delegate. When the legislature delegates authority to administrative agencies, it is often criticized for compromising political accountability and harming liberty interests. When the legislature delegates authority to private parties, critics' primary concerns are the specter of self-dealing and a heightened concern about political accountability.

A. *Delegation to Administrative Agencies*

The most familiar delegations are those made to administrative agencies. When the legislature vests authority in an agency to make rules, adjudicate disputes, and enforce the law, the legislature relies on the expertise of agency officials to act in accordance with its statutory obligations. At times, legislatures explicitly require agencies to employ people with subject matter expertise. For example, Congress requires members of the Defense Nuclear Facilities Safety Board to be "respected experts in the field of nuclear safety . . . ."[28] Similarly, Congress requires the Administrator of the EPA to appoint a committee to advise it on air quality standards that includes "at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies."[29] Even without an explicit legislative requirement, agency personnel develop expertise by drawing on expert views from within the government and by interacting with outside scientists and members of industry.[30]

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26 *See* DAVID S. SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10 (1993) (criticizing broad delegations of authority); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132-34 (1980) (same).

27 *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95-96 (1985) (arguing that delegation improves the responsiveness of government by focusing the electorate on the President); Rossi, *supra* note 1, at 1179 (arguing that agency structure helps agencies make decisions more efficiently than the legislature because of lower monitoring and supervision costs); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1744-50 (2002) (arguing that it is impractical for a principal to spell out all commands to an agent in great detail); Bamberger, *supra* note 21, at 390 (arguing that regulated parties often have greater knowledge and expertise than government regulators about highly technical subject matters).

28 42 U.S.C. § 2286(b)(1).

29 *Id.* § 7409(d)(2)(A). For more on agency expertise, and challenges to it, see Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2027-28 (2015).

30 *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840-41 (2013) (describing the role of the Office of Information and Regulatory Affairs (OIRA) as an information aggregator, consolidating information from other agencies as well as overseeing the public comment process); Mark Seidenfeld, *The Role of Politics in a Deliberative Model*

1. Diminished Political Accountability

Delegation to agencies has been criticized for disrupting the chain of political accountability that connects the people and their representatives. When a member of the legislature supports or opposes a policy, constituents can learn of the legislator's position, including any votes he or she casts. As a result, constituents can reward or punish the legislator if they agree or disagree with these decisions. This direct connection between the people and their representatives reinforces political accountability and helps ensure that elected representatives in fact represent their constituents' views.[31]

By contrast, when the legislature delegates policymaking authority to agencies, it obscures the actor responsible for policy decisions. If voters disagree with a policy choice, whom do they blame? The legislature itself didn't make the choice and the agency head ultimately responsible for the choice was not voted in—and cannot be voted out—by the public. For delegations of federal authority, voters can punish the President for an agency's choice,[32] but the connection between the President and the agency decision is tenuous. The vast majority of agency decisions, even if reviewable by a presidentially appointed agency head who can be removed by the President, are made in the first instance by agency personnel who are not appointed by the President.[33]

Relatedly, agency delegation has also been criticized for allowing the legislature to avoid scrutiny for difficult policy decisions. When the legislature enacts a statute vesting broad authority in an agency, the legislature can claim credit for addressing a problem without actually doing the hard work of balancing competing interests. When the agency works out

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of the Administrative State, 81 GEO. WASH. L. REV. 1397, 1427-28 (2013) (describing the rulemaking teams agencies typically use to develop rules, often consisting of "members from various offices within the agency, each with its own expertise and professional outlook").

31 *See* Cass R. Sunstein, *Forward: The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1189-90 (2018) (arguing that the nondelegation doctrine's "most important goal is to ensure a certain kind of accountability—the kind that comes from the special safeguards to which Congress is subject"); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 470-71 (2011) (arguing that "when elected legislators transfer the right to make policy decisions to unelected bureaucrats, they sever [the] essential link" between government and popular will).

32 *See* Mashaw, *supra* note 27, at 95 ("All we need do is not forget there are also presidential elections and that . . . presidents are heads of administrations.").

33 *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 153-54 (2019) ("[T]he vast majority of agency adjudications and federal regulatory actions do not involve APA-governed formal adjudications before an ALJ or the agency itself."); Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1654-1662 (2016) (describing Administrative Law Judges (ALJs) and Administrative Judges (AJs) and the number of and types of cases they hear).

the details, inevitably drawing criticism from at least some segment of the population, it is the agency rather than the legislature that takes the blame.[34]

2. Harm to Liberty Interests

Delegation has also been criticized for harming liberty interests by making government action easy to accomplish. The passage of legislation is difficult because of the sheer number of people who must agree before it is enacted.[35] For one reason, members of the legislature may genuinely disagree on a proposed policy or represent constituencies with different policy preferences. Moreover, even agreement by a significant majority of members of the legislature may be insufficient to accomplish the enactment of a bill. Because of chamber rules—for example, the supermajority required to defeat a filibuster in the United States Senate—"many measures with broad and deep support" fail to pass.[36] And, of course, bicameralism and presentment requirements mean that agreement must be shared by three separate institutions with different members, different constituencies, and different interests.

Compared with the legislature, it is relatively easy for an agency to act. Because there are few required processes to slow them down, agencies conduct countless informal adjudications every year, including adjudicating private claims and assessing and enforcing penalties.[37] Even more time-consuming action, like rulemaking, is also relatively simple compared with legislation. Because agency heads vested with rulemaking authority also have the authority to direct agency personnel, they can direct the drafting of an administrative rule and guide it through the notice and comment process with efficiency. This hierarchical arrangement avoids the multiple veto points that impede legislation. Not surprisingly, the relative ease with which agencies act leads to far more agency action than statutory law. To the extent that increased government involvement is equated with a decrease in liberty (a premise certainly open to challenge), the relative ease with which agencies act is deleterious to liberty.

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34 *See* SCHOENBROD, *supra* note 26, at 10 (describing how broad delegations allow legislatures to avoid political accountability); Rao, *supra* note 19, at 1478-79 (arguing that delegation may allow Congress to avoid responsibility for difficult regulatory decisions, shifting the responsibility for regulatory costs to agencies). For example, the National Traffic and Motor Vehicle Safety Act granted broad authority to the agency to issue safety regulations. When the agency's safety standard proved highly unpopular to consumers, Congress amended the statute to undo the agency's decision. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 36 (1983).

35 Sunstein, *supra* note 31, at 1190.

36 JOSH CHAFETZ, CONGRESS'S CONSTITUTION 296-97 (2017).

37 *See* Barnett, *supra* note 33, at 1646-47 (noting that "more than 550,000" informal adjudications take place annually, and that these include oral hearings over which ALJs and AJs preside "to award benefits and licenses, enforce agency penalties, and adjudicate claims primarily between private parties").

B. *Delegation to Private Parties*

Legislatures also vest authority in private parties. Private delegation takes many forms, but like delegation to agencies, legislatures delegate to private parties to take advantage of their expertise.[38] Consider the federal Agricultural Marketing Agreement Act (AMAA), which authorizes the Department of Agriculture to issue marketing orders to regulate particular agricultural commodities.[39] Before a proposed order can be finalized, the Secretary of Agriculture must obtain approval from private groups of producers and handlers of the target commodity.[40] This delegation ensures not only that the views of market participants are taken into consideration, but also that the final order reflects the expertise of "those with the most intimate knowledge" of commodity market conditions.[41] Similarly, many states have adopted industrial codes, like the National Electrical Code.[42] This Code is promulgated by a private group that includes "electrical contractors, inspectors, manufacturers, utilities, testing laboratories, regulatory agencies, insurance organizations, organized labor, and consumer groups" who jointly develop its details.[43] Like these delegations, legislatures frequently delegate policymaking authority to private groups to formulate rules within their areas of expertise, like accreditation[44] and medical standards.[45]

1. Self-dealing

Delegations to private parties have been criticized even more consistently than agency delegations. Commentators' primary concern is one of *self-dealing*;[46]

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38 *See* David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 656-57 (1986) (discussing the potential benefit for private delegation to provide access to specialized expertise otherwise unavailable to the government); Abramson, *supra* note 20, at 179 ("The first, and probably primary, reason Congress delegates governmental tasks to public regulators is their expertise. This expertise rationale is also used to justify reliance on private regulators." (footnote omitted)).

39 Agricultural Marketing Agreement Act, Pub. L. No. 137, ch. 296, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.); *see, e.g.*, Lion Raisins, Inc. v. United States, 58 Fed. Cl. 391, 393 (Fed. Cl. 2003) ("The AMAA . . . provide[s] the Secretary with the authority to impose volume regulations to promote orderly marketing conditions and stabilize the price of raisins.").

40 Agricultural Marketing Agreement Act ch. 296.

41 Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 520-22 (2011).

42 NATIONAL ELECTRICAL CODE (Nat'l Fire Prot. Ass'n 2020).

43 Lawrence, *supra* note 38, at 689.

44 *See, e.g.*, *In re* Hansen, 275 N.W.2d 790, 796-97 (Minn. 1978) (upholding a delegation to a "nongovernmental body with expertise in the area of legal education").

45 *See, e.g.*, Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827, 830 (Pa. 2017) (invalidating a statute requiring physicians to adopt American Medical Association impairment methodology).

46 *See* Horton, *supra* note 31, at 473 (explaining that private parties "have fundamentally different incentives" than legislators or bureaucrats, in that they "select regulation that provides

that is, when a private delegate has the authority to affect the substance of government rules, the delegate is well-positioned to use this power for its own economic advantage. The concern with self-dealing was raised squarely by the Supreme Court in *Carter v. Carter Coal*, when it noted that delegation of the power to fix terms of employment in the coal industry to a group of coal producers and miners was "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."[47]

The Court's concern in *Carter* was based on the distinction between the incentives and obligations of agency officials and, on the other hand, those of private parties. While agency officials are bound by an obligation to regulate in the public interest, private parties are not similarly bound.[48] As a result, private delegates, as opposed to public delegates, have every incentive to "select regulation that provides them with maximum benefits without considering the effect on the other regulated parties or the public."[49] Consider the agricultural marketing orders noted above: the producers, who must approve a proposed order by a supermajority, have every incentive to hold out for favorable regulation rather than acquiesce in public-regarding regulation if it is against their self-interest.[50]

2. Even Less Political Accountability

The political accountability concerns that exist in the context of agency delegation are magnified in the context of private delegations. Most saliently, private individuals are not bound by the same rules as public officials. Public officials are bound by an oath to faithfully discharge the duties of their office,[51] connecting their service morally, if not legally, to the public interest. Private delegates, by contrast, are not bound to serve the public interest in this way.[52] Similarly, private delegates are not subject to the provisions of the Constitution

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them with maximum benefits without considering the effect on the other regulated parties or the public" (internal citation omitted)).

47 Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

48 *See* 5 U.S.C. § 3331 (requiring executive officers to take an oath to faithfully discharge their duties); Krent, *supra* note 41, at 510 ("[P]rivate parties are less electorally accountable, less subject to bureaucratic constraints, and may be less motivated to serve the public good than are independent administrative agencies.").

49 Horton, *supra* note 31, at 473.

50 SCHOENBROD, *supra* note 26, at 3-4 (describing negative effects of delegation of authority to promulgate agricultural marketing orders).

51 5 U.S.C. § 3331.

52 *See* Calvin R. Massey, *The Non-Delegation Doctrine and Private Parties*, 17 GREEN BAG 2d 157, 167-68 (2014) ("[D]elegation to private entities raises the specter of a cession of power to unelected and politically unaccountable persons who have every incentive to exercise the delegated power for their own ends.").

that constrain official action, like the Due Process Clause.[53] Likewise, they need not comply with statutory constraints on the agency decision-making process, like those imposed by the Administrative Procedure Act.[54]

Moreover, even though agency personnel are unelected, agency heads can be removed by the President or through the impeachment process.[55] By contrast, removing a private delegate does not come with the same weighty mark of public disapproval. And while the President's connection to agency action is attenuated, the President's connection to the action of private parties is nonexistent. As a result, delegation to private parties cuts the President out of the process of regulation and deprives the public of the meaningful ability to punish the President for the delegate's action.[56]

III. DELEGATION TO NONEXPERTS

Whether composed of private citizens or public officials, the typical delegate is an institution with expertise in the subject matter it regulates. But, while delegation to experts is the rule, it is also possible for a legislature to delegate policymaking authority to an institution without expertise in the matters it regulates. This model of delegation can be called *delegation to nonexperts*.

The rest of this Essay will describe and begin the project of evaluating delegation to nonexperts. As an initial matter, I offer two caveats about the scope of this Essay. First, not every process that takes the views of nonexperts into account is a delegation for the purposes of this Essay. In both federal[57] and state[58] rulemaking processes, for example, views of the public, including nonexperts, are solicited as part of the notice and comment process. Although an agency is not required to alter a proposed rule because of public comments, it must take them seriously by responding to significant comments.[59]

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53 Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1387 (2006) ("[T]he Constitution does not prescribe how private individuals or private organizations are to treat each other; rather, only governmental action is subject to the requirements of the Constitution." (emphasis omitted)).

54 *See* Horton, *supra* note 31, at 472-73 (explaining that the Administrative Procedure Act does not bind private parties).

55 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492-93 (2010) (describing the President's removal authority); U.S. CONST. art. I, § 2 (noting the House's impeachment power); *id.* § 3 ("The Senate shall have the sole power to try all impeachments.").

56 Krent, *supra* note 41, at 532, 536 (arguing that delegation to private parties "does not trigger the President's appointment and removal authorities").

57 *See* 5 U.S.C. § 553(c) (requiring that agencies "give interested persons an opportunity to participate in . . . rule making" and "consider[] . . . the relevant matter presented.").

58 REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT, art. 3 (UNIF. LAW COMM'N 2010) (describing the procedural requirements for state rulemaking, including the requirements for notice and comment).

59 Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment.").

Nevertheless, I do not consider this a *delegation* because public comments themselves cannot stop the promulgation process. Accordingly, this Essay will not address the many ways in which delegates solicit and consider the views of nonexperts when those nonexperts themselves play no official role in taking final agency action.

Second, just like expert delegates, nonexperts can be either public officials or private citizens. For example, many state statutes permit committees composed of legislators or executive branch officials to alter or veto administrative rules. These statutes allow administrative rules informed by the "technical expertise of specialist bureaucrats" to be modified or vetoed by committees whose members do not have a comparable level of expertise.[60] Delegations to nonexpert *public officials*, including these types of committees, have different features, and raise different concerns, than delegations to nonexpert *private* parties. As described above, unlike private delegates, public officials have an obligation to act in the public interest.[61] Because of these different characteristics, in this Essay I only consider nonexpert *private* delegations.

Delegation to nonexperts, as defined above, can be illustrated by a recent innovation in Michigan's rulemaking process. The Michigan legislature has delegated rulemaking authority over environmental matters to a committee whose members have limited expertise in the subject matters it regulates. Michigan's Environmental Rules Review Committee (Review Committee) oversees rulemaking conducted by the Michigan Department of Environment, Great Lakes, and Energy (EGLE).[62] The Review Committee has authority to determine whether EGLE's proposed rules are consistent with law; whether they are "necessary and suitable" in light of the costs they are likely to impose; and whether they "are based on sound and objective scientific reasoning."[63] If the Review Committee determines that a proposed rule does not meet these criteria, it has multiple opportunities to influence, delay, and even derail the proposed rule.[64]

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60 Neal D. Woods, *Separation of Powers and the Politics of Administrative Rule Review*, 15 ST. POL. & POL'Y Q. 345, 348 (2015). I also exclude OIRA from my definition of nonexpert delegation. Although OIRA is headed by a political appointee and lacks the substantive expertise of regulating agencies, it has career staff with substantive expertise and collects expert information from different agencies during rulemaking. Sunstein, *supra* note 30, at 1871.

61 *See supra* text accompanying notes 50-55.

62 S. 652 § 65(19), 99th Leg., Reg. Session (Mich. 2018). At the time the Review Committee was created, the Department was known as the Michigan Department of Environmental Quality.

63 *Id.* § 66(4). There are also other findings, not discussed here, that the Review Committee must make. *See id.*

64 After the Review Committee objects to a proposed rule, EGLE must address these concerns by revising the rule or providing it with more information. *Id.* § 66(6). After public comment, the Review Committee has the opportunity to derail the finalized rule by rejecting it or suggesting

Despite the fact that the Review Committee must make legal, scientific, and cost-benefit determinations, and despite its power over the rulemaking process, the Review Committee's members, by statutory design, have limited expertise in the matters it oversees. Two of the Review Committee's members must be members of the public and one must be a small business owner;[65] none of these three are likely to have any expertise in the subject matters that the Review Committee regulates. Moreover, most of the Review Committee's other members are representatives of various industrial groups—for example, waste management, manufacturing, oil and gas, and agriculture.[66] Although these industry representatives likely will have some expertise in environmental issues that impact their industries, none will have expertise in the vast majority of subject matters that the Review Committee oversees, which include drinking water, dams, dunes, floodplains, shipping, wetland management, and countless other matters.[67]

Perhaps the modicum of expertise required of some of the members of the Review Committee saves it from the label "nonexpert." Even so, the Review Committee can be considered "proof of concept": that is, the mismatch between the significant rulemaking responsibility of the Review Committee and its lack of institutional expertise suggest that legislatures may be willing to go further to delegate authority to private parties with *no* expertise. State and federal responses to the recent COVID-19 pandemic further confirm this likelihood. As noted above, some government officials have demonstrated a great willingness to disregard and even undermine expert institutions in favor of following admittedly nonexpert courses of action.[68] Part IV evaluates the consequences of a legislature's decision to delegate authority to nonexperts.

IV. EVALUATING DELEGATION TO NONEXPERTS

Delegation to nonexperts has different characteristics than delegation to experts, whether public or private. It is therefore not surprising that

modifications, forcing EGLE to attempt to reconcile these differences. *Id.* § 66(9). In total, the Review Committee can delay the rule by more than a year and force EGLE into one of three unenviable choices: it may give up and withdraw its proposed rule, appeal to the governor to override the Review Committee, or begin the rulemaking process anew. *Id.* § 66(11).

65 *Id.* § 65(2). This description is not meant to disparage any particular member of the Review Committee.

66 *Id.*

67 Of the twelve voting members, only two might have experience with a broader array of environmental issues: one must represent an environmental organization and one must represent a land conservancy organization. *Id.* And while the group will also include science advisors and agency employees, these members may not vote. *Id.* §§ 65(4), 65(13).

68 *See supra* text accompanying notes 5-9.

delegation to nonexperts can be criticized for some, but not all, of the same reasons as delegation to experts. Moreover, delegation to nonexperts also raises some unique concerns. This Part will compare the concerns raised by delegation to experts to those raised by delegation to nonexperts.

A. *No Accountability*

The accountability concerns that accompany agency and private delegations are even more severe when the delegate is not an expert. As noted above,[69] agency delegates are unelected and private delegates are not bound by oath to pursue the public interest. Despite these characteristics, however, expert delegates, both public and private, share a characteristic that increases the likelihood that they will act in the public interest. Expert delegates of all kinds are held accountable by their common interest in cultivating a reputation for expertise in the subject matter of the delegation.

A reputation for expertise is a significant component of an agency's regulatory success. As a result, agency officials value and cultivate their agency's reputation for expertise.[70] For example, the FDA's reputation causes pharmaceutical manufacturers to self-regulate, "abandon[ing] hundreds if not thousands of new therapeutic ideas every year" to avoid FDA rejection.[71] This self-regulation makes the FDA's regulatory role easier by eliminating the need for it to make approval decisions in marginal cases that firms could, but do not, present to it.[72] Private delegates have a similar incentive to maintain a reputation for expertise. The private group that promulgates the National Electrical Code, for example, has an incentive to draft a Code that is efficient and effective. If it fails to do so, its reputation (and the reputation of its employees and members) will suffer and it will cease to be considered an expert in the field; ultimately, states might withdraw their delegations from it.

Nonexpert delegates, like agency delegates, are unelected; and like private delegates more generally, they are not bound by oath to pursue the public interest. But, unlike either agency or private expert delegates, nonexpert delegates are unconstrained by reputational concerns. Like the members of Michigan's Review Committee, a nonexpert delegate's position may last only a few years and is not the delegate's primary source of income, professional contacts, or, likely, professional satisfaction. As a result, a nonexpert delegate's professional reputation will not suffer for failing to regulate effectively. Indeed, it would be perverse for the reputation of nonexperts to

69 *Supra* Part II.

70 *See* DANIEL CARPENTER, REPUTATION AND POWER 10-11, 33-34, 46-47 (2010) (describing the relationship between an agency's reputation and its regulatory power).

71 *Id.* at 16.

72 *Id.*

suffer simply because they failed to understand complex scientific, economic, and legal concepts; such specialized matters are simply outside of their areas of knowledge. Moreover, even removal from his or her position, which could be a career-ending blow to a public official, is hardly consequential for nonexperts. Even if removed, nonexperts are free to continue their normal professional lives without interruption. Because a nonexpert has little affirmative incentive to regulate responsibly, and will suffer little consequence for failing to do so, the reputational accountability that constrains public and private expert delegates is absent from the nonexpert delegate. Because nonexperts lack this reputation constraint, and because they also are unelected and are not bound by oath to pursue the public interest, nonexperts have even less accountability than their expert counterparts.

B. *Limited Self-dealing*

Although delegation to nonexperts exacerbates problems of accountability, it mitigates the problems of self-dealing that affect private delegations. As noted above,[73] private delegates generally have an incentive to "select regulation that provides them with maximum benefits without considering the effect on the other regulated parties or the public."[74] This concern is rooted in the assumption that private delegates have the expertise that makes them attractive delegates precisely because they participate in the line of business that they regulate.[75] It follows from this assumption that private delegates have an incentive to regulate for their own benefit.

In the case of delegations to nonexperts, however, self-dealing concerns are limited or nonexistent. Nonexpert delegates are not likely to be in the line of business that they regulate. (If they were, they would likely have some expertise, after all.) Accordingly, nonexpert delegates are not likely to have a financial interest in their regulatory decisions beyond an interest as members of the public. As a result, the nonexpert delegate can be expected to regulate without the specter of self-dealing that clouds other private delegations. Consider, again, Michigan's Review Committee. Although some of the committee's members do work in lines of business that may be particularly affected by the environmental regulations they oversee, many others do not.[76] They will not, therefore, be in a position to self-deal. Moreover, even the Review Committee's members who work in industries affected by

73 *Supra* Part II.B.1.

74 Horton, *supra* note 31, at 473.

75 *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (discussing the conflict created by delegating to private parties, namely that the private persons often participate in the industry they are regulating and therefore "may be and often are adverse to the interests of others in the same business").

76 S. 652 § 65(2), 99th Leg., Reg. Session (Mich. 2018).

environmental regulations will be self-interested only in a small fraction of cases that the Review Committee addresses. As noted, Michigan's EGLE regulates many subjects that are of little interest to the Review Committee's industrial members.[77] As a result, even the industrial members of the Review Committee can be expected to be self-interested only rarely.

C. *Inexpert and Arbitrary Agency Action*

Delegation to nonexperts is likely to lead to regulation that is both inexpert and, more distressingly, arbitrary. As noted above, legislatures delegate authority to other bodies, whether public or private, to take advantage of the delegate's expertise. Agencies are well-situated to develop expertise due to their ability to solicit comments and advice from members of industry and other government agencies[78] and their "capacity to devote extended time and attention to specific problems."[79] Private delegates, moreover, are more likely to have first-hand experience with the problems they regulate,[80] are better able to represent the interests of affected industry members,[81] and have highly specialized knowledge unavailable to government regulators.[82]

Nonexpert delegates have the advantages of neither agency nor private delegates. Because they are not experts in the fields they regulate, nonexpert delegates lack highly specialized knowledge, are unlikely to have first-hand experience with the problems they regulate, and do not represent the interests of affected industry members. Even if a nonexpert delegate did have the resources to research and collect pertinent information, it would have little incentive to do so. For the same reasons that nonexpert delegates are unlikely to self-deal (no special interest in the outcome of the regulation), they have little incentive to invest resources in developing expertise in the subject matter of the delegation. Because nonexpert delegates do not have, and likely will not develop, expertise in the subject matter of the delegation, they are likely to reach decisions that do not reflect subject-matter expertise.

A related and potentially more serious risk created by delegation to nonexperts is the risk of arbitrary regulation. When elaborating on the

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77 *See supra* text accompanying notes 66-68.

78 *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019) ("Agencies (unlike courts) can conduct factual investigations, can consult with affected parties, can consider how their experts have handled similar issues over the long course of administering a regulatory program."); *cf.* Sunstein, *supra* note 30, at 1841 (discussing OIRA's role as an information aggregator, including its role assisting agencies in processing and addressing public comments).

79 Bamberger, *supra* note 21, at 401.

80 Abramson, *supra* note 20, at 179.

81 Krent, *supra* note 41, at 522.

82 Bamberger, *supra* note 21, at 390.

Administrative Procedure Act[83] in *State Farm*, the Supreme Court identified situations in which agency rulemaking decisions will be considered "arbitrary and capricious":

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[84]

Although the Supreme Court has not read this language as broadly as it might,[85] nonexpert delegate action is likely to be arbitrary and capricious under even a modest version of *State Farm*. Implicitly or explicitly, legislatures require delegates to make policy decisions based on legal, scientific, economic, or other considerations.[86] Nonexpert delegates, however, do not have expertise in the disciplines that the legislature expects will inform their decisions. As a result, even well-intentioned nonexpert delegates are apt to inadvertently rely on factors the legislature did not intend them to consider when making decisions. For this same reason, it is also likely that nonexpert delegates will fail to consider important aspects of the problems placed before them. Indeed, nonexpert delegates may fail even to *recognize* important issues because of their lack of expertise. Finally, if the data and arguments presented to them are intended for experts, nonexpert delegates are liable to misinterpret and misapply them. As a result, nonexpert delegates may make decisions or offer explanations that run counter to evidence presented to them. For all of these reasons, decisions by nonexpert delegates run a significant risk of being arbitrary and capricious.[87]

V. CONCLUSIONS AND QUESTIONS FOR FUTURE RESEARCH

Delegation of authority to nonexperts has different characteristics than delegation to experts, either public or private. Concerns about accountability are more acute in the context of nonexperts. Conversely, the self-dealing concerns associated with private delegates are minimal or absent for

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83 *See* 5 U.S.C. § 706 (providing that courts should set aside "agency action, findings, and conclusions found to be arbitrary [and] capricious").

84 Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

85 *See generally* ADRIAN VERMEULE, LAW'S ABNEGATION 191 (2016) (recounting the government's high success rate in *State Farm* challenges).

86 *See supra* text accompanying notes 28-30.

87 *Cf. State Farm*, 463 U.S. at 43 (describing the arbitrary and capricious standard).

nonexpert delegates. And the risk of inexpert and arbitrary agency action is pervasive for nonexpert delegates.

While this Essay provided a sketch of the issues associated with delegation to nonexperts, there is more work to be done on this subject. This Essay, therefore, can be considered an introduction to a much broader topic. Future study into delegation to nonexperts should include the following:

- *Delegation to Nonexperts and the Death of Expertise*: Recent scholarly work documents the popular rejection of expertise in politics, medicine, law, and other fields. Future work could investigate how delegation to nonexperts fits with this broader trend.
- *Delegation to Nonexperts and the Nondelegation Doctrine*: The nondelegation doctrine is in flux. After the Supreme Court's recent *Gundy* opinion, the Court is expected to breathe new life into the long dormant doctrine. Future work could explore whether it would be appropriate for the courts to apply an enhanced version of the nondelegation doctrine to nonexpert delegates.
- *Delegation to Nonexperts and Reputational Costs*: The effectiveness of agency regulation heavily depends on the agency's reputation for expertise. Future work could investigate whether delegation to nonexperts negatively affects the agency's ability to regulate effectively.

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