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Delegation as a Danger to Liberty Symposium - The Phoenix Rises again: The Nondelegation Doctrine from Constitutional and Policy Perspectives: Delegation and the Constitution

Nadine Strossen
New York Law School

DELEGATION AS A DANGER TO LIBERTY

*Nadine Strossen**

I am delighted to participate in this important symposium. I am not an expert on the regulatory process or administrative law. Rather, my expertise and concerns are in the area of individual freedom. Accordingly, my interest in the delegation issue is rooted in my commitment to liberty.

In significant respects, liberty is threatened when the law-making function of government is delegated to unelected, unaccountable bureaucrats. In his pivotal opinion in the landmark case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[1] Justice John Marshall Harlan reminded us that members of Congress, along with state legislatures, are "ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[2] Justice Harlan's statement prompts this question: What exactly *is* Congress's essential constitutional role as a guardian of liberty? And this question, in turn, triggers another: What is the relevant concept of liberty?

For the Framers of the Constitution, liberty was essentially the right to be left alone by government unless some important public purpose warranted intervention.[3] The modern Supreme Court has embodied this concept in the so-called *heightened* scrutiny standards of judicial review.[4]

To protect liberty, thus understood, the Framers adopted several complementary strategies. Of these strategies, modern case law has most frequently addressed the judicially enforceable rights

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* Professor of Law, New York Law School; President, American Civil Liberties Union. For research and administrative assistance in preparing this piece, Professor Strossen thanks her academic assistant, Amy L. Tenney, and her research assistants, Ili Graeler, Jenean M. Klein, and Mark A. Konkel. She also gratefully acknowledges the inspiration and insights of her NYLS colleague, Professor David Schoenbrod.

1 403 U.S. 388 (1971).

2 *Id.* at 407 (quoting Missouri, Kan., & Tex. Ry. Co. v. May, 194 U.S. 267, 270 (1904)).

3 *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

4 *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.5, at 414-17 (1997) (describing the history of, and the reasoning behind, levels of scrutiny in constitutional review).

that are expressly articulated, notably, those found in the Bill of Rights. These constitutionally enumerated rights prohibit specified types of government actions, such as censoring speech or preventing the free exercise of religion.[5]

Important as they are, explicit constitutional rights are not coterminous with the Framers' appropriately broad concept of liberty.[6] Rather, from the broad array of possible government actions that undermine liberty, these express rights carve out a few such actions that are barred, or at least subject to close judicial scrutiny. These rights generally concern those government actions that are particularly likely to lack an important public purpose or to present a peculiarly grave threat to individual freedom. But these explicit constitutional rights do not protect us from many other threats to our liberty—our right to be let alone absent the need to promote an important public purpose.[7] In short, these judicially enforceable, express constitutional rights do not, in many circumstances, stop government from imposing regulations or taxes for what are actually private purposes.

Because explicit constitutional rights fall short of fully guaranteeing the Framers' conception of liberty, we must look elsewhere for further protection. One possible source of such further protection is contained within the legislative process defined in Article I—a second essential strategy that the Framers designed to protect liberty. This complementary strategy actually preceded the development of enumerated judicially enforceable rights.[8] In fact, Al-

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5 *See* U.S. CONST. amend. I.

6 *See* Clinton v. City of New York, 118 S. Ct. 2091, 2109 (1998) (Kennedy, J., concurring):

> In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts.

7 *See* U.S. CONST. amend. IX ("The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people."); *see also* Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 15 (1988).

8 *See Clinton*, 118 S. Ct. at 2103 (noting that "[t]he procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself," and striking down the Line Item Veto Act for violating those procedures); INS v. Chadha, 462 U.S. 919, 951 (1983) ("It emerges clearly that the prescription for legislative action in [Article I], represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 29 (1993) (stating that the Constitution's "baroque" legislative process, set

exander Hamilton opposed adding a bill of rights to the Constitution on the ground that "the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[9]

Hamilton was wrong in concluding that the Constitution, including the Article I legislative process, makes a bill of rights superfluous, as his contemporaries fortunately perceived and history has proved. But Hamilton was correct in concluding that the legislative process significantly helps to protect liberty.

Delegation of this constitutionally defined lawmaking power to regulatory agencies undercuts its important protection of liberty in four ways. First, delegation shifts power from Congress and the President—two highly visible institutions that are responsive to a broad spectrum of interests—to various agencies, commissions, and boards—lower-visibility institutions that are attuned to only a small subset of all the interests. According to the political science literature, agencies are dominated by their top officials, a small group of persons from the private sector, and a few key members of Congress.[10] As John Hart Ely observed, "one reason we have broadly based representative assemblies is to await something approaching a consensus before government intervenes."[11] But no such consensus is needed when legislative power is delegated.

Second, delegation allows legislators and the President to shift much of the blame for unpopular government policies to the agencies. Therefore, an important deterrent to enacting unpopular *laws* does not deter unpopular *regulations*.[12]

Third, delegation makes it far easier to impose new laws. In James Madison's words, Article I was meant to curb the "facility and excess of law-making" by requiring that statutes go through a bicameral legislature and the President.[13] Madison's view that the legislative process would tend to discourage narrowly partisan laws—though not eliminate them—has been borne out by much

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out in Article I of the Constitution, safeguards liberty); *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 708 (1997) (concluding that the checks and balances included in Article I were "key element[s] of the constitutional scheme to preserve individual liberty").

9 THE FEDERALIST NO. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also Clinton*, 118 S. Ct. at 2109 (Kennedy, J., concurring) ("So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary.").

10 *See* LAWRENCE C. DODD & RICHARD L. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 308-09 (1979).

11 JOHN HART ELY, DEMOCRACY AND DISTRUST 134 (1980).

12 *See* SCHOENBROD, *supra* note 8, at 9.

13 THE FEDERALIST NO. 62, *supra* note 9, at 378 (James Madison).

recent political science literature.[14] The differing constituencies of representatives, senators, and the President—and the differing lengths of their terms in office—make it likely that they will be partial to varying interests. This diversity of viewpoint, coupled with the greater difficulty of prevailing in three forums rather than one, means that popular support sufficient to produce a bare majority in a unicameral legislature would probably fail to get a statute through the Article I process.[15]

The fourth respect in which delegation threatens liberty is consolidation of lawmaking and law enforcement power in the same hands.[16]

I do not mean to suggest that agencies can make whatever laws they want, whenever they want. The constraints on agency lawmaking that do exist, however, do not adequately protect individual liberty. First, agencies must comply with the Administrative Procedure Act.[17] As the name suggests, though, those requirements are simply procedural in nature. They merely slow down agency lawmaking and do not necessarily weed out laws that violate liberty or lack an important public purpose.

Second, persons affected by agency-made law do have a right to seek judicial review. But such review is usually highly deferential.[18] Agencies have learned to shield even narrowly partisan regulations from judicial reversal by presenting them as the product of reasoned analysis aimed at promoting a public purpose.[19]

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14 *See, e.g.*, SCHOENBROD, *supra* note 8, at 29.

15 *See, e.g.*, INS v. Chadha, 462 U.S. 919, 959 (1983) ("The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.").

16 *See* WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 22 (1997) (referring to administrative agencies as a "headless Fourth Branch of government" because of their ability to exercise legislative, executive, *and* judicial functions even though the three traditional branches of government are prohibited from doing so by the Constitution).

17 Pub. L. No. 89-554, 80 Stat. 381 (codified as amended in scattered sections of 5 U.S.C.).

18 *See* Chevron v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984) (holding that, unless an agency decision is foreclosed by law, it should be upheld by a reviewing court as long as it is a "permissible construction of the statute"); Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (holding that a court may overturn an agency decision only if the court cannot "conscientiously find that the evidence supporting the decision is substantial" in reviewing the entire record); FUNK ET AL., *supra* note 16, at 269 (comparing the highly deferential standard in judicial review of agency decisions to an appellate court's very deferential review of a trial court's findings of fact).

19 *See* SCHOENBROD, *supra* note 8, at 114.

Even if the reviewing court finds some flaw in the agency's analysis, the agency remains free to reach the same result backed by a new explanation that is crafted to overcome the court's prior criticism.[20] In the words of University of Texas law professor Harold Bruff:

> An agency desiring a particular policy outcome can [survive judicial review through] the charade of hearing from everyone interested, responding to their views and data in rational discourse, and elaborating a rationale for the decision that is coherent, supported by the administrative record, and consistent with prior agency policy and known statutory intent.[21]

My point is not that administrative procedure and judicial review of agency action are worthless in protecting liberty. Rather, my point is that the legislative process is more effective than the administrative process in doing so. The United States Supreme Court apparently agrees. Consider, for example, its 1958 ruling in *Kent v. Dulles*.[22] In *Kent*, the Court chose to construe narrowly a statute that gave the Secretary of State discretion to issue or deny passports. Specifically, the Court held that the statute did not authorize the Secretary's regulations denying passports to people affiliated with the Communist Party.[23] The Court's opinion, written by the great civil libertarian, Justice William O. Douglas, well describes delegation's adverse impact on liberty. He wrote:

> [T]he right of exit is a personal right included within the word "liberty" as used in the Fifth Amendment. If that "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress.... Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.[24]

The cornerstone of the Court's conclusion was that the legislative process offers a protection for liberty for which the administrative process is not an adequate substitute. Unfortunately, despite *Kent*'s broad wording, later Supreme Court decisions have not so strictly limited delegated lawmaking, even when it en-

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20 *See id.* at 115.

21 Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 239 (1984).

22 357 U.S. 116 (1958).

23 *See id.* at 130.

24 *Id.* at 129 (citations omitted).

trenches upon First Amendment rights.

I would now like to move from the abstract to the concrete, to describe three specific examples of the many actual situations where delegation has in fact undermined liberty, in particular, the precious freedom of speech that many consider an especially important aspect of liberty.[25]

The first example centers around the infamous *gag rule* issued by the Department of Health and Human Services ("HHS") in 1988.[26] It prohibited employees of federally-funded family planning clinics from giving any information to their patients about abortion, even when the patients asked about it,[27] and even when abortion was medically indicated—in other words, even when the woman's health would be undermined by carrying the pregnancy to term.[28] At that time, HHS could never have garnered the majorities in the House and the Senate that would have been needed to enact such a bar in statutory form.[29] Undeterred, the HSS made the law itself.[30] The ACLU challenged the gag rule all the way up

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25 *See, e.g.*, Smith v. California, 361 U.S. 147, 169 (1959) (Douglas, J., concurring) ("[The Court] recognizes implicitly that these First Amendment rights, by reason of the strict command in that Amendment—a command that carries over to the States by reason of the Due Process Clause of the Fourteenth Amendment—are preferred rights."); Palko v. Connecticut, 302 U.S. 319, 327 (1937) (Cardozo, J.) (stating that freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom").

26 *See* Prohibition on Counseling and Referral for Abortion Services; Limitation of Program Services to Family Planning, 42 C.F.R. § 59.8 (1989) (effectiveness suspended Feb. 5, 1993).

27 *See id.* § 59.8(b)(5) (mandating that the project counselor tell pregnant women seeking information about abortions that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion").

28 *See id.* § 59.8(a)(2) ("In cases in which emergency care is required, however, the title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.").

29 *See* SCHOENBROD, *supra* note 8, at 16 (explaining that in 1989, when HHS promulgated the gag rule, the House and Senate had pro-choice and Democratic majorities).

30 Indeed, several judges concluded that the rule was unlawful on this basis, for exceeding or contravening the scope of the legislative authority. Justice Blackmun, for example, found that "the Secretary's regulation of referral, advocacy, and counseling activities exceed[ed] his statutory authority." Rust v. Sullivan, 500 U.S. 173, 204 (1991) (Blackmun, J., dissenting). Further, Justice Stevens stated:

> Not a word in the statute . . . authorizes the Secretary to impose any restrictions on the dissemination of truthful information or professional advice by grant recipients. . . . [The] entirely new approach adopted by the Secretary in 1988 was not, in my view, authorized by the statute. The new regulations did not merely reflect a change in a policy determination that the Secretary had been authorized by Congress to make. Rather, they represented an assumption of policymaking responsibility that Congress had not delegated to the Secretary.

Id. at 221-22 (Stevens, J., dissenting) (citations omitted).

to the Supreme Court, where it lost, five to four. A narrow majority of the Justices held that the gag rule did not violate any constitutional rights, neither the explicit right of free speech,[31] nor the implicit right of reproductive freedom.[32]

Moreover, departing from *Kent v. Dulles*,[33] the Court also stretched to find statutory authorization for HHS's regulatory ban on abortion information. The statute in question barred federally-funded family planning clinics from performing abortions.[34] It certainly did not expressly *authorize* a ban on information about abortion. The Court reasoned, nevertheless, that the statute also did not expressly *bar* such a ban.[35] As Justice Stevens noted in his dissent, "[i]n a society that abhors censorship and in which policymakers have traditionally placed the highest value on the freedom to communicate, it is unrealistic to conclude that statutory authority to regulate conduct implicitly authorized the Executive to regulate speech."[36]

Thanks to the majority's opinion, those who opposed the ban on abortion information as violating free speech and reproductive freedom, not to mention on important public health policy grounds, could only protect these vital rights and interests by enacting a statute.[37] Large bipartisan majorities in both houses did support a statutory repeal of the gag rule, but not the two-thirds supermajorities needed to override President Bush's veto. The override failed by twelve votes.[38] In this situation, accordingly, delegation created a cruel irony: the hurdles that had been built into the legislative process to protect liberty instead obstructed its protection.

For a second specific example of delegation's anti-liberty impact, consider the regulations designed to curb smoking that were proposed by the Food and Drug Administration ("FDA") in

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31 *See id.* at 192-200.

32 *See id.* at 201-02.

33 357 U.S. 116 (1958).

34 *See* 42 U.S.C. § 300a-6 (1994) ("None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.").

35 *See Rust*, 500 U.S. at 184 ("Based on the broad directives provided by Congress in Title X in general and § 1008 in particular, we are unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling, referral, and advocacy within the Title X project is impermissible.").

36 *Id.* at 222.

37 *See He Defies the Majority on the Gag Rule*, N.Y. TIMES, Nov. 22, 1991, at A30; *The Gag Rule, Gagged*, N.Y. TIMES, Nov. 2, 1991, at A22 (stating that the gag rule denied "quality family planning services" to clinic patients—most of whom are poor); *Thumbing His Nose at Congress*, N.Y. TIMES, Nov. 22, 1991, at A30.

38 *See* sources cited *supra* note 37.

1995.[39] These regulations included restraints on tobacco advertising in the print media and on billboards,[40] raising very serious First Amendment problems.[41]

Congress has not outlawed such advertising. Rather, the FDA claimed authority to enact the regulation under a broadly worded delegation.[42] The FDA said that it would withdraw the proposed regulation only if Congress were to enact a similar statute.[43] Therefore, even if both houses of Congress passed a bill bar-

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39 *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314, 41,348 (1995) (to be codified at 21 C.F.R. pts. 801, 803, 804, and 897) (proposed Aug. 11, 1995), *published as final rule*, 61 Fed. Reg. 44,396 (1996) [hereinafter Proposed Tobacco Regulations]:

> In the case of cigarettes and smokeless tobacco, the primary mode of action is that of a drug, due to the nicotine, and, therefore, primary jurisdiction over these products belongs in [the FDA]. . . . It is within FDA's discretionary power to determine which, if any, of the available regulatory authorities it will employ in the regulation of a product.

But see Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 170 (4th Cir. 1998) (concluding that the FDA "did not have jurisdiction to regulate tobacco products"), *petition for cert. filed*, 67 U.S.L.W. 3484 (U.S. Jan 19, 1999) (No. 98-1152).

40 *See* Proposed Tobacco Regulations, *supra* note 39, at 41,374 (to be codified at 21 C.F.R. subpt. D, §§ 897.30, 897.32, 897.34).

41 *See Tobacco Legislation: Is It Constitutional?: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Solange E. Bitol, Legislative Counsel, ACLU) (arguing that the FDA's proposed regulations are unconstitutional because broad restrictions on billboard, internet, and other advertising are not narrowly tailored enough to justify curtailing First Amendment rights); *Id.* (statement of Burt Neuborne, Professor of Law, New York University School of Law) (finding that the FDA's proposals to restrict tobacco advertising are "simply far too broad" and would be found unconstitutional by the Supreme Court); *see also* Barbara Dority, *The Rights of Joe Camel and the Marlboro Man; Cigarette Advertising Restrictions*, HUMANIST, Jan. 11, 1997, at 34 (quoting Northwestern University law professor and First Amendment expert Martin Redish as stating that "[t]here are serious constitutional problems with the majority of the new [tobacco] regulations").

42 *See* 21 U.S.C. § 353(g)(1) (1994) ("The Secretary shall designate a component of the Food and Drug Administration to regulate products that constitute a combination of a drug, device, or biological product."); *id.* § 321(h)(3) (giving the FDA jurisdiction to regulate any "devices" "intended to affect the structure or any function of the body"); FDA, *Executive Summary: Annex: Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination* (visited Nov. 23, 1998) <http://www.fda.gov/opacom/campaigns/tobacco/execsum.html> (concluding that cigarettes and smokeless tobacco products are drugs and devices under the FDA's jurisdiction). *But see Brown & Williamson Tobacco Corp.*, 153 F.3d at 170; Rep. Ed Whitfield, *FDA Has No Authority to Regulate Tobacco*, ROLL CALL, June 10, 1996, at 8 (stating that the FDA conceded in 1963 that it could not regulate tobacco because doing so would exceed its statutory grant of authority).

43 *See FDA Control Called Illegal*, CHATTANOOGA FREE PRESS, Aug. 11, 1995, at A1 (reporting that President Clinton suggested that Congress should come up with compromise legislation in lieu of the FDA regulations).

ring FDA regulation of tobacco advertising, the presidential veto that would likely follow[44] and the probable lack of congressional supermajorities to override it[45] would mean that the FDA could still regulate this speech. Once again, as in the gag rule situation, thanks to delegation, the hurdles that were built into the legislative process to protect liberty ironically end up obstructing its protection.

A third example of delegated lawmaking that undermined liberty involved the 1975 sanction by the Federal Communications Commission ("FCC") of Pacifica Radio for broadcasting George Carlin's famous "Seven Dirty Words" monologue.[46] The FCC based its decision on statutory language prohibiting the broadcast of "obscene, indecent, or profane language."[47] The Supreme Court ultimately upheld the FCC on the ground that the broadcast, while not *obscene*, was *indecent* under the statute.[48] But the term *indecent* is so open-ended as to confer on the FCC virtually unlimited lawmaking authority.[49] Indeed, the United States Court of Appeals for the District of Columbia Circuit had reversed the FCC's opinion on the ground that it was rulemaking in disguise and that the resulting rule was overbroad.[50] The upshot of this delegation was that the FCC got to be both lawmaker and law enforcer over the content of constitutionally protected speech to boot.

The Supreme Court has seen fit to tolerate most delegation.

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44 *See* Charles J. Lewis, *Teen Smoking Pits FDA Against Tobacco Firms*, TIMES UNION (Albany), Jan. 21, 1996, at A1 (stating that President would veto any bill that exempted tobacco from the realm of the FDA's regulation).

45 *See* Charles J. Lewis, *Tobacco Companies Plead Case with $4.1M*, TIMES UNION (Albany), Mar. 15, 1996, at A1 (quoting Matthew Myers, an anti-smoking activist, as stating that "[Congress] certainly [does not] have the votes to override a presidential veto").

46 *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

47 18 U.S.C. § 1464 (1994).

48 *See Pacifica*, 438 U.S. at 741.

49 The lower court that struck down the Communications Decency Act ("CDA"), which criminalized, inter alia, "indecent" expression on the Internet, based its holding in part on the fact that the undue vagueness of that term violated the Fifth Amendment's due process guarantee. *See* ACLU v. Reno, 929 F. Supp. 824, 856 (E.D. Pa. 1996) (Sloviter, J., plurality opinion); *id.* at 858 (Buckwalter, J., plurality opinion). While the Supreme Court did not reach the Fifth Amendment vagueness claim, affirming instead the lower court's ruling on a First Amendment overbreadth rationale, the Court's discussion of the First Amendment issues revealed substantial concerns about the vagueness of the CDA's operative terms, including "indecent." *See* Reno v. ACLU, 117 S. Ct. 2329, 2344 (1997) ("Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment.").

50 *See* Pacifica Found. v. FCC, 556 F.2d 9, 10 (D.C. Cir. 1977); *see also id.* at 20 (Bazelon, J., concurring).

Whether or not this tolerance is justified,[51] Congress has an independent duty to protect liberty by exercising its responsibility to make the law.

[51] I am not endorsing Congressman J.D. Hayworth's bill, The Congressional Responsibility Act of 1997, H.R. 1036, 105th Cong. (1997), or any other specific legislation on the delegation issue at this point. The ACLU is nervous about jeopardizing particular regulations that affirmatively promote liberty. Given a Congress that is hostile to many civil liberties, these regulations are an especially important tool for us now. But, as I have also noted, in some political contexts, regulations can subvert liberty, even when Congress seeks to protect it. Therefore, I applaud and thank Professors Hamilton and Schoenbrod for organizing this important symposium, which focuses attention on Congress's constitutional duty to protect liberty by exercising its responsibility to make law through the specified Article I process. I look forward to further discussions about how best to implement that important duty.