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**Delegation and Democracy: A Reply to My Critics Symposium -
The Phoenix Rises again: The Nondelegation Doctrine from
Constitutional and Policy Perspectives: Democracy and
Delegation**

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SYMPOSIUM

DELEGATION AND DEMOCRACY: A REPLY TO MY CRITICS

*David Schoenbrod**

INTRODUCTION

High officials tell us that we can be proud to live in a democracy because we have elected them. That tale does not altogether convince voters today. Large majorities tell pollsters that government has somehow eluded their control.¹

Nor should the tale be convincing. The Constitution established an indirect democracy. Indirect democracy works only if the people's elected representatives assume personal responsibility for the key decisions on the scope of government. To impose such responsibility, the Framers, elitists though they were, structured the Constitution to force members of Congress to take responsibility for decisions to increase the scope of government. Article I of the Constitution establishes as a prerequisite for the most important decisions to increase the scope of government—imposing laws, levying taxes, appropriating money, and committing armed forces to combat—that such actions be approved by majorities in both houses of Congress.² Their votes must be recorded and therefore be made available to their constituents if as few as twenty percent of the legislators request it.³ So, government may not expand its powers in any controversial way unless voters know just whom to blame if blame there be.

There is, of course, one other elected federal official in our constitutional scheme—the President—who also has a role in

* Professor, New York Law School. My thanks to Harry Wellington and the conference participants, especially Marci Hamilton and Peter Schuck, for their helpful comments on an earlier draft. My thanks also to Phillip Caal and Floyd Englehardt, New York Law School class of 1998, for their excellent research assistance.

¹ See THE HARWOOD GROUP, THE KETTERING FUND, CITIZENS AND POLITICS: A VIEW FROM MAIN STREET iii (1991).

² See U.S. CONST. art. I, § 8, cl. 1.

³ See *id.* art. I, § 5, cl. 3.

growing the government.⁴ The President's role, however, was designed not to enhance democratic accountability, but rather to check rash or partisan decisions by Congress.⁵

Although the Constitution established congressional responsibility as the main engine of our indirect democracy, members of Congress have evaded responsibility by delegating legislative powers to the executive branch. The result, as I have argued, is that democracy suffers.⁶

My argument has prompted criticism by participants in this symposium. For example, Professor Jerry Mashaw, who had been scheduled to speak, but did not, contends that delegation does no harm to democracy;⁷ Professor Dan Kahan contends that democracy is a meaningless concept;⁸ and Professor Peter Schuck argues that delegation is a policy choice that Congress is entitled to make.⁹ This Article responds to each of them after placing the question of delegation's impact on democracy in historical context.

I. A BRIEF HISTORY OF ELITIST EXCUSES FOR DELEGATION

Jerry Mashaw and Dan Kahan are not the first to try to explain away the harm that delegation does to democracy. Rather, they are the rearguard in a parade of futility.¹⁰ The effort to square delegation with democracy is pervasively futile because the drive for delegation, from the beginning of the twentieth century, stemmed from a desire to reduce government's accountability to ordinary voters.

A. *How the Modern Elite Undermined Accountability*

The Constitution gave voters real control over government during most of the nineteenth century, according to historian Rob-

⁴ The President must accept personal responsibility either by introducing a declaration of war or approving a statute. Should the President not approve a statute, then it is enacted only if two-thirds of the lawmakers in both houses override his veto. *See id.* art. I, § 7, cl. 2.

⁵ *See* THE FEDERALIST NO. 73 (Alexander Hamilton); *see also* Marci Hamilton, *Representation and Delegation*, 20 CARDOZO L. REV. 807 (1999).

⁶ *See* DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

⁷ *See* JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 139-40 (1997).

⁸ *See* Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795 (1999).

⁹ *See* Peter Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999).

¹⁰ *See* SCHOENBROD, *supra* note 6, at 131.

ert H. Wiebe.¹¹ The democracy was far from perfect; only white men could vote. Nonetheless, high officials did have to account to ordinary people who were thought fully entitled to a meaningful say in the role that government played in their lives.¹²

That democracy was undercut at the beginning of the twentieth century, according to Professor Wiebe, by the rise of what he calls "the national class."¹³ The national class are the leaders and budding leaders of the institutions with clout on the national scene: the nationally oriented corporations and unions, the nationally oriented quarters of the professions and media, the nationally prestigious universities, and of course the federal government itself.

The national class thought that ordinary people should not have the power to hold government accountable. That power should come not from what ordinary people pride themselves on—self-support—but rather from what the national class had to offer—specialized knowledge.¹⁴ Members of the national class thought, and many still feel, that experts armed with science and insulated from politics were better equipped to govern than elected officials accountable to ordinary people.

In order to shift control of government from voters to experts, the national class supported two basic changes in American government. First, it set out to discourage voting by the lower classes, particularly recent immigrants and freed slaves. Poll taxes and stricter voter qualifications were aimed not just at African-Americans, but also at all races of the lower class. These restrictions contributed to a sharp drop in voter participation.¹⁵ In addition, changes in law restricted the use of public spaces for the public electioneering by parties and other fraternal organizations that had previously played an integral role in attracting the lower class to the polls in droves.¹⁶

Second, the national class sought to insulate the government from accountability at the polls. It campaigned to transfer governmental power from institutions that were most accountable to ordinary voters to institutions more in the control of the national

¹¹ See ROBERT H. WIEBE, *SELF RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* (1995).

¹² See *id.* at 65, 85.

¹³ *Id.* at 141.

¹⁴ See *id.* at 142-44.

¹⁵ See *id.* at 135.

¹⁶ See *id.* at 134-37, 164-65.

class.¹⁷ It succeeded; power was transferred from the states to the national government and, within the national government, from Congress to the executive and the judiciary.¹⁸ From its inception, the core purpose of delegation was to undercut democratic accountability.

Government by expert came to the fore at the national level during World War I; it grew under Herbert Hoover who ran for President as the "Great Engineer," that is, the great expert; and it grew still more under President Franklin Roosevelt. According to Professor Wiebe:

What Hoover's New Era modeled, Roosevelt's New Deal expanded and refined. It would be absurd to minimize the differences in policy, mood, and leadership between the two administrations: millions of Americans understood. But popular participation in government was not one of them. Despite the image of an approachable president and his open government, New Deal decisions occurred even more commonly than ever behind Washington's closed doors. . . . Thurman Arnold's *Folklore of American Capitalism* (1937), often cited as the New Deal's most significant commentary on government, derisively dismissed the very thought of popular rule.

. . . Policy itself fragmented into a multitude of exclusive dialogues among administrative officials, congressional committees, and powerful citizens. By the 1940s it was quite common for the same cluster of officials and citizens to write a law in private, then execute it in private, with just a quick public peek into the process as it was enacted. Few laws were designed for more than a tiny minority to comprehend.¹⁹

World War II, and later the Cold War provided a succession of new reasons to further centralize power in Washington, particularly in the executive branch. Going to war in Korea without congressional approval completed what Arthur Schlesinger, Jr., has called the "capture by the Presidency of the most vital of national decisions, the decision to go to war."²⁰

Consider how far the top national leadership—Congress and the President, Democrats and Republicans alike—have gone to insulate Congress from responsibility for the most important exercises of national power. As I was writing the initial draft of this Article, four instances came to mind. First, President William

¹⁷ See *id.* at 136-37.

¹⁸ See *id.* at 173-80, 206-07, 217-22.

¹⁹ *Id.* at 207.

²⁰ ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* ix (1973).

Clinton coolly contemplated an attack upon Iraq without asking for congressional authorization. President Clinton, like his predecessor, George Bush, seems to think that he can launch a premeditated military attack without Congressional approval.²¹ Rather than insisting upon doing its duty under the Constitution to decide whether to commit our armed forces, Congress has found it convenient to delegate that decision to the President. As John Hart Ely persuasively argued in *War and Responsibility*,²² such an arrangement is both unconstitutional and likely to get us into more conflicts because of the tendency of presidents to use foreign battles to divert attention from domestic embarrassments. Second, the Line Item Veto Act²³ delegated to the president authority to unilaterally repeal spending items and certain provisions of the tax code.²⁴ Senator Patrick Moynihan stated that the line item veto was a "formula for executive tyranny . . . [and that i]f L.B.J. had had this power, we would have had Nero."²⁵ Fortunately, the United States Supreme Court has since held this act unconstitutional.²⁶ Third, Congress pervasively delegates to unelected agency officials the power to impose regulatory laws on society. Fourth, Congress has begun to delegate to agencies the power to impose taxes.²⁷

We now have war, regulation, and taxation without representation.

B. *The Supreme Court's Attempts to Square Delegation with Democracy*

For well over a century after the adoption of the Constitution, the Supreme Court held that the Constitution prohibits members of Congress from bestowing upon others their personal responsi-

²¹ As Congress was drafting competing resolutions to authorize President Bush to send troops to Saudi Arabia, Bush told reporters, "I don't think I need [congressional authority]. . . . I have the authority to fully implement the United States resolutions Many attorneys have so advised me." William Scally, *Congress Heads Toward Fateful Vote on Persian Gulf War*, REUTERS N. AM. WIRE, Jan. 9, 1991, available in LEXIS, News Library, Arcnws File.

²² JOHN HART ELY, *WAR AND RESPONSIBILITY* (1993).

²³ 2 U.S.C. §§ 691-692 (Supp. II. 1996). The Supreme Court held LIVA unconstitutional in *Clinton v. City of New York*, 118 S. Ct. 2091 (1998).

²⁴ See Walter Shapiro, *The Loneliest Job in the World, Except for All the Lawyers*, USA TODAY, Feb. 13, 1998, at 6A.

²⁵ *Id.*

²⁶ See *Clinton v. City of New York*, 118 S. Ct. 2091 (1998).

²⁷ See Clean Air Act, 42 U.S.C. § 7661(a)(b)(3) (1994); Telecommunications Act of 1996, 47 U.S.C. § 609 (Supp. II. 1997); see also David Schoenbrod & Marci Hamilton, *Congress Passes the Buck: Your Tax Buck*, WALL ST. J., June 12, 1998, at A10.

bility for enacting laws.²⁸ When national class legislation began to delegate lawmaking authority to federal agencies at the turn of the century, there had to be a rationale to square the delegation with the Constitution.²⁹

1. The First Rationale: Congress Did Not Delegate

The first rationale put forth was that the statutes did not delegate the power to make the laws but rather only granted the power to enforce laws enacted by Congress.³⁰ The supposed laws were, from my perspective, not laws at all because they provided no discernible rule of conduct. Nonetheless, this first rationale was more naive than disingenuous. The national class had the conceit that its expertise could pour meaning into these empty congressional formulations, and so doing was more akin to factfinding than lawmaking. Thus, the national class could think there was clear meaning in statutory standards that, to a modern mind, were hopelessly vague.³¹

Many scholars have incorrectly concluded from this first rationale that the nondelegation doctrine was never more than a dead letter before reactionary justices invoked it in 1935 to strike down early New Deal legislation.³² But, on at least three occasions prior to 1935, the Supreme Court struck down federal statutes for delegating lawmaking authority.³³ Two of those statutes delegated lawmaking authority to state legislatures and a third to courts and juries. State legislatures and juries are not the sort of institution controlled by the national class. The Supreme Court was quicker to notice implicit delegations of legislative power when the dele-

²⁸ See SCHOENBROD, *supra* note 6, at 30-31, 155-56.

²⁹ See *id.* at 31-35.

³⁰ See generally *Field v. Clark*, 143 U.S. 649, 690-91 (1892) (upholding a statute that delegated power to the President to suspend the free importation of certain goods when those exporting countries laid tariffs on U.S. goods because Congress had the authority "to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations").

³¹ See SCHOENBROD, *supra* note 6, at 31-36.

³² See, e.g., MASHAW, *supra* note 7, at 133.

³³ See, e.g., *Washington v. W.C. Dawson*, 264 U.S. 219 (1924) (affirming the decision of *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), which held that Congress could not delegate to states the application of state worker compensation laws in admiralty cases); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) (striking down a statute that made it a crime to charge "unjust or unreasonable" prices for "any necessities" as unconstitutional because it delegated legislative power to courts and juries); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) (striking down a statute that instructed federal courts to apply state worker compensation law in resolving admiralty cases).

gates were not members of the national class.³⁴ The same class bias persists in Supreme Court delegation cases to the present day, as delegations to agencies generally are upheld, while delegations to other official bodies are reviewed under labels other than “delegation” and often are found constitutionally deficient.³⁵

2. The Next Rationale: The “Intelligible Principle Test”

As Congress began to delegate lawmaking power more blatantly, the Court could no longer pretend that there was no delegation. So, in *J.W. Hampton & Co. v. United States*,³⁶ decided in 1928, the Supreme Court held that Congress could delegate the power to make the law if it provided “an intelligible principle” to guide the agency lawmakers.³⁷ The Court did not, however, explicitly admit that Congress could delegate the power to make law. That did not come until five years later, when it said that the statute in *Hampton* delegated legislative power in a “permissible”—that is, a minor—way.³⁸ But the implication was clear in 1928. Even such a fervent believer in government by expert as President-elect Herbert Hoover reacted angrily at the departure from constitutional tradition: “There is only one commission to which delegation of that authority can be made. That is the great commission of [the voters’] own choosing, the Congress of the

³⁴ See, e.g., *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607, 634 (1980) (striking down a health standard promulgated by OSHA, which limited occupational exposure to benzene from ten parts benzene per million parts of air to one part benzene per million parts of air because OSHA’s arrival at this figure was not premised on concrete findings, but rather on the “assumptions” that “leukemia might result from exposure to 10 ppm and that the number of cases [of leukemia] might be reduced by lowering the exposure level to 1 ppm”); *National Cable Television Ass’n v. United States*, 415 U.S. 336, 342 (1974) (affirming that Congress can delegate powers to agencies “setting standards to guide their determination” but not reaching the question of whether the regulation before it met the intelligible principle requirement).

³⁵ See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (holding unconstitutional a provision of an INS regulation that allowed a one-house veto of an executive decision to allow an alien to remain in the United States because such an action was legislation that required passage by a majority of both houses of Congress and presentation to the President); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 105 (1976) (holding unconstitutional a U.S. Civil Service Commission (“CSC”) regulation denying non-U.S. citizens employment in federal service despite the argument by the CSC that the regulation was mandated by Congress, the President, or both, because the Court was “not willing to presume that . . . defendants [were] deliberately fostering an interest [of Congress, the President or both which was] so far removed from [its] normal responsibilities”); *Smith v. Goguen*, 415 U.S. 566, 568-69, 572 (1974) (holding unconstitutional a Massachusetts statute that made it a crime to “publicly . . . treat[] contemptuously the flag of the United States” because the statute was vague).

³⁶ 276 U.S. 394 (1928).

³⁷ *Id.* at 409.

³⁸ *NBC v. United States*, 319 U.S. 190 (1943) (discussing the *Hampton* decision).

of [the voters'] own choosing, the Congress of the United States and the President. It is the only commission which can be held responsible to the electorate."³⁹

New Deal legislation forced the recognition that Congress had delegated its legislative power in a manifestly major way. Two decisions, *Panama Refining Co. v. Ryan*⁴⁰ and *A.L.A. Schechter Poultry Corp. v. United States*,⁴¹ struck down various provisions of the National Recovery Act for delegating legislative power without "an intelligible principle."⁴² Although it is fashionable to decry these decisions as the product of reactionaries, Justice Brandeis joined in both majority opinions while Justice Cardozo dissented in *Panama Refining* but concurred in *Schechter*.

The threat posed by the court-packing plan and the appointment of new justices made it necessary for the Supreme Court to find some guise under which to uphold major delegations of legislative power. One tactic was for Congress to fill the delegating statutes with enough palaver about statutory goals so that the Court would at least have something to talk about in concluding that the statute provided "an intelligible principle."⁴³ The pretense was that Congress was somehow still in charge. As everyone who had seen *Mr. Smith Goes to Washington*⁴⁴ knew, the whole idea was to take the key policy decisions from the selfish people in Congress and give them to the agencies controlled by the good man in the White House. A more fitting rationale had to be found.

3. The Final Rationale: Congress Can Repeal Agency Laws

The Supreme Court's final rationale is that delegation does no real harm to democracy because Congress retains the power to en-

³⁹ J.S. Cotton, Letter, *Flexible Tariffs*, 13 CONST. REV. 100-01 (1929) (quoting President-elect Hoover's speech of Oct. 15, 1928).

⁴⁰ 293 U.S. 388 (1935).

⁴¹ 295 U.S. 495 (1935).

⁴² *A.L.A. Schechter Poultry*, 295 U.S. at 537-38; *Panama Refining*, 293 U.S. at 430.

⁴³ See, e.g., *Fahey v. Mallonee*, 332 U.S. 245, 249-53 (1947) (holding constitutional the Homeowners' Loan Act of 1933 despite the claim that it unconstitutionally delegated congressional power to the Federal Home Loan Bank Board because there were adequate standards to guide the policy of the board); *Yakus v. United States*, 321 U.S. 414, 426 (1944) (holding constitutional the Emergency Price Control Act of 1942, promulgated by the Office of Price Administration, because the necessary standards to gauge whether the will of Congress had been obeyed were present); *United States v. Rock Royal Coop.*, 307 U.S. 533, 574-78 (1939) (holding constitutional the Agricultural Marketing Agreement Act of 1937, promulgated by the Secretary of Agriculture, because it contained the necessary standards for determining the intent of Congress).

⁴⁴ MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939).

act a statute, repealing whatever agency-made laws that it does not approve.⁴⁵ This rationale reverses the burden that the Constitution places on those who want to expand the powers of government by imposing a new law. Under the Constitution, the proponents of the new law must bear the burden of getting it approved by the House, the Senate, and the President.⁴⁶ Under the last rationale, inaction by either House is sufficient for the agency-made law to stay in effect. There are, of course, many ways to prevent a controversial bill from coming to the floor for a vote, and legislators are only too willing to avoid controversial votes. As a result, laws are sustained without any legislative accountability.

The Supreme Court understands perfectly well that legislators bear little responsibility for inaction, and so it refuses to rely upon legislative inaction in interpreting statutes.⁴⁷ It is utterly unprincipled to claim that legislative inaction, somehow squares delegation with Article I of the Constitution. Indeed, the Supreme Court has come close to recognizing this much. In *INS v. Chadha*,⁴⁸ it stated, “[t]o allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I.”⁴⁹

Congress has recently provided us with a laboratory experiment to see if legislators are willing to step forward to repeal agency laws with which they disagree. In the name of congressional responsibility, Congress enacted the Congressional Review Act,⁵⁰ which sets up expedited procedures for floor votes to repeal new agency laws before they go into effect.⁵¹ In the first eighteen months of this procedure, agencies promulgated thousands of regulations, many of which have been criticized by legislators. But the Senate voted on only one of them, and the House on none.⁵² The experiment shows that legislators react to responsibility as vampires do to garlic—they flee.⁵³

⁴⁵ See SCHOENBROD, *supra* note 6, at 181-83.

⁴⁶ See U.S. CONST. art. I, § 7, cl. 2.

⁴⁷ See, e.g., *Zuber v. Allen*, 396 U.S. 168, 185 (1969) (“Legislative silence is a poor beacon to follow in discerning the proper statutory route.”).

⁴⁸ 462 U.S. 919 (1983).

⁴⁹ *Id.* at 958 n.23.

⁵⁰ 5 U.S.C. §§ 801-808 (Supp. II 1996).

⁵¹ See *id.*

⁵² See *The Role of Congress in Monitoring Administrative Rulemaking: Hearings on H.R. 1704 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 105th Cong. 1 (1997) (testimony of Rep. Kelley).

⁵³ Professor Schuck points out that agencies may have changed the regulations they proposed to avoid defeat in Congress. See Schuck, *supra* note 9, at 787-88. But he misun-

In sum, with the Supreme Court's blessing, Congress has transformed its responsibility for the laws from a right of the voters to an option of the legislators.

C. *The Harm to Democracy*

The problem that legislators have with the Constitution is that they must take responsibility for both the benefits and costs of new laws. However they vote, they will offend some constituents. Rivals for reelection can easily search the *Congressional Record* to discover their opponent's voting record. The incumbents do not know in advance which of their votes will come back to haunt them at the next election and therefore have to worry about the wishes of their constituents on every vote.

Delegation has allowed legislators to rewrite the ground rules of democracy to help entrench themselves in office. They can pretend to deliver the best of everything to everyone by commanding agencies to promulgate laws to achieve popular statutorily prescribed goals.⁵⁴ The statutes are framed so that legislators can skirt the hard choices. This permits legislators to claim much of the credit for the benefits of the laws but shift to the unelected agency officials much of the blame for the inevitable costs and disappointments when the agency fails to deliver all the benefits promised. Come the next election, rival candidates will search the *Congressional Record* in vain for evidence on where the incumbent stood on the hard choices. Moreover, when some constituents complain that the agency has delivered too few of the benefits promised, and other constituents complain that the agency has imposed too much cost, the incumbent can build electoral support and raise funds by doing casework. Legislators can do casework for both sides in the same regulatory dispute because casework, unlike votes on the floor of Congress, is not publicly recorded.⁵⁵

Delegation thus allows members of Congress to function as ministers, who express popular aspirations (through enacting lofty statutory goals) and tend to their flocks (by doing casework), rather than lawmakers who must make hard choices in passing laws. In a book that argues that delegation has enhanced legislators' chances of reelection, Morris Fiorina writes:

So long as . . . congressmen . . . function principally as national

derstands my point. The agencies still promulgated regulations that drew substantial criticism in Congress, yet the legislators contrived to avoid voting on them.

⁵⁴ See SCHOENBROD, *supra* note 6, at 89-90.

⁵⁵ See *id.* at 101-02.

policy makers . . . reasonably close congressional elections will naturally result. For every voter a congressman pleases by a policy stand he will displease someone else. The consequence is a marginal district. But if we have incumbents who deemphasize controversial policy positions and instead place heavy emphasis on nonpartisan, nonprogrammatic constituency service . . . the resulting blurring of political friends and enemies is sufficient to shift the district out of the marginal camp.⁵⁶

With delegation, legislators can escape being ejected from office except upon grounds that would oust a minister from the pulpit—scandal. In those exceptional cases when incumbents do lose an election, their defeat is far more likely to be caused by some escapade or chicanery than by how they shaped the law.⁵⁷ Entrenched encumbency is a marker for what is a profound problem—that legislators have rewritten the ground rules of government to evade responsibility.

II. PROFESSOR MASHAW'S POST HOC RATIONALIZATIONS FOR DELEGATION

Jerry Mashaw argues that delegation does no harm to democracy and therefore distances himself not only from the initial proponents of delegation, but its modern proponents, most of whom make no such claim as well.⁵⁸ To reconcile delegation with democracy at this stage would require a counterintuitive, post hoc rationalization of heroic proportions. If anyone has the intelligence and verve to construct such a rationalization, it is Jerry Mashaw. His recent book, entitled *Greed, Chaos, and Government*,⁵⁹ is terrific, but its effort to reconcile delegation with democracy has deep problems. To demonstrate, I will examine each of his rationales.

A. *Mashaw I: Delegation Does Not Stop Us from Picking Legislators Whose Ideologies Accord with Our Own*

Mashaw asks, and I quote him at length to give his argument its full force:

⁵⁶ MORRIS P. FIORINA, CONGRESS: KEYSTONES OF THE WASHINGTON ESTABLISHMENT 36-37 (1977) (quoting RANDALL RIPLEY, CONGRESS: PROCESS AND POLICY (1975)).

⁵⁷ See SCHOENBROD, *supra* note 6, at 104-05.

⁵⁸ See, e.g., Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323 (1987); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391 (1987). Professors Pierce and Stewart argue that delegation is necessary or enhances welfare. I deal with those arguments in SCHOENBROD, *supra* note 6, at 107-52.

⁵⁹ MASHAW, *supra* note 7.

Do we really want to choose our representatives (or hold them accountable) on the basis of specific votes concerning specific legislation which, but for constitutional necessity (a nondelegation doctrine with bite), they would have cast in more general terms? How exactly does it help us in choosing legislators to judge them on the basis of preference expressions that are not the expressions they would give, but for the constitutional necessity of being specific?

Even if we were to imagine that statutory precision would be informative, it is hard to envisage how rational voter calculation is appreciably improved. When one votes for Congressperson X, presumably one votes on the basis of a prediction about what X will do in the next time period in the legislature. How much better off are voters likely to be in making that prediction—that is, in determining how well Congressperson X is likely to represent them over a range of presently unspecified issues—by knowing that he or she voted yes or no on the specific language in certain specific bills in some preceding legislatures?

After all, the voter will also know that X could not have controlled all or even a substantial portion of the language of those bills. Votes must have been cast “all things considered.” Therefore, when making a general appraisal of X’s likely behavior in the future, it is surely much more important that voters know the general ideological tendencies that inform those votes (prolabor, probusiness, prodisarmament, prodefense) than that X votes for or against the particular language of [a] particular bill. I know of no one who argues that statutory vagueness prevents the electorate from being informed on the general proclivities of their representatives.⁶⁰

Actually, Mashaw does know someone “who argues that statutory vagueness prevents the electorate from being informed on the general proclivities of their representatives,” and it is I. As Mashaw states a few pages later:

David Schoenbrod clearly seems to believe that more specific information is always better information for the purposes of democratic accountability. In his view, “delegation allows legislators to convey information selectively, withholding opinions about the hard choices while providing opinions that embrace popular aspirations. The Clean Air Act and many other regulatory statutes have passed by wide margins for this reason, not because Congress reached a consensus on difficult sub-

⁶⁰ *Id.* at 139-40.

jects.” Schoenbrod continues: “The ideological poses that legislators strike and the laws that emerge from agencies often bear little resemblance to each other. . . . Indeed delegation makes it possible for legislators to espouse internally inconsistent ideologies (for example, avoiding economic dislocation and protecting health). They need not join issue over inconsistencies because they are talking at the symbolic level of goals rather than at the concrete level of rules.”

. . . I have no quarrel with Schoenbrod that legislators do all these things in the context of broad delegations of authority to administrators. My argument is that not all of these things are unqualifiedly bad, and that those things that do reduce accountability are equally available to legislators in the context of enacting highly specific legislation.

. . . .

The Clean Air Act that Schoenbrod uses as an example for his view as easily supports mine. There are indeed some critical gaps in this statute and its many amendments that leave substantial policy discretion to administrators. On the other hand, the statute goes on for hundreds of pages, many of them containing hypertechnical provisions that few citizens could possibly understand. Moreover, to the extent that the Clean Air Act and its amendments do things that dramatically depart from citizens’ expectations, I would suggest that they are largely in the detailed provisions, not the broad aspirational sections. Voters do not read bills and would have little chance of understanding most of them if they did. Hence, legislators can selectively convey information about legislation whether they legislate specifically or generally.⁶¹

While Mashaw and I agree on much, I still think he is profoundly wrong. For starters, he conflates whether the statute is specific or general with whether the statute states the law or delegates.⁶² As Mashaw himself points out, the Clean Air Act delegates lawmaking authority in the most exhaustingly specific terms. In contrast, the one section of the 1970 Clean Air Act that actually stated the law—the provision requiring new car makers to reduce emissions of three specified pollutants by ninety percent—is comparatively simple in its basic concept.⁶³ It is not the detail for

⁶¹ *Id.* at 146-47.

⁶² My book draws this distinction early and often. See SCHOENBROD, *supra* note 6, at 9-10, 43, 135-36, 142-44, 181-84.

⁶³ See Clean Air Act Amendment of 1970 § 202(b)(1), Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 7521(b)(1) (1994)).

which the legislators are responsible, but rather the law enacted. When Congress enacts a law, it must take responsibility not only for the benefits promised, but also for the duties imposed. But when Congress delegates, its fingerprints are not left on the duties imposed on the public, and the more detail included in the delegation, the easier it is for legislators to obscure their responsibility for the eventual costs and disappointments.⁶⁴ My book contains two extended case studies, one being the Clean Air Act, which show precisely how legislators use delegation and the related phenomenon of casework to give voters an impression of their ideology that differs from how they actually exercise their power.⁶⁵

Mashaw argues that statutes that do not delegate will not make legislators accountable because voters do not read statutes. Thus, legislators can characterize their actions as they choose.⁶⁶ Mashaw is both right and wrong. It is true that voters do not read statutes, and bully for them. Mashaw is wrong anyway because the fulcrum of legislative responsibility is not the statute, but the floor fight. With delegation, the floor fight is avoided because almost all legislators can vote for a bill that calls for clean air and jobs too. That is why the 1970 Clean Air Act passed almost unanimously.⁶⁷

⁶⁴ In a related passage, Mashaw states:

Nor does specificity help voters police for inconsistency in legislators' ideological positions. Indeed, it would seem to me much easier for a voter to detect the inconsistency in a legislator's statement that he or she intended "to protect the public health through strict air quality regulation while avoiding any serious economic dislocation" than by attempting to figure out that the specific provisions of a bill were indeed trading off these values and in precisely what ways.

MASHAW, *supra* note 7, at 147. I wonder how Mashaw would tell voters to evaluate President Clinton's statement in the 1998 State of the Union Address that:

[t]he vast majority of scientists have concluded unequivocally that if we don't reduce the emission of greenhouse gases, at some point in the next century we'll disrupt our climate and put our children and grandchildren at risk. This past December, America led the world to reach a historic agreement committing our nation to reduce greenhouse gas emissions through market forces, new technologies, energy efficiency. We have it in our power to act right here, right now. I propose \$6 billion in tax cuts and research and development to encourage innovation, renewable energy, fuel-efficient cars, energy-efficient homes. Every time we have acted to heal our environment, pessimists have told us it would hurt the economy. Well, today our economy is the strongest in a generation, and our environment is the cleanest in a generation. We have always found a way to clean the environment and grow the economy at the same time. And when it comes to global warming, we'll do it again.

President Bill Clinton, Address Before a Joint Session of the Congress of the State of the Union (Jan. 27, 1998), in 34 WEEKLY COMP. PRES. DOC. 129, 137 (Feb. 2, 1998).

⁶⁵ See SCHOENBROD, *supra* note 7, at 19-20, 54-57 (discussing the navel orange market order); *id.* at 61-67 (discussing the Clean Air Act).

⁶⁶ See MASHAW, *supra* note 6, at 147.

⁶⁷ See SCHOENBROD, *supra* note 6, at 63 & n.19.

Without delegation, the bill would have to contain clauses like, "widget plants shall emit no more than X pounds of sulfur per ton of widgets produced." Such a clause is open to an amendment to delete it from the bill or substitute "Y pounds" for "X pounds." Legislators have to stand up and be held accountable on the hard choices. That is why one of the only contested provisions of the 1970 Clean Air Act was on the amendments to the one true law in the statute—limiting emissions from new cars by ninety percent.⁶⁸ Floor fights are newsworthy and attract public interest. The local papers will point out how the local representatives voted. By the next election, legislators will have made many controversial choices. They will be known for how they act on hard choices and not just for what they say.

Unlike Mashaw, members of Congress understand that delegation lets them avoid responsibility. That is why they go to great lengths to use delegation to avoid blame not only for regulation, but also for raising their own salaries.⁶⁹ If, as Mashaw argues, legislators do not truly avoid blame through delegation, they would not be so reluctant to invoke the Congressional Review Act to try to repeal agency laws with which they disagree.

In an attempt to show that ending delegation would be of no benefit, Mashaw points out that spending bills are full of detail, yet "perhaps nowhere in American politics do legislators make better use of selective information and creative incoherence than in explaining to the American people what has been done in constructing the federal budget."⁷⁰ Mashaw is right about the legislative appropriations process, but he is wrong to think that legislative lawmaking would work the same way.⁷¹

There is an accountability loophole in the Constitution for appropriations, but not lawmaking. The Constitution's provisions on appropriations were drafted with the expectation that Congress

⁶⁸ See *id.* at 73.

⁶⁹ See Citizens' Commission on Public Services and Compensation, Pub. L. No. 90-206, 81 Stat. 642 (1967) (codified as amended at 2 U.S.C. § 351 (1994)).

⁷⁰ MASHAW, *supra* note 7, at 147.

⁷¹ The opinion by Justice Scalia, concurring in part and dissenting in part, relied upon history to argue that Congress could allow the President discretion not to spend appropriated monies. See *Clinton v. City of New York*, 118 S. Ct. 2091, 2115-18 (1998). In my book, I argued that such discretion is not a delegation of legislative power. See SCHOENBROD, *supra* note 6, at 180, 186-88, 190-91. However, the Line Item Veto Act not only gave the President discretion not to spend, but also to take away the power from future Presidents to spend that money. See *Clinton*, 118 S. Ct. at 403-20. For that reason, I believe that the majority was correct to conclude that the act delegated an Article I legislative power.

would not run planned budget deficits except to deal with emergencies.⁷² So long as Congress acted according to that expectation, it could not benefit one interest group without hurting some other group by reducing an appropriation or imposing a tax. Thus, interest would tend to thwart interest, as James Madison predicted.⁷³ When that balanced budget expectation collapsed, more than a century later, Congress could give to Paul without seeming to take from Peter, because the cost of the appropriation is flung forward in time to be borne by persons yet to be identified. In contrast, with lawmaking, a law that benefits Paul will restrict Peter now, and Peter generally will have notice of this law and know whom to blame.

Congress takes further advantage of the loophole in accountability for appropriations by lumping thousands of spending items together and voting on them wholesale. There is an implicit agreement in the Senate by which most members do not support amendments that strike items of spending, even those with support in their own states. The reason for the deal is that if such items were individually subject to vote, each senator would lose the ability to deliver pork to his constituents. What holds these thieves' agreement together is that no senator has a Peter for a constituent who is complaining loudly that a particular item of spending hurts him. But Peter is there when Congress imposes rules of conduct. Unlike the appropriations' agreements, an agreement to prevent the rule-by-rule consideration of proposed laws would collapse under its own weight.

In sum, just because the Constitution has a loophole that permits legislators to hide the ball on spending is no excuse to let them violate the Constitution by hiding the ball on lawmaking.

Even if Mashaw were somehow correct in asserting that dele-

⁷² See OFFICE OF MANAGEMENT & BUDGET, HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1998, at 15 (1997):

[E]xcept for periods of war (when spending for defense increased sharply), depressions or other economic downturns (when receipts fell precipitously), the Federal budget was generally in surplus throughout most of the Nation's first 200 years. For our first sixty years as a Nation (through 1849), cumulative budget surpluses and deficits yielded a net surplus of \$70 million. The Civil War, along with the Spanish-American War and the depression of the 1890s, resulted in a cumulative deficit totaling just under \$1 billion during the 1850-1900 period. Between 1901 and 1916, the budget hovered very close to balance every year.

....

... The traditional pattern of running large deficits only in times of war or economic downturns was broken during the rest of the 1980s.

⁷³ See SCHOENBROD, *supra* note 6, at 27-28 (referring to THE FEDERALIST NOS. 10, 51 (James Madison)).

gation does not hinder voters in picking legislators with similar ideologies, he is wrong in thinking that there is no loss of democracy. In the democracy that is our birthright under the Constitution, voters are not consigned to picking representatives in the hope that their representatives' ideologies will lead them to act in the future as we want. Rather, we can punish legislators who we think voted unwisely by removing them from office at the next election. But with delegation, legislators can distance themselves from much of the blame that results from making decisions on new laws.

Even though legislators may personally share our ideological preferences, political incentives lead them to delegate in ways that do not produce laws that coincide with our views. For example, because they escape much of the blame for the inevitable costs of creating new federal lawmaking programs and also much of the blame for the inevitable failure of these programs to produce the benefits promised, legislators are skewed towards creating and enlarging an agency's lawmaking jurisdiction, making its goals more ambitious, its methods more intrusive, and its procedures more complicated. The upshot is that, in lawmaking, the national government, particularly the executive branch, increasingly takes jurisdiction over matters that might otherwise be left to the political branches of state or local government, the common law, or private ordering.

While the problem is often too much regulation, sometimes it is too little regulation. Because legislators also escape blame for the resulting disappointments when agencies fail to deliver on statutory promises, Congress is insensitive to the delay and uncertainty that frequently results when the agency lacks the political muscle needed to make, expeditiously, the hard choices that Congress ducked.⁷⁴ What first alerted me to the dangers of delegation was that the Environmental Protection Agency ("EPA") was years too late in exercising its delegated power to stop the danger posed to young children from leaded gasoline. I am convinced that the national government would have dealt with leaded gasoline as a health hazard years earlier if Congress could not have delegated that responsibility to the EPA in 1970.⁷⁵

In sum, even if voters could correctly discern incumbents' ideologies in the sense that Mashaw means (for example, "pro-

⁷⁴ See SCHOENBROD, *supra* note 6, at 145-46.

⁷⁵ See David Schoenbrod, *Remarks to the National Resource Defense Council*, 20 CARDOZO L. REV. 767 (1999).

business" or "pro-labor"), delegation skews legislators' political incentives in ways that favor the national class over ordinary voters. Favoring insiders over outsiders is different than favoring left over right; remember, Standard Oil was a big proponent of the New Deal's National Recovery Act.⁷⁶

The early proponents of delegation were correct; it is a way to insulate the "experts" from the pressures of elective politics. Once the 1970s arrived with their emphasis on participatory democracy and talk of "power to the people," the rationale in favor of delegation has been repackaged to make it sound less elitist. While the talk is different, the walk still has all the swagger of "power to the insiders."

B. *Mashaw II: We Can Hold Legislators
Accountable for Delegating*

Mashaw also argues that we can hold legislators accountable for delegating:

The dynamics of accountability apparently involve voters willing to vote upon the basis of their representative's record in the legislature. [In this sentence, he is correcting the last of the flaws that I identified in his previous argument.] Assuming that our current representatives in the legislature vote for laws that contain vague delegations of authority, we are presumably holding them accountable for that at the polls. How is it that we are not being represented?⁷⁷

Notice that Mashaw's theory allocates to voters the responsibility to stop legislators from delegating rather than allocating to legislators the responsibility of convincing voters that the Constitution should be amended to allow delegation.

Mashaw's allocation of responsibility is wrong-headed on many levels. It is not as if voters get to choose between candidates who delegate and those who do not. When the Republicans in Congress think environmental regulation is too aggressive, they do not replace the Clean Air Act with a regulatory regime in which Congress takes responsibility or even use the Congressional Review Act to challenge regulations such as the new ambient air quality standards for ozone and particulate matter. Instead, they introduce legislation that would delegate in ways that would make it harder to regulate strictly. Indeed, the *Washington Post* took exception to a recent Republican environmental bill on the basis that

⁷⁶ See SCHOENBROD, *supra* note 6, at 38 & n.45.

⁷⁷ MASHAW, *supra* note 7, at 139.

the way for Congress to change the EPA's priorities is to stop delegating and start taking some responsibility.⁷⁸

That will not happen readily, however, because delegation gives the electoral advantage to those who duck the hard choices. As I said before, delegation is not so much an issue of left versus right as insiders versus outsiders.

With insiders having such a significant stake in delegation, outsiders opposed to delegation face a tremendous organizational challenge. Moreover, it is hard to get ordinary voters to focus on the issue. It is human nature to care more about what a particular piece of legislation does to one directly rather than whether the process by which the legislation is passed will do indirect harm by undermining democracy in the long run. Even law students have to be hit on the head by us professors to get them to look beyond the direct consequences in cases about the structure of government and see the long-term stakes. Ordinary voters are apt to care more whether a particular bill seems to help them than whether it delegates. For example, even in 1970 when there was a public outcry against Congress because it had dropped the ball on air pollution by delegating broadly to agencies and Congress promised explicitly that it would make the "hard choices," Congress easily got away with delegating again. The 1970 statute camouflaged its delegation with the kind of spurious detail that even an expert such as Jerry Mashaw confuses with nondelegation.⁷⁹

Despite these organizational and informational obstacles, the political effort to stop delegation has gained ground in recent years. Presently, more than seventy representatives and thirteen senators support a bill to end delegation and alternative bills also have substantial support.⁸⁰ But if this effort does not succeed, and it may well not, it does not mean that the voters have had fair representation on this issue.

Voters would be represented more fairly if delegation were addressed as the constitutional issue that it is. In 1935 after the Supreme Court decided the cases striking down instances of delegation, President Roosevelt considered seeking amendments to the Constitution to authorize delegation but decided to maintain a "studied silence" on amending the Constitution during the 1936

⁷⁸ See Editorial, *Once Again, Regulatory Reform*, WASH. POST, Aug. 26, 1997, at A14.

⁷⁹ See Clean Air Act Amendment of 1970 § 202(b)(1), Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 7521(b)(1) (1994)).

⁸⁰ See S. 433, 105th Cong. (1997) (sponsored by Sen. Brownback and 12 cosponsors); H.R. 1036, 105th Cong. (1997) (sponsored by Rep. Hayworth and 67 cosponsors).

presidential election and refrained from initiating the amendment process afterwards for fear of losing Democratic congressmen during the 1938 election. In the end, he decided to either pack or intimidate the Court rather than present the delegation issue to the public.⁸¹ The Court's "change in time that saved nine" was not, in Bruce Ackerman's term, "a constitutional moment," but rather a constitutional stupor brought on for the convenience of those in power in all three branches of the federal government.⁸² It is in order to guard against such self-dealing that the Constitution requires that the states be involved in the constitutional amendment process.⁸³

Few people who, unlike professors, are not paid to study and opine upon the structure of government have the time, knowledge, and inclination to do the work that Mashaw says voters need to do to claim their democratic birthright. They must read all the grist in order to guess candidates' ideologies and then wage a meta-political campaign to get legislators to assume responsibility for the hard choices. Like Henry Higgins in *My Fair Lady* who sings, "Why can't a woman be more like a man,"⁸⁴ Mashaw argues, "Why can't ordinary voters be more like me?" Because they are not, for delegation still means "power to the insiders."

C. *Mashaw III: We Still Have Democracy Because the President Is Accountable for the Laws*

Mashaw also argues in a section entitled "Accountability in a Presidential System" that "the flexibility that is currently built into the processes of administrative governance by relatively broad delegations of statutory authority permits a more appropriate degree of administrative, or administration, responsiveness to the voter's will than would a strict nondelegation doctrine."⁸⁵

Notice that Mashaw talks about "responsiveness" not responsibility. In other words, he claims that the administration will give voters what they want, not that it will be more meaningfully ac-

⁸¹ See SCHOENBROD, *supra* note 6, at 160-62.

⁸² See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 457-61, 510-15. (1989).

⁸³ See U.S. CONST. art. V.

⁸⁴ MY FAIR LADY (Warner Bros. 1964).

⁸⁵ MASHAW, *supra* note 7, at 153. Part of what Mashaw is talking about in this passage is that true legislative specificity would require a great deal of detail in the administrative lawmaking process. That argument is wide off the mark because, as I have already pointed out, Mashaw confuses the issue of specificity-vagueness with the issue of whether Congress has delegated the power to make the laws. Thus, I focus instead on his main point that the voters get what they want because the administration is responsive.

countable for what it does. This is government "for the people," not government "by the people."⁸⁶ Mashaw is correct to refrain from claiming that the President is meaningfully accountable to the voters for the laws promulgated by appointees. With delegation, the public loses the right to have both its elected representatives *and* its elected President take personal responsibility for the law. In exchange, it gets the right to have someone appointed by an elected President take responsibility.

The President is not as accountable for agency laws as members of Congress are for enacted laws. The President, who does not have to publicly sign off on agency laws, may deny responsibility for them. Moreover, the Framers included the requirement that bills be presented to the President not out of any sense that the President was more accountable than Congress, but rather because the President was less accountable to particular interest groups and thus more inclined to protect liberty.⁸⁷ A President has less reason than a member of Congress to worry that a position taken on a particular law will affect reelection prospects. The President's responsibility for any one law is, after all, diluted by the electorate's concern about a host of other issues involving, for example, national defense, foreign affairs, and law enforcement.

In any event, voters who would disagree with any one agency law are likely to agree with others. Since voters must take or leave presidential positions wholesale, it is unlikely that the President will suffer much political tension over any one agency law. Of course, voters must also take or leave legislative positions wholesale when they elect members of Congress, but in any one legislative district there are likely to be only a limited number of issues of particular local concern. A position taken by an incumbent on any one such issue could cause five percent of the voters to choose the challenger, thereby producing a ten percent swing. That risk would force many incumbents to pay careful attention to constituents' concerns when voting on a law. Given the difficulty of holding the President accountable for the laws that bureaucrats adopt, it is no wonder that we tend to think of countries where only the chief executive is elected as undemocratic.⁸⁸

⁸⁶ Cf. Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysberg (Nov. 19, 1863), in 7 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 17 (Ray P. Bassler ed., 1953).

⁸⁷ See *THE FEDERALIST* NO. 73, *supra* note 5, at 494-96.

⁸⁸ The Supreme Court does rely on the accountability of the President to justify courts deferring to agencies on matters of statutory interpretation. See *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Court's point is that presidential ap-

Why does Mashaw think that an administration that is democratically accountable to the voters in only a very diluted sense would be more responsive to the voters' wishes? He does not explain why the administration should be responsive at all but implicitly assumes that it will be so. Unspoken, but still there, is the old national class conceit that experts, if left to their devices, will act in the public interest. So, yes, Virginia, there is a Santa Claus, but it is worth considering why Saint Nick, the agency administrator, will pay much attention to the voters' desires other than to prevent the President from losing the next election, assuming it is still the first term. One possibility is that Saint Nick does not want to stir up public opinion to such an extent that Congress will trim the agency's power. This might explain why the EPA under Presidents Ford and Carter did not use its power to make Los Angeles cut gasoline supplies by eighty percent to meet Clean Air Act deadlines and why the EPA under President Reagan did not scrap the regulations that were slowly reducing the lead content of gasoline.⁸⁹ So long as the agency does not profoundly anger large numbers of voters, and instead only slightly irritates large numbers of voters or badly harms only smaller numbers, it need not fear that Congress will take away its power.

Now, it would be nice to think that Saint Nick would use his freedom of action in the public interest, but agencies, and the administrations of which they are a part, have numerous agendas that involve coalition building. Such "log rolling" is reason to suspect Mashaw's unspoken premise that the agency will be "responsive."

Mashaw's explicit argument is not that the administration is responsive, but that Congress cannot be. In particular, he conjures up the possibility of a "Law of Conservation of Administrative Discretion" under which it is difficult for Congress to decide too many of the specifics of government such that any attempt to do so will lead to a wooden form of administration, unresponsive to the popular will. Here, again, Mashaw confuses the issue of specificity with that delegation. To avoid delegating, Congress need only state the law. It can leave to others discretion in matters such as law interpretation, prosecutorial discretion, and remedy. I have explained elsewhere why that allocation of responsibility not only accords with the requirements of Article I, but also with its pur-

pointees are *more* accountable than judges, not that the accountability of presidential appointees is a sufficient replacement for the accountability of legislators. *See id.* at 856-66.

⁸⁹ *See* SCHOENBROD, *supra* note 6, at 67-72.

poses.⁹⁰ As for the one area where Congress cannot delegate—making the laws—agencies are sometimes much slower than Congress.⁹¹

Moreover, there are many ways that delegation reduces, rather than increases, discretion outside of Congress. As already discussed, delegation skews political incentives so that jurisdiction is shifted to national administrative agencies from the political branches of state and local regulators, common law courts, and private ordering. There is reason to believe that delegation has encouraged far more such centralization than we need or that we would have had if members of Congress had taken responsibility for the laws.⁹² Rigidity is introduced not just through the centralization of control, but also through the formalistic rule-bound methods of federal administrative law that are far more rigid than what it often replaces. For example, a city council can directly decide how to respond to a particular local environmental problem, while when the EPA has jurisdiction, local responses must be in accord with an elaborately detailed federal chain of command.⁹³

Mashaw has a second and final reason for claiming that the administration is more responsive—Arrow's Theorem. Arrow's Theorem states that, under certain conditions, democratic choices cannot be stable. An explanation of the theorem goes as follows:

Assume that three children—Alice, Bobby, and Cindy—have been pestering their parents for a pet. The parents agree that the children may vote to have a dog, a parrot, or a cat. Suppose each child's order of preference is as follows: Alice—dog, parrot, cat; Bobby—parrot, cat, dog; Cindy—cat, dog, parrot. In this situation, if pairwise voting is required, then majority voting cannot pick a pet.⁹⁴

A majority (Alice and Cindy) will vote for a dog rather than a

⁹⁰ See *id.* at 180-82.

⁹¹ Dan Kahan would like to see Congress be able to delegate to the Department of Justice the power to make the criminal laws in the hope that it will be more responsive than Congress. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996). I would need to know a lot more about criminal law than I do to comment on Kahan's various examples, but I have two comments. First, as to one of Kahan's most troubling examples, RICO, it seems likely that a delegation doctrine with teeth would have been killed at birth. Second, many of the other problems that Kahan raises might be cured through the Department of Justice issuing rules of interpretation.

⁹² See generally DAVID SCHOENBROD, CENTER FOR THE STUDY OF AMERICAN BUSINESS, TIME FOR THE FEDERAL ENVIRONMENTAL ARISTOCRACY TO GIVE UP POWER (1998).

⁹³ See *id.*

⁹⁴ Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 902 (1987).

parrot; a majority (Alice and Bobby) will vote for a parrot rather than a cat; and a majority (Bobby and Cindy) will vote for a cat rather than a dog.⁹⁵

In these rather peculiar circumstances, a majority will never reach a stable conclusion. Relying on Arrow's Theorem, Mashaw concludes that "delegating choice to administrators is but another way of avoiding voting cycles through the establishment of dictators."⁹⁶ "Dictators" is, as I have been arguing, not that far from the right word.

While Arrow's Theorem may give Alice, Bobby, and Cindy a reason to delegate to their parents the choice of their pet, it does not give Congress a plausible excuse to delegate to agencies the task of making law. Empirical research has shown that Congress is not prey to the kind of voting cycles that plague these hypothetical children. Moreover, the assumptions upon which Arrow premised his theorem do not hold true in the United States Congress. For example, Arrow's Theorem assumes that voters' preferences are not arrayed along some continuum, but rather are topsy-turvy, like those of Alice, Bobby, and Cindy. However, studies show that preferences within Congress tend to be arrayed along a liberal-conservative continuum.⁹⁷

In addition, only experts, certainly not real parents, would choose such a stupid way to select the family pet. Nor were the Framers so stupid in designing the Article I legislative process. Even if the House or Senate were caught in a voting cycle over dogs, cats, and parrots, an individual President would not be, and additionally the President may veto any legislation. Of course, the House and the Senate can override a presidential veto if a two-thirds majority of both bodies so vote. Overrides of vetoes are unlikely to lead to voting cycles. As theorists have recently shown, based upon some plausible assumptions about voting preferences, a requirement of at least a sixty-four percent majority will ordi-

⁹⁵ *Id.* at 902 n.172.

⁹⁶ Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 98 (1985).

⁹⁷ The research on absence of cycling in Congress is collected and discussed in DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 48-49 (1991). For policy changes by agencies, see William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 961-62. For discussion of Arrow's assumptions, see, for example, ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 153-54 (1989); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 89-94 (1990). See also Mayton, *supra* at 953-58.

narily prevent voting cycles.⁹⁸ In sum, Arrow's Theorem is interesting, but it provides no excuse for delegating to Mashaw's dictators.

D. *Mashaw and Welfare*

As the discussion of accountability of the President shows, Mashaw attempts to prove that delegation is compatible with democratic accountability by arguing that it enhances welfare. That is why he uses the language of "responsiveness" rather than "responsibility." While this panel's topic is the impact of delegation on democracy not welfare (and I believe in separation of panels), I cannot resist a few brief comments on Mashaw's argument that delegation enhances welfare.

Mashaw suggests that delegation enhances welfare by avoiding logrolling in Congress. His argument is to put lawmaking in the hands of an executive that he labels "responsive" to the voters. He fails to notice that logrolling takes place in the Executive as well, although it goes by different names, such as "coalition building." His is an argument by characterization.

Mashaw is also incorrect in dismissing the arguments of Peter Aranson, Ernest Gellhorn, and Glen Robinson that the blame-shifting allowed by delegation reduces welfare.⁹⁹ Mashaw writes that their "claim rests on a much more general proposition—that the free play of political life, assuming self-interested constituents and self-interested legislators, makes all legislation disbeneficial (or most of it anyway)."¹⁰⁰ He goes on to dispute the more general proposition. Let us say that Mashaw is correct. Suppose that bills with a prospect of passage are evenly split between those that produce more benefits than costs and those that produce more costs than benefits. Even under this supposition, Aranson, Gellhorn, and Robinson are correct in their claim that the blame-shifting allowed by delegation reduces welfare. After all, the blame-shifting skews the political incentives faced by legislators, desensitizing them to the blame they deserve for costs they indirectly impose and the benefits they indirectly withhold by consigning laws needed now to the limbo of agency rulemaking.

⁹⁸ See Andrew Caplin & Barry Nalebuff, *On 64%-Majority Rule*, 56 *ECONOMETRICA* 787 (1988). Mashaw and others have raised a number of second order objections to how Article I avoids voting cycles. I deal with these arguments in SCHOENBROD, *supra* note 6, at 132-34.

⁹⁹ See Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 *CORNELL L. REV.* 1, 36-37 (1982).

¹⁰⁰ MASHAW, *supra* note 7, at 143.

Whether delegation enhances or reduces welfare depends upon a number of other factors such as agency expertise, differences in the politics of agency and legislative lawmaking, differences in agency and legislative procedures, judicial review, and others. I have stated at length elsewhere why I think that, on balance, delegation does more harm to welfare than good.¹⁰¹ Mashaw's book is unresponsive to my arguments about delegation and welfare. It would be pointless to repeat my arguments here.

Whether delegation reduces welfare and democracy is important as a matter of politics and policy but should be largely irrelevant as to whether it is constitutional. If the constitutionality of departures from the letter of Article I of the Constitution rides too much on instrumental analysis, then what Article I requires becomes a question of policy. On policy issues, the political process ordinarily should and does trump the judicial process. The upshot is that the politicians get to make the constitutional ground rules of government as they go along. The upshot is the kind of ersatz democracy that we now have.

III. PROFESSOR KAHAN AND MAKING NONSENSE OF "DEMOCRACY"

Professor Kahan responds to my claim that delegation undercuts democracy with an essay entitled *Democracy, Schmemocracy*.¹⁰² His premise is that democracy is an empty concept; his conclusion is that my claim is devoid of meaning.

His premise is incorrect. He tries to show that "democracy" lacks any core content by suggesting two quite different concepts of the word—a pluralist conception in which "official decisions conform to the aggregated preferences of the electorate"¹⁰³ and a civic republican conception in which "official decisions are reached through a process of reflective deliberation."¹⁰⁴ He then shows that no form of government uniquely maximizes both of these concepts of democracy and that delegation might be argued to increase both.

Professor Kahan misdefines democracy. The root meaning of the word is, from the Greek, for rule by the people. The primary definition in the dictionary is "government by the people exercised directly or through elected representatives," and none of the sec-

¹⁰¹ See SCHOENBROD, *supra* note 6, at 5, 7-12.

¹⁰² Kahan, *supra* note 8.

¹⁰³ *Id.* at 796.

¹⁰⁴ *Id.* at 797.

ondary definitions correspond to Kahan's.¹⁰⁵ Kahan's pluralist conception of democracy is not democracy. It speaks to whether government gives the people what they want, not whether the people exercise direct or indirect control over it. It is like Mashaw's version, "government for the people," not "government by the people."¹⁰⁶

Kahan's civic republican spin on democracy is also not democracy. It speaks to the process by which the rulers decide, not whether the people have a role in ruling themselves.

As Professor Kahan misunderstands democracy, a government run by a benign philosopher king would constitute a perfect democracy. Professor Kahan is one dictionary short of being an effective apologist for the administrative state.

Kahan's understanding of democracy is impoverished, as well as mistaken. He understands it as some compromise between self-rule, where the people rule themselves directly, and paternalism, where the people are ruled by philosopher-experts. But the Framers opted neither for direct democracy nor paternalism. They opted for an indirect democracy in which representatives of the people ruled, but only through a legislative process in which different groups of elected officials checked and balanced each other.¹⁰⁷ As Professor Marci Hamilton explains, many of the most reflective of the Framers believed that representatives owe their constituents their conscience, not slavish adherence.¹⁰⁸ These Framers viewed our democracy as based on leadership and accountability. Kahan views democracy as some balance between followership and nonaccountability.

Kahan's conception not only dilutes accountability, but also makes the entire enterprise of government less reflective, from top to bottom. The Framers wanted Congress to be forced to face the hard choices partly because voters would learn from the clashes between the representatives of voters with opposing desires. In contrast, under Kahan's dumbed-down conception of democracy, elected legislators get to avoid the hard choices by delegating. At best, this means that voters do not get to learn by seeing their representatives wrestle with the hard choices. At worst, this means that the representatives pretend no choice has to be made in instructing the delegates to produce benefits without costs. The

¹⁰⁵ AMERICAN HERITAGE DICTIONARY 380 (2d ed. 1991).

¹⁰⁶ Cf. Lincoln, *supra* note 86.

¹⁰⁷ See Marci Hamilton, *supra* note 5, at 812.

¹⁰⁸ See *id.* at 813.

delegates are left with the unedifying job of providing political cover for the legislators. For example, we have the spectacle under the Clean Air Act of the EPA pretending that it sets ambient air quality standards without regard to cost. The upshot is neither accountability nor reflection.

Despite his loud protests of semantic ambiguity, Professor Kahan understands full well the core meaning of democracy. It is the visceral appeal of this core meaning that makes him set out, as he acknowledges, to try to deflect the charge that delegation undercuts democracy.¹⁰⁹ He is thinking, I suppose, that no one can claim delegation undercuts democracy when there is no one, correct design for a democracy, as the word is commonly understood. A democracy can be direct or indirect. If indirect, various powers can be granted to a single elected official or to a chamber of them, there may be one legislative chamber or more, the terms of office may be *X* years or more, and, directly relevant to the delegation issue, the power to make law may be allocated to one set of officials or another. Moreover, in selecting between alternative designs, maximizing democratic accountability is only one of the considerations. Indeed, the Framers were also concerned with the pluralistic and civic republican virtues that Kahan claims to mistake for democracy.

While there are many possible designs for a democracy, there is one particular design for democracy in the Constitution. It was understood to require, as I argued at length in my book, that the power and responsibility for lawmaking be in the legislative process.¹¹⁰ With that as my benchmark, I argued that delegation significantly reduces democratic accountability.¹¹¹ Whether it in fact does do so is the issue that separates Jerry Mashaw and me.

Professor Kahan claims that I have no sure benchmark because he says it is debatable whether the Constitution was intended to require that the laws be made in the legislative process.¹¹² His argument at this juncture is even thinner than when it tries to reduce democracy to rule by a benign despot. It amounts to one sentence in which he invokes the debate about whether the Framers believed in a complete separation of powers.¹¹³ Clearly they did not, as can be seen, for example, in the Presentment

¹⁰⁹ See Kahan, *supra* note 8, at 795.

¹¹⁰ See SCHOENBROD, *supra* note 6, at 47-48, 155-64, 174-79.

¹¹¹ See *id.* at 84-96, 99-106.

¹¹² See Kahan, *supra* note 8, at 800.

¹¹³ See *id.* at 805.

Clause, which gives the President a limited veto over Congress's exercise of legislative powers.¹¹⁴ But whether the Framers believed in complete separation of powers is besides the point. The delegation issue is not whether there will be complete separation of powers, but rather whether the elected representatives will be on the hook for the kind of hard choices identified in Article I.

Believing the Constitution to be ambiguous on whether delegation of the power to make law is permitted, Kahan thinks he has caught opponents of delegation in a bootstrap argument. He claims that the only way we can overcome the ambiguity in the Constitution is by claiming that delegation undercuts democracy.¹¹⁵

Here, again, Kahan is incorrect. The argument that the Constitution forbids delegation is based upon the text and context of the Constitution, the understandings of the Framers, and the judicial interpretations closest in time to the Constitution's adoption. I will not repeat the arguments here because I have recorded them elsewhere.¹¹⁶ The point is that the democracy-based argument is not the primary argument for the claim that the Constitution forbids delegation, but rather one of the reasons why the Framers intended the Constitution to forbid delegation. It is the proponents of delegation who have placed critical reliance on democracy. Seeking to change the subject by turning from formalism to instrumentalism, they claim that delegation should be constitutional because it does not undercut democracy.¹¹⁷

Overall, Kahan's essay does not explore the question of whether delegation undercuts democratic accountability. Instead, he too attempts to change the subject by inviting us to speculate on whether there is a correct way to design a government that is democratic (as he uses the word). I decline to accept his invitation because it is a diversion. It diverts us into thinking that our government is shaped by professors theorizing rather than politicians entrenching themselves in office. These politicians are the ones with the power to redesign the ground rules of government for their convenience, unless we force them to remember that the basic purpose of a written constitution is to stop them from doing so.

Professor Kahan's critique by misdefinition and misdirection fails to oust opponents of delegation from the high ground. We can still rightly protest, without qualification, that delegation un-

¹¹⁴ See U.S. CONST. art. I, § 7, cl. 2.

¹¹⁵ See Kahan, *supra* note 8, at 795.

¹¹⁶ See SCHOENBROD, *supra* note 6, at 47-48, 155-64, 174-79.

¹¹⁷ See *id.* at 99-104.

dercuts democracy.

IV. PROFESSOR SCHUCK AND DELEGATION AS A POLICY ISSUE

Professor Peter Schuck has a quiver full of criticisms in his Article, but the ones that do not reiterate those of Mashaw and Kahn boil down to this: "[Schoenbrod] does not see that the level and type of delegation are themselves fundamental policy choices, and that these issues . . . are almost always—and quite explicitly—at the core of political debates in Congress over the shape and content of particular pieces of legislation."¹¹⁸ Because, for Schuck, delegation is a policy issue for the political branches to handle, the courts should stay away from what is not fit business for them. In his opinion, delegation is a "political question,"¹¹⁹ although he does not explicitly invoke that doctrine. After talking of plunging "a long, sharp knife deep into the [delegation] doctrine's heart,"¹²⁰ he makes this final thrust: "Professor Schoenbrod, usually so sensible about such things, would surely deplore it."¹²¹

Not all advice from good friends is good, especially when one misunderstands the other, as Schuck does me. Schuck misunderstands me when he says that I do not see that delegation has important policy ramifications. Of course I do; in fact, my book has two chapters on those ramifications.¹²² What Schuck does not see is that delegation is one of those policy choices that is controlled by the Constitution. Were all issues with policy implications off limits to the courts, they would largely be out of the business of constitutional review. The Constitution is a series of policy choices, often about how government should make policy.¹²³ The Constitution is written precisely so that politicians cannot change these meta-policy choices.

Schuck does not argue that the Constitution allows delegation but rather marshals arguments that he might use, were he writing a constitution, to explain why his draft would leave the choice on delegation to the legislature. He argues delegation is necessary for national welfare partly because "social complexity has made it far more difficult for legislators (not to mention voters) to accurately predict the consequences of their choices so that they can reason

¹¹⁸ Schuck, *supra* note 9, at 781.

¹¹⁹ *Cf. Baker v. Carr*, 369 U.S. 186, 209 (1962).

¹²⁰ Schuck, *supra* note 9, at 776.

¹²¹ *Id.* at 775.

¹²² See SCHOENBROD, *supra* note 6, at 119-52.

¹²³ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 88-101 (1980).

their way to a conclusion as to the best policy choice.”¹²⁴ For him, the agency is the best place to make the law “not only because the details of the regulatory impacts are hammered out there. It is also because the agency is where the public can best educate the government about the true nature of the problem that Congress has tried to address.”¹²⁵ Furthermore, “[i]n short, it is only at the agency level that the citizen can know precisely what the statute means to her; how, when, and to what extent it will affect her interests; whether she supports, opposes, or wants changes in what the agency is proposing”¹²⁶

Delegation is the reason, however, that it is only at the agency level that legislators or anyone else have any understanding of what is at stake. With delegation, legislation is mainly concerned with promising the best of everything to everyone, yet it is only when laws are passed that rights are actually linked to duties. Were Congress to make the law, the stakes would become apparent to legislators (and their constituents) at the legislative level, which is precisely why legislators avoid accountability and delegate.

To get a clearer picture of what those stakes are, Congress could make a number of policy choices other than delegation. It could ask the agency to recommend a draft with an accompanying analysis of the consequences. It could target whatever law it enacts at the specific problems that sparked congressional attention (e.g., lead in gasoline, emissions from new cars) rather than, as it often does with delegation, launch a regulatory program designed to address a far larger set of problems (e.g., air pollution from every source from big factories to the corner dry-cleaner) in order to obscure the fact that it has not resolved the issues that most concern its constituents. Congress could also leave more issues to state and local government and private action.

Delegation skews Congress’s political incentives toward granting federal agencies comprehensive jurisdiction over large areas of policy, much of which could be left to state and local government. For example, air pollution was being reduced at a relatively steady rate from at least the beginning of the twentieth century.¹²⁷ The data do not show any uptick in the rate of im-

¹²⁴ Schuck, *supra* note 9, at 778.

¹²⁵ *Id.* at 782.

¹²⁶ *Id.*

¹²⁷ See SCHOENBROD, *supra* note 92, at 8.

provement when the federal government took over in 1970.¹²⁸

Schuck seems to think that Congress acts in the public interest when it decides to delegate. As he sees the legislative process, the "legislative staffs, the White House, regulated firms, 'public interest' groups, state and local governments, and others [fight over the scope and terms of the delegation.]"¹²⁹ He implies that the balance struck in the legislative fight produces something like the right result.

Schuck distrusts legislators to make laws but trusts them in deciding whether to delegate. I distrust them when they make laws and distrust them more when they delegate. Legislators have selfish interests in deciding whether to delegate and so have a conflict of interest. Through delegation, they can claim credit, shift blame, and increase the demand for casework as a means for them to exact campaign contributions and other favors. The stakeholders from the private sector, in contrast, aim to get the law they want, wherever it is made. For them, delegation is only a possible means to that end. The balance on delegation that might be produced by the tugging and hauling between the competing private stakeholders is knocked out of wack by the heavy hands of those with the biggest stakes in delegation and the power to do it, the legislators.

Not only does Schuck blink at the selfish interests of the legislators, he also puts too much faith in the idea that all the relevant interests are represented. Just because many well organized interest groups are active in the contest does not guarantee a good outcome as the well organized interests are only a part of the overall public interest. The unorganized interests are the ones most prone to be harmed by delegation.

Schuck also suggests that agencies use their delegated powers well. He does so by taking me to task for writing in the initial draft of my paper that agencies are free "to do as they please."¹³⁰ I did write in discussing those occasions where Congress might "trim the agency's power . . . [that] so long as the agency does not profoundly anger large numbers of voters—and instead only slightly irritates large numbers of voters or really screws much smaller numbers—it is free to do as it pleases."¹³¹ I was rebutting the ar-

¹²⁸ In another context, Schuck kindly provided me with citations of other comprehensive federal programs that have not produced better results than their state, local, and private antecedents.

¹²⁹ *Id.* at 781.

¹³⁰ *Id.* at 777.

¹³¹ See David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20

gument that the power of Congress to repeal the agency rule or cut back its delegated powers works to reconcile delegation with democracy. Schuck has taken my unfortunately hyperbolic language, literally and out of context, to be a claim that agencies are unrestrained. This I do not believe, as is clear from my book where I discuss multiple constraints on agency action and the problem of agency paralysis.¹³²

That the agencies are constrained does not necessarily make what they produce good. None of the sources of constraint that Schuck invokes can rightly be claimed to filter out bad laws and force imposition of good ones. Congress and the White House are at their least accountable in the many open, and not so open, ways that they lean on agencies engaged in making laws. The courts cannot demand that agencies produce good laws, they can only require superficially plausible reasons for the laws that agencies do produce.

Public participation is also not much of a solace. According to Schuck, "[t]oday, the administrative agency is often the site where public participation in lawmaking is most accessible, most meaningful, and most effective."¹³³ But the average member of the public lacks the lawyers and experts needed for meaningful participation. The most average citizens can do is write a letter, whether to an agency or a representative. The letter will probably result in little in either case but is more likely to count when the law is being made by the representative who wants our vote, than the agency official who wants a bigger office. What Schuck really means by public participation is participation by the leadership of various interest groups, be they unions, corporations, and cause-based groups. Interest group leaders do monitor agencies, but usually only on issues of the most direct interest to the leadership. The broadest and most important public interests have little if any representation. To show just how delegation hurts unorganized interests—in fact and not just in theory—was the point of the extended case studies in my book.¹³⁴

Schuck argues that delegation could not be that much of a problem because our country is prosperous and our government functions reasonably well compared to governments elsewhere. This is despite delegation, not because of it. The credit for our

CARDOZO L. REV. 731 (1999) (draft of Sept. 1, 1998, on file with *Cardozo Law Review*).

¹³² See SCHOENBROD, *supra* note 6, at 82-84, 111-18, 121-26.

¹³³ Schuck, *supra* note 9, at 781.

¹³⁴ See SCHOENBROD, *supra* note 6, at 56-57, 63-67.

success belongs much more, I think, to other factors such as a free press and checks and balances, both of which are vitiated by delegation. Delegation removes lawmaking from the center stage of politics, that most worthy of press attention. It frees lawmaking from the requirement that both houses of Congress and the President take affirmative responsibility.

While the constraints on delegation may avoid the very worst laws that might otherwise come from agencies, to rest content with that and to say there is no problem, as Schuck does, is to miss the bigger picture. Inherent in delegation is a bias towards more regulation, more centralized and complicated regulation, because lawmakers escape most of the blame for launching sweeping regulations that promise more than can be delivered and impose costs for which legislators would not take responsibility if they had to make the hard choice. In other words, society is deprived of the most direct means to decide how much it wants to be controlled by government. Rather, that decision is ceded, in substantial measure, to a government run by legislators who want to entrench themselves in office, agency officials who want to enlarge their budgets, and interest group leaders whose livelihoods and power grow in our thriving administrative state.

The genius of our Constitution was that the people would get to decide how much government they want. If, as Schuck believes, the people's welfare would be advanced by giving up some of that decisional power, let the people so decide through the constitutional amendment process. Instead, the insiders have done that for them.

Schuck argues that courts should abstain from tackling the delegation issue because "it would greatly strengthen the power of the federal courts relative to that of Congress and the agencies."¹³⁵ For Schuck, such a shift of power "is particularly obnoxious when, as in this case, it is not essential to the vindication of enumerated constitutional rights."¹³⁶ Schuck does not explain why it is not also obnoxious for courts to make what he would have to label "policy choices" on what parts of the Constitution are worthy of enforcement.

Schuck goes on to argue that the courts lack a judicially manageable test of unconstitutional delegation. The test that I propose in my book rides on the difference between lawmaking and law interpretation. I devote a chapter to explaining that, despite the

¹³⁵ Schuck, *supra* note 9, at 790.

¹³⁶ *Id.* at 790-91.

slippery nature of these concepts, the test is no worse than other constitutional tests.¹³⁷ Schuck does not take issue with my argument but rather misunderstands it. He writes: "How general is too general, how specific is specific enough—these are, contrary to Professor Schoenbrod's claim, questions of degree, not kind. They are preeminently questions of politics and of policy that courts are poorly equipped to answer . . ."¹³⁸ My test does not ride on the concepts of generality or specificity, but rather on the distinction between lawmaking and law interpretation.

In any event, if Congress concluded that the courts were intruding too deeply in policy by enforcing the nondelegation doctrine, Congress has an available remedy. It could adopt the idea floated by Justice Breyer to enact a statute under which agency rules would not go into effect without being enacted by Congress.¹³⁹ Then there could never be any delegation, and thus courts would have nothing to rule upon. As a result, Schuck can get most of the advantages that he thinks come from the agency process.

Schuck also predicts that the Supreme Court will never put teeth into the delegation doctrine.¹⁴⁰ I am not a prophet, but I do believe that a vibrant democracy is a possibility, not a certainty or an impossibility. The outcome is a choice, not a certainty. I wish that Schuck, who puts so much value on being able to make his own choices, would urge his fellow citizens, including the justices of the Supreme Court, to insist on a form of government in which voters would have a more effective choice on the scope of government.

CONCLUSION

The comments on my book made at this symposium and from other sources have pushed me toward realizing that I need to broaden my focus beyond a scholarly analysis of delegation and the power to regulate. Reviews by Judge Douglas Ginsburg and Professor Harold Krent made me realize that the battle against delegation had to be fought in the court of politics as well as the

¹³⁷ See SCHOENBROD, *supra* note 6, at 180-91.

¹³⁸ Schuck, *supra* note 9, at 791. He also writes, "[r]esolution of these questions, moreover, depends entirely on context—or, as Professor Schoenbrod recognizes, on a 'slew of other factors.'" *Id.* at 791. The "slew of other factors" quote is taken out of context. My point was not that courts should look at the context in deciding whether the text of a statute made the law.

¹³⁹ See Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 793-94 (1984).

¹⁴⁰ See Schuck, *supra* note 9, at 791.

courts of law.¹⁴¹ Phillip Howard's comments at the symposium that a lack of responsibility is pervasive in Washington and is not limited to Congress underscored my desire to show that shirking by Congress is part of that broader picture.¹⁴² William Niskanen's comment at the symposium that delegation cannot end without returning much power to the states underscored my desire to link the argument against delegation with an argument for federalism.¹⁴³ Peter Schuck's claim that ending delegation would rock a prosperous ship of state underscored my desire to explain in popularly understandable terms the real harm done to society by an overlarge, irresponsible national government. In other words, delegation of regulatory lawmaking power is only one aspect of a more profound disease in our body politic. The challenge I recognize is to explain that disease to people who do not deem themselves experts.

I am working on a new book that attempts to paint this broader picture. With that work in progress, this symposium's focused on delegation forced me to paint on a canvas narrower than the picture in my mind. Yet, the symposium has energized me because the contributions from all sides have been so good and because it was with delegation that I first saw, from personal experience—how politicians' subversions of the Constitution undercut democracy and hurt real people.

¹⁴¹ See Douglas Ginsburg, *Delegation Running Riot*, 18 REG. 83 (reviewing SCHOENBROD, *supra* note 6); Harold Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710 (1994) (same).

¹⁴² See Phillip Howard, Comments at the *Cardozo Law Review* symposium "The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives" (Mar. 19, 1998) (transcript on file with the *Cardozo Law Review*).

¹⁴³ See William A. Niskanen, *Legislative Implications of Reasserting Congressional Authority over Regulations*, 20 CARDOZO L. REV. 939 (1999).