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Politics and the Principle That Elected Legislators Should Make the Laws

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POLITICS AND THE PRINCIPLE THAT ELECTED LEGISLATORS SHOULD MAKE THE LAWS*

DAVID SCHOENBROD**

[T]he most significant development in the law over the past thousand years . . . is the principle that laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people.

—Justice Antonin Scalia

[T]he cabdriver asked me what's the hearing about. "[Its title is] 'does Congress delegate too much power to agencies and what should be done about it.'" He said, "why do they want to hear about that? They know the answer."

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** Professor, New York Law School, Adjunct Scholar, Cato Institute. I am particularly indebted to Marci Hamilton, my partner in the delegation wars, with whom I discussed this article from its earliest stage. I am also indebted to Jonathan H. Adler, Robert Gasaway, Gary Lawson, David I. Levine, Ross Sandler, and Harry Wellington for insightful comments on drafts as well as William Mills, my law library liaison at New York Law School, for his sleuthing, and Samantha Burd, New York Law School class of 2003, for excellent research assistance.

1. Antonin Scalia, Editorial, *How Democracy Swept the World*, WALL ST. J., Sept. 7, 1999, at A24.

2. *Does Congress Delegate Too Much Power To Agencies and What Should Be Done About It?: Hearing Before the House Subcomm. on National Economic Growth, Natural Resources, and Regulatory Affairs of the Comm. on Government Reform*, 106th Cong. 102 (2000) (statement of David Schoenbrod). By way of disclosure, a book in which I criticized delegation (DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)) had a role in triggering some recent developments on the delegation front, or at least the press seems to think so. See e.g., John J. Fialka, *Professor Seeks to Limit Congress [sic] Ability to Delegate Tasks to Federal Agencies*, WALL ST. J., May 20, 1999, at B12; Tony Mauro, *Putting the Regulatory State to a Major Test*, LEGAL TIMES, Oct. 30, 2000, at 13. Professor Marci Hamilton and I submitted pro se amicus briefs in *Loving v. United States*, 517 U.S. 748 (1996), and *Clinton v. City of New York*, 524 U.S. 417 (1998). Our briefs seemed to have some impact. Compare Brief Amicus Curiae of Marci A. Hamilton and David Schoenbrod in Support of Petitioner at 4, *Loving v. United States*, 517 U.S. 748 (1996) (No. 94-1966) with *Loving*, 517 U.S. at 757. Compare Brief Amicus Curiae of Marci Hamilton and David Schoenbrod in Support of Appellees, *Clinton v. City of New York*, 524 U.S. 417 (1998) (No. 97-1374) with *Clinton*, 524 U.S. 417 (1998). Also, the statutory precedent upon which the EPA critically relied in promulgating and defending the regulation at issue in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001), was based upon an interpretation of the Clean Air Act that I, while long previously representing the Natural Resources

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After the revolutionaries fought under the banner of “No Taxation Without Representation,” the Framers adopted a Constitution that barred any new tax unless a majority of the representatives in a directly elected legislature personally took responsibility for it.³ This Constitution required legislators to take responsibility not only for tax laws, but all other laws regulating the people, as well as all laws appropriating their money.⁴ While Justices who had lived through

Defense Council, had successfully pressed on the agency and the D.C. Circuit. *See, e.g.,* Natural Resources Defense Council v. Train, 545 F.2d 320 (2d Cir. 1976); Lead Industries Ass’n v. EPA, 647 F.2d 1130 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1042 (1981). Professor Hamilton and I submitted an amicus brief in *Browner v. Am. Trucking Ass’ns*, which became *Whitman v. Am. Trucking Ass’ns*, this time on behalf of several manufacturing trade associations. Brief of the Manufacturers Alliance/MAPI Inc., The Aluminum Ass’n, and the Steel Manufacturers Ass’n as Amici Curiae in Support of Respondents, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) (No. 99-1257). Finally, I helped to draft legislation discussed in this article to vindicate the principle that the elected legislators should make the law. Congressional Responsibility Act of 1999, S. 1348, 106th Cong. (1999); H.R. 2301, 106th Cong. (1999).

3. *See* U.S. CONST. art. I, §§ 7-8. The individual responsibility comes from the requirement that Congress publish the votes of individual members at the demand of twenty percent of the legislators. Thus, a roll call vote is required for any controversial legislation.

4. *See, e.g.,* U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States. . . .”); U.S. CONST. art I, § 8, cl. 3 (“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .”); U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”).

these events were still on the Supreme Court, the Court in its first delegation case reasoned from the premise, shared by both parties, that it would be unconstitutional for Congress to delegate these legislative powers.⁵ The early Congresses did not make a practice of delegating them.⁶

The principle that elected legislators should make the laws became a fundamental part of American folklore, where it remains to this day. Imagine the outrage if Congress dared enact a statute that made it a felony for an individual to commit an act that endangers public health, safety, or welfare, such acts to be listed in advance in regulations promulgated by the Attorney General. People would rightly condemn the statute,⁷ on the ground that laws should come from elected lawmakers.

The Supreme Court would strike this hypothetical statute under its void for vagueness doctrine.⁸ That doctrine is designed not only to require notice of what the law prohibits, which this hypothetical statute does provide, but also to vindicate the principle that elected legislators should take responsibility for the law, which this statute would violate.⁹

The public would also be outraged if Congress delegated to the Internal Revenue Service the power to set income tax rates or delegated to the president *carte blanche* power to appropriate money. Yet, the reaction would be far different if Congress enacted a statute that makes it a felony for a person to emit pollution that endangers public health, safety or welfare, such emissions to be listed in advance in regulations promulgated by the administrator of the Environmental Protection Agency. Many of those who decry the delegations of

5. *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813).

6. There have been assertions to the contrary, but they are based upon a misunderstanding of the concept of legislative power. See *infra* text accompanying note 18.

7. Although far less sweeping powers were granted to the Attorney General by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001), civil libertarians condemned it for letting the Attorney General dictate the law. See, e.g., Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. OF BOOKS, Feb. 28, 2002, at 44 (criticizing USA PATRIOT Act for setting out a “breathhtakingly vague and broad definition of terrorism and of aiding terrorists” and giving too much discretion to the Attorney General). See also Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997).

8. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 577 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). The hypothetical statute also raises federalism issues, but they are not the focus of this article.

9. See *Smith*, 415 U.S. at 572, 575.

legislative power hypothesized in the previous paragraphs would be untroubled by delegating to the EPA administrator. The *New York Times* editorial board opined that the Line Item Veto Act was unconstitutional because it delegated (in a limited way) the legislative power to appropriate funds, yet ridiculed the idea that the Clean Air Act was unconstitutional because it delegated the legislative power to regulate private conduct.¹⁰ Moreover, the Supreme Court would surely uphold the delegation to the EPA administrator. In fact, it recently upheld such a delegation in its unanimous decision in *Whitman v. American Trucking Ass'n.*,¹¹

The author of the opinion was Justice Antonin Scalia, who also wrote that “the most significant development in the law over the past thousand years . . . is the principle that laws should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people.”¹² His opinion in *American Trucking* begins its discussion of delegation boldly: “Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers . . .”¹³ It ends limply: “we have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”¹⁴ *American Trucking* is widely understood as repudiating the constitutional doctrine forbidding the delegation of legislative power or refusing to enforce it on the basis that the Court lacks a judicially manageable standard.¹⁵

10. Editorial, *The Court Vetoes Line Item*, N.Y. TIMES, June 26, 1998, at A22 (“It is unfortunate that the majority opinion rests solely on the procedural problem, never reaching the more profound constitutional defect. The line item veto is an affront to the separation of powers and an abrogation of responsibility by Congress.”); Editorial, *Bad Decision on Clean Air*, N.Y. TIMES, May 19, 1999, at A22 (criticizing the U.S. Court of Appeals for the D.C. Circuit for striking EPA regulations on the basis of the delegation doctrine).

11. 531 U.S. 457 (2001).

12. Scalia, *supra* note 1, at A24.

13. *American Trucking*, 531 U.S. at 472.

14. *Id.* at 474-75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

15. See, e.g., Douglas W. Kmiec, *Rediscovering a Principled Commerce Power*, 28 PEPP. L. REV. 547, 585-86 (2001) (“The unanimous reversal of the D.C. Circuit [in *American Trucking*] strongly hints that the Court is without a workable standard . . .”); Sandra B. Zellmer, *The Nondelegation Doctrine: Fledgling Phoenix or Ill-Fated Albatross?*, 31 ENVTL. L. REP. 11151, 11159 (2001) (“[O]ne wonders whether there is anything of substance left [to the nondelegation doctrine].”); *Leading Cases*, 115 HARV. L. REV. 306, 528 (2001) (reading *American Trucking* as discussing and debating the lack of a judicially manageable standard, but arguing “the Court’s steadfast adherence to an empty

This article takes a radically different view of *American Trucking* and the delegation case law in general. In it, I contend that at least some Justices believe that the Constitution does embrace the principle that elected legislators should make the law, and further believe it is judicially manageable. They shy away from enforcing it because it is *politically* unmanageable to stop Congress from delegating politically controversial choices to expert administrative agencies. The Justices find an outlet for their convictions by stopping delegations to governmental institutions and officers other than administrative agencies acting under the cloak of expertise. This article argues that the Court has on occasion stopped delegations of the legislative power that the Constitution vests in the Article I legislative process to states, law enforcement officers and juries, an agency lacking the cloak of expertise, Congress acting outside the Article I legislative process, and the president acting outside the Article I legislative process. This insight not only provides a way to understand seemingly disparate areas of case law, but also suggests that the Court does have a useful, although not all-powerful, role in enforcing the constitutional principle that elected legislators should make the law. That role could eventually have repercussions for delegations to agencies acting under the cloak of expertise.

Part I briefly explains how the Framers' robust idea of legislative responsibility deteriorated to the limp thing that is *American Trucking*. Part II surveys and rejects the various theories used to rationalize the Court's failure to stop delegation of lawmaking authority to administrative agencies: (a) the Constitution was implicitly amended to allow delegation; (b) delegation does not undercut the purposes of Article I; and (c) delegation is nonjusticiable because there is no judicially manageable test, it is a necessity of modern government, and the Court has so recognized this by never enforcing it except in two aberrant cases. Part III contends that, for at least some Justices, the real reason for not opposing delegation of lawmaking authority to administrative agencies is political: striking delegation all of a sudden would bring a withering backlash, especially from the legislators who would have to shoulder responsibility. Part IV shows that, despite this political difficulty, the Court has been taking baby steps to advance the delegation principle. Part V explains why the Court took no such baby step in *American Trucking*. Part VI identifies the importance of understanding the

doctrine is curious, and probably misguided.").

politics of the delegation case law.

This article does *not* argue that delegation is bad public policy nor does it argue in plenary fashion that the Constitution properly interpreted forbids it. I have made such arguments at length in a book.¹⁶ This article is rather an effort to come to terms with what I have since learned about the political obstacles to enforcing the delegation doctrine.

I. HISTORY

The notion that constitutional principle required that elected lawmakers make the law remained intact until the Progressive Era that bridged the late nineteenth and early twentieth centuries. The Progressives believed that the scientific method could be used to solve many public policy problems. In keeping with that belief, Congress began to enact statutes that instructed experts in federal agencies to deploy science to accomplish popular goals.¹⁷ These statutes effectively left specifying the rules of private conduct up to the agencies.

Yet, the Progressives did not see their statutes as delegating legislative power. They thought of the scientific method as producing sure results in the public interest.¹⁸ By this logic, Congress had enacted the laws because the scientific method put certainty into statutory language that was otherwise open-ended.

We now believe that the Progressives put too much faith in the scientific method and expertise. Scientists often do not come up with sure results, even in the seemingly hard sciences.¹⁹ Even sure results cannot be translated into regulations without the regulator making policy and political judgments along the way. The agencies themselves, although styled as expert, are highly political. As former Secretary of Labor Robert Reich once put it, agency politics

16. See SCHOENBROD, *supra* note 2.

17. See, e.g., Tea Importation Act, ch. 358, 29 Stat. 604 (1897) (codified as amended at 21 U.S.C. §§ 41-50 (1994)) (repealed 1996) (statute at issue in *Butterfield v. Stranahan*, 192 U.S. 470 (1904)); Tariff Act of October 1, 1890, ch. 1244, 26 Stat. 567 (1891) (statute at issue in *Field v. Clark*, 143 U.S. 649 (1892)).

18. See SCHOENBROD, *supra* note 2, at 32.

19. See, e.g., Alvin M. Weinberg, *Science and Its Limits: The Regulator's Dilemma*, in NATIONAL ACADEMY OF ENGINEERING, HAZARDS: TECHNOLOGY AND FAIRNESS 9 (1986) (“[S]cience was being asked a question that lay beyond its power to answer; the question was trans-scientific. Yet the regulator, by law, was expected to regulate, even though science could hardly help in the process. This is the regulator’s dilemma.”).

“confounds the ideal of scientific policy-making on which the legitimacy of regulatory agencies is based.”²⁰ Lawmaking by expert agencies is politics by other means.

Not knowing what we now know, the Supreme Court of the Progressive Era upheld the statutes on the theory that the expert agencies were applying statutory law to facts as they found them rather than making law.²¹

Yet, it would be a mistake to conclude that the Progressives had jettisoned the principle that elected legislators must take responsibility for the laws. The Progressives sprang from a tradition that embraced separation of powers.²² When it came to delegating legislative powers to plainly non-expert bodies, the Progressives were not blinded by their misplaced faith that science provided sure answers. The Supreme Court of the Progressive Era struck statutes in which Congress delegated its legislative power to juries or state legislatures.²³ Yet, although knowledgeable people today do not have the same blind spot as did the Progressives, our judicial and political culture inherited their tolerance for delegations of questions seemingly susceptible to scientific answer to bodies seemingly committed to the scientific method. That tolerance would not extend to my hypothetical statute granting sweeping lawmaking powers to the Attorney General over matters that have no pretense of technicality.

In 1935, the Supreme Court handed down two decisions, *Panama Ref. Co. v. Ryan*²⁴ and *A.L.A. Schechter Poultry Corp. v. United States*,²⁵ striking the New Deal’s National Industrial Recovery Act. The Act gave the President sweeping power to regulate the economy with only the slightest of guidance from Congress. Because the statute created an administrative agency and decisions before and since have generally upheld delegations involving such agencies, these two decisions are often thought of as constitutional oddities. For example, Cass Sunstein wrote that 1935 was “the nondelegation doctrine’s only

20. Robert B. Reich, *The Politics of Regulation*, THE NEW REPUBLIC, June 14, 1980, at 36, 37 (reviewing THE POLITICS OF REGULATION (James Q. Wilson ed., 1980)).

21. See, e.g., SCHOENBROD, *supra* note 2, at 31-34.

22. SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 25, 86, 89, 448-49 (1893).

23. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

24. 293 U.S. 388 (1935).

25. 295 U.S. 495 (1935).

good year.”²⁶ Yet, the Act was different from those upheld before because it did not fit the Progressives’ idea of scientific policy making. It was clear that the pivotal role in drafting the regulations that the President would sign into law would be played by committees made up of representatives of regulated businesses and unions. These regulations were thus clearly political rather than scientific in origin. Perhaps, too, the Court was beginning to see through the idea of scientific policymaking and to realize its implications for democratic accountability.

Although one decision was unanimous and the other nearly so, the Court could not permanently reverse its failure to enforce the principle that elected legislators should make the laws. Having muddied the concept in the context of supposedly scientific policy making, the Court no longer had a principled basis for striking statutes for delegating legislative power to administrative agencies.²⁷ Its decisions of 1935 could thus be portrayed as result-oriented and so made the Court vulnerable to political pressure. That pressure came with a vengeance in President Franklin Roosevelt’s Court-packing plan, coupled as it was with the argument that delegation was needed to deal with the exigency of the Great Depression. The Court wilted under the pressure and its capitulation was solidified by President Roosevelt’s new appointments to the Court and yet another exigency, World War II.²⁸ By the mid-1950s, Congress was free to delegate with so little constraint that a leading scholar pronounced the death of the doctrine against delegation.²⁹ Today, executive branch appointees routinely write laws and sometimes even imposes taxes with the thinnest of congressional guidance.³⁰ Hidden in the 1996 Telecommunications Act is a provision that does not employ the word “tax” but which authorizes the Federal Communications Commission to levy a tax at a rate of its own choosing on everyone’s long distance telephone bill.³¹

26. Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 332 (1999).

27. See *infra* text accompanying notes 76-80.

28. See, e.g., SCHOENBROD, *supra* note 2, at 40.

29. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 75-76 (1958).

30. See, e.g., *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989) (upholding statute that grants the Secretary of Transportation power to impose user fees based on usage of hazardous pipelines).

31. See Telecommunications Act of 1996, 47 U.S.C. § 254(d) (2002):

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the

The modern Supreme Court has not, however, been entirely content with the evident departures from the principle that elected legislators should make the laws. Justices as diverse as William O. Douglas³² and William Rehnquist³³ have expressed concern. The Court has narrowly construed statutes in the name of curbing delegation.³⁴ It has also found ways to strike statutes that delegate in various unusual ways.³⁵ Even so, it has framed the opinions in terms that make no promises to do anything about the general phenomenon of delegation to expert federal agencies.³⁶

Then, a little something happened in 1996. The Court's opinion in *Loving v. United States* talked about the delegation doctrine in the present tense and not as a relic of the distant past.³⁷ Although turning aside the delegation challenge to a statute that authorized the President to establish the criteria for death sentences in military tribunals, the Court noted that

Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking. Ill suited to that task are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control. The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance. . . . [T]he delegation doctrine,

specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be *de minimis*. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

Id. See also David Schoenbrod & Marci Hamilton, *Congress Passes the Buck - Your Tax Buck*, WALL ST. J., June 12, 1998, at A10.

32. See *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 341 (1974).

33. See *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring). This case is commonly referred to as the *Benzene* case.

34. See, e.g., *Indus. Union Dep't*, 448 U.S. at 641; *Nat'l Cable Television*, 415 U.S. at 342; *Kent v. Dulles*, 357 U.S. 116, 129 (1958); see also John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Cass R. Sunstein, *Delegation Canons*, 67 U. CHI. L. REV. 315 (2000).

35. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *INS v. Chadha*, 462 U.S. 919 (1983). See also cases cited *supra* note 8 (void for vagueness cases).

36. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 440 (1998); *Chadha*, 462 U.S. at 945.

37. *Loving v. United States*, 517 U.S. 748, 757-58 (1996).

has developed to prevent Congress from forsaking its duties.³⁸

In framing the question of delegation this way, the Court was recalling that the Constitution's lawmaking process was designed to ensure democratic accountability. The Court was also recalling that the Constitution's lawmaking process was designed to promote liberty by checking the House of Representatives with a separately selected Senate and President.³⁹ Delegation allows laws to be made in ways that circumvent these checks.

Loving was followed in 1998 by *Clinton v. City of New York*, which struck the Line Item Veto Act.⁴⁰ The Court conceived of the particular form that the line item veto took in that statute as an exercise of legislative power and struck the statute because it provided that this legislative power was to be exercised by the President alone and not the full Article I legislative process. The problem with the statute, the Court asserted, was that it allowed deviation from the legislative process mandated in Article I rather than that it delegated legislative power to the president (a spurious distinction, as I will argue later). Thus, the Court said its striking the Line Item Veto Act was independent of its permissive attitude towards delegating to administrative agencies.⁴¹ Yet, along the way, the Court narrowly construed the 1892 decision in *Field v. Clark*,⁴² to which the modern, permissive approach to delegation can be traced.⁴³ In that case, the Court upheld a statute that authorized the president to raise tariffs on goods from countries whose tariffs were "reciprocally unequal," reasoning that the president had only to find a fact.⁴⁴

After *Clinton v. City of New York* came *AT&T Corp. v. Iowa Utilities Board*, decided in early 1999.⁴⁵ It narrowly construed a power delegated to the Federal Communications Commission. The motive, according to a thoughtful law review article by a recent law

38. *Id.* (citation omitted).

39. See U.S. CONST. art. I, § 7; HANNA PITKIN, THE CONCEPT OF REPRESENTATION 195-96 (1972).

40. *Clinton v. City of New York*, 524 U.S. 417 (1998). See also Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265 (2001).

41. *Clinton*, 524 U.S. at 448.

42. 143 U.S. 649 (1892).

43. See *Clinton*, 524 U.S. at 442-44.

44. *Id.* at 442-43 (quoting *Field*, 143 U.S. at 693).

45. 525 U.S. 366 (1999).

clerk to Justice Stephen Breyer, was to avoid delegation problems.⁴⁶

Running in tandem with these delegation-related decisions were a series of federalism decisions in which the Court gave voice to the previously dormant notion that the Court has a role to play in keeping Congress within its powers enumerated in the Constitution.⁴⁷ The two lines of cases raised the question whether the Court might be willing to place some modest curbs on Congress, not only in stretching its enumerated powers, but also in delegating them to federal agencies. The Court soon had an opportunity to answer that question. A few months after *Clinton v. City of New York*, a panel of the D.C. Circuit expressly invoked the delegation doctrine to invalidate two Environmental Protection Agency (EPA) regulations establishing ambient air quality standards under the Clean Air Act.⁴⁸ The stakes in these regulations included, according to the EPA, the lives of thousands, the health of millions, and the outlay of tens of billions of dollars per year.⁴⁹ The D.C. panel held that the statute as interpreted by the EPA was so open ended as to violate the delegation doctrine. Yet, in a new twist on that doctrine, the appellate court held that the agency could save the statute by interpreting it to reduce the vagueness.⁵⁰ The Supreme Court granted certiorari.⁵¹ The result was its opinion in *Whitman v. American Trucking Associations*, seeming to foreswear any intention to block delegation to administrative agencies.⁵²

46. Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 *YALE L.J.* 1399, 1401-02 (2000).

47. *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

48. *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *reh'g granted in part and denied in part*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part and rev'd in part*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

49. Brief for the Petitioners at 1, 8-15, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (No. 99-1257); Brief for Cross-Petitioners at 8-11, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (No. 99-1426). Industry claimed that the costs would be much higher. See Brief for Cross-Petitioners at 8-11, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (No. 99-1426).

50. *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999)

51. *Browner v. Am. Trucking Ass'ns*, 529 U.S. 1129 (2000).

52. 531 U.S. 457 (2001).

II. RATIONALIZATIONS

A. *The Constitution Was Amended to Allow Delegation*

One way to read the modern delegation cases is that the delegation doctrine is now only a ghost. Justice Stevens wrote a concurring opinion in *American Trucking* in which he argued that the Court's modern delegation cases allow Congress to delegate its legislative power.⁵³ If he believes that the delegation doctrine is dead,⁵⁴ he does not explain when it died or how.

Bruce Ackerman, however, had previously offered an explanation.⁵⁵ He argues that there was a "constitutional moment" in 1936 when the people amended the Constitution to allow delegation.⁵⁶ As the argument goes, the Supreme Court's decisions of 1935 against delegation initiated the constitutional moment by asking the people whether they wanted to amend the Constitution to allow delegation.⁵⁷ They answered "yes" by reelecting a President and a Congress known to favor delegation.⁵⁸

Even if Ackerman is correct in his fascinating and dangerous assertion that the Constitution can be amended in ways other than through the arduous procedures specified in Article V, there was no constitutional moment for delegation. President Franklin D. Roosevelt, far from bringing the constitutionality of delegation to the people, sought to suppress the issue. He squelched a movement within his own administration to press for an amendment authorizing delegation out of fear that the issue would cost him and his party votes.⁵⁹ Ackerman's supposed constitutional moment was a moment

53. 531 U.S. at 489 ("In Article I, the Framers vested 'All legislative Powers' in the Congress, Art I, § 1, just as in Article II they vested the 'executive Power' in the President, Art II § 1. Those provisions do not purport to limit the authority of either recipient of power to delegate authority to others") (citing *Bowsher v. Synar*, 478 U.S. 714, 752 (1986) (Stevens, J., concurring), *INS v. Chadha*, 462 U.S. 919, 985-86 (1983) (White, J., dissenting)).

54. Some of Justice Stevens' other opinions suggest he sees some vitality in the delegation doctrine. See *Loving v. United States*, 517 U.S. 748, 774-75 (1996) (Stevens, J. concurring in the judgment); *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion).

55. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

56. *Id.* at 1053-55.

57. *Id.* at 1053-55.

58. *Id.* at 1054-55.

59. William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 385-86 (1966).

of silence.

Far from recognizing an amendment authorizing delegation, the Court continues to state, as in *Loving*⁶⁰ and *American Trucking*,⁶¹ that the Constitution forbids delegation of legislative power. It still interprets statutes in the name of avoiding constitutional concerns about delegation.⁶² It still, as we shall see, bars delegations that do not fit the Progressive model.⁶³

B. Delegation Does Not Undercut The Purposes Of Article I

Another rationalization for readily permitting delegation is that the Supreme Court, taking a functionalist approach, has found that delegation to federal administrative agencies offends no purpose of the Constitution.⁶⁴ There have been several variations on this theme. In decisions in cases filed before the New Deal, the Court stated that some delegation is permissible if Congress has taken responsibility for agency lawmaking by controlling it with an “intelligible principle” in the statute.⁶⁵ The theory that the “intelligible principle” test still required Congress to take responsibility wilted, however, in the face of the Court’s construing an “intelligible principle” to include concepts such as “the public interest.”⁶⁶

The Court next offered the rationale that Congress was still responsible for the laws made by agencies because it can always repeal them.⁶⁷ This rationale too was abandoned in the face of the

60. *Loving*, 517 U.S. at 758.

61. *American Trucking*, 531 U.S. at 472.

62. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 109 (1990).

63. See *infra* note 69.

64. See Felix Franfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1013 n.11 (1924).

65. See, e.g., *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928); see also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

66. See, e.g., *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943) (“The touchstone provided by Congress was the ‘public interest, convenience, or necessity,’ a criterion which ‘is as concrete as the complicated factors for judgment in such a field of delegated authority permit.’”) (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 25 (1932) (“[T]he term ‘public interest’ as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service . . .”).

67. E.g., *Yakus v. United States*, 321 U.S. 414, 426 (1944); see also *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 753-54 (D.D.C. 1971); Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 565 (1947).

obvious fact that the Court has repeatedly held that Congress does not act by remaining silent.⁶⁸ That makes sense because it is all but impossible for voters to hold their representatives accountable for their votes in roll calls that never took place.

I have argued that delegation undercuts democratic accountability and Dan Kahan, Jerry Mashaw, and Peter Schuck have taken issue with me.⁶⁹ Because I have already responded at length,⁷⁰ I will not replicate the debate. The gist of it is that they emphasize that agency heads are not free to promulgate laws by whim but rather are constrained by a variety of forces, many of them democratic in origin. Their argument for delegation stands the Progressives' argument on its head. The Progressives favored delegation because the agencies would be insulated from popular politics. Kahan, Mashaw, and Schuck, on the other hand, favor delegation because the agencies would be responsive to popular politics. They exaggerate, in my opinion, the extent to which agencies must be responsive, but the pith of our disagreement is this. For them, the glass is half full in that the agency lawmakers must be somewhat responsive to popular concerns. For me, the glass is half empty because the lawmakers in Congress do not have to take responsibility for the laws. Making the representatives take the blame is the reason behind the principle embodied in Article I that elected legislators should make the law. It is a full glass to which we are constitutionally entitled.

Whatever the merits of the debates among scholars, the Supreme Court has long since stopped contending that delegation does no harm to democratic accountability. It invokes the accountability-enhancing, liberty-protecting purposes of the Article I legislative process in striking delegations to entities that are more politically accountable than agencies and in narrowly construing delegations to agencies.⁷¹

68. See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412, 440 (1988) (Brennan, J., dissenting) ("Inaction, we have repeatedly stated, is a notoriously poor indication of congressional intent . . ."); *INS v. Chadha*, 462 U.S. 919, 958 n.23 (1983) ("To 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."); *Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow in discerning the proper statutory route.")

69. JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 131-57 (1997); Dan M. Kahan, *Democracy Shmemocracy*, 20 CARDOZO L. REV. 795 (1999); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999).

70. David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731 (1999).

71. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 438 (1998); *Chadha*, 462 U.S. at 945; *Kent v. Dulles*, 357 U.S. 116, 128 (1958).

Loving, in the language quoted above, explicitly acknowledges that delegation undermines democratic accountability and the structural safeguards of liberty.⁷²

Justice Scalia, the author of the Court's opinion in *American Trucking*, plainly believes that the delegation doctrine serves purposes of foundational importance, as he so forcefully indicated in the quotation that starts off this article. In the writing from which the quotation came, Justice Scalia went on to argue that liberty is further safeguarded when representatives are checked as they are in the Article I legislative process.⁷³ Similarly, he wrote in his dissenting opinion in *Mistretta v. United States*: "It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature."⁷⁴

C. *Delegation Is Not Justiciable*

Despite his belief in the critical importance of the delegation doctrine, Justice Scalia's opinion for the Court in *American Trucking* concluded that the doctrine is in essence nonjusticiable: "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"⁷⁵ The internal quotation is from his own dissenting opinion in *Mistretta v. United States*. Here it is in context:

But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. As Chief Justice Taft expressed the point for the Court in the landmark case of *J.W. Hampton, Jr., & Co. v. United States*,

72. See *supra* text accompanying note 38.

73. Scalia, *supra* note 1, at A24.

74. 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

75. *American Trucking*, 531 U.S. at 474-75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

276 U.S. 394, 406 (1928), the limits of delegation “must be fixed according to common sense and the inherent necessities of the governmental co-ordination.” Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the “necessities” of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law. As the Court points out, we have invoked the doctrine of unconstitutional delegation to invalidate a law only twice in our history, over half a century ago. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

There are three elements in this argument: (1) there is no judicially manageable test of delegation’s constitutionality and (2) Congress must, as a matter of necessity, leave some discretion to the executive branch so that, as a consequence, (3) the Court has struck statutes on delegation grounds only twice. The same elements are also found in the majority opinion in *Mistretta*, which Justice Scalia also cites in *American Trucking*.⁷⁷ This argument is impressive in form, but puny in substance. None of its three elements can withstand scrutiny.

1. Is There a Judicially Manageable Test of Unconstitutional Delegation?

The Court’s current test of unconstitutional delegation is elastic. To satisfy the “intelligible principle” test, it is enough for Congress to state the goals that should guide the agency in making the laws. The Court’s test thus rides on a question of degree—did Congress say enough about its goals—but without providing any standard to gauge when Congress has failed to say enough. This test thus does create problems⁷⁸ of manageability, as the Court found in *Printz v. United States*.

Whether the “intelligible principle” test is worse than any other test of constitutionality that the Court manages to enforce is another question. Louis Jaffe, a supporter of delegation, thought not: “[N]early every doctrine of constitutional limitation has been attacked

76. 488 U.S. at 415-16 (Scalia, J., dissenting).

77. 531 U.S. at 474-75.

78. 521 U.S. 898, 927 (1997) (“This Court has not been notably successful in . . . [implementing the intelligible principle test]; indeed, some think we have abandoned the effort to do so.”) (citing David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1233 (1985)).

as vague. Essentially the charges go to the institution of judicial review as we have it rather than specifically to the delegation doctrine.”⁷⁹ The “intelligible principle” test is no more elastic than many other constitutional tests, such as the intermediate scrutiny tests used in judging gender discrimination or regulations on the time, place, and manner of speech.⁸⁰ Indeed, it is no more elastic than the political question doctrine under which the Court finds that doctrines are not justiciable if there is no judicially manageable standard.⁸¹ The Court, of course, has not held that gender discrimination or regulations of the time, place, and manner of speech are nonjusticiable or, for that matter, that the political question doctrine itself is not judicially manageable.

Justice Scalia, writing before he went on the bench, argued that the supposed lack of a judicially manageable test should not keep the Court from enforcing the delegation doctrine:

In fact, the argument may be made that in modern circumstances the unconstitutional delegation doctrine, far from permitting an increase in judicial power, actually reduces it. For now that judicial review of agency action is virtually routine, it is the courts, rather than the agencies, that can ultimately determine the content of standardless legislation. In other words, to a large extent judicial invocation of the unconstitutional delegation doctrine is a *self-denying ordinance*—forbidding the transfer of⁸² legislative power not to the agencies, but to the courts themselves.

79. Jaffe, *supra* note 67 at 577.

80. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968); *Craig v. Boren*, 429 U.S. 190 (1976).

81. See Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L. J. 597, 622 (1976) (calling the political question doctrine “deceptive”).

82. Antonin Scalia, *A Note on the Benzene Case*, 4 REGULATION 25, 28 (July/Aug. 1980). These words were written before the Court, in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984), instructed lower courts to defer to agency interpretations of statutory provisions with uncertain meanings. Courts at all levels have found ways to apply *Chevron* in ways that allow plenty of scope to impose their own reading on statutes of uncertain meaning. E.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretation of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969 (1992); Peter Schuck & Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (1990). Moreover, as the Court held in *United States v. Mead Corp.*, 533 U.S. 218 (2001), *Chevron* deference will not be accorded only where Congress has explicitly or implicitly indicated to the courts to defer to agency interpretations of statutes. *Mead*’s “background rule is that ambiguity in legislative instructions to agencies is to be resolved not by the agencies but by the judges.” 533 U.S. at 243 (Scalia, J., dissenting). Finally, in *American Trucking*, Justice Scalia stated that, when a statute is sufficiently vague to raise delegation concerns, the job of construing it narrowly is for the courts, not the agency. 531 U.S. at 473.

Nonetheless, the elasticity of the “intelligible principle” test would create political problems for the Court, as can be illustrated by the facts of *American Trucking*. The Clean Air Act’s supposedly “intelligible principle”, according to the EPA, is that it must set ambient air quality standards pegged to protect health.⁸³ Yet, the pollutants at issue in the case pose some threat to health at vanishing small levels⁸⁴ and the EPA was not going to set the ambient air quality standards at zero. Thus, the agency’s “intelligible principle” provided no criteria to decide how safe is safe enough. Yet, if the Court had used the “intelligible principle” test to strike the statute, the Court could offer no specific explanation of how specific is specific enough. It would have been open to the charge that it was using the delegation doctrine as a pretext for protecting business from regulation needed to protect public health. The Court is particularly vulnerable to this kind of attack when it invokes the delegation doctrine because of its association with the Court’s policy-motivated opposition to the early New Deal.

The upshot is that the Court has applied its “intelligible principle” test in a way that requires Congress to say nothing intelligible about the hard choices that turn campaign slogans into rules of law.⁸⁵ Instead, Congress gets to make fuzzy promises and then pass fuzzy, feel-good statutes.

While the “intelligible principle” test is troublesomely elastic, it is not the only conceivable test of unconstitutional delegation. Quite another test grew out of the text of the Constitution and was taken as a premise in the early Supreme Court. The essence of this test was that Congress cannot delegate its legislative power.⁸⁶ That meant that if Congress wanted to regulate interstate commerce, it would have to do the regulating itself. What regulating meant was clearly understood. As Chief Justice Marshall wrote in *Gibbons v. Ogden*, to regulate commerce is “to prescribe the rule by which commerce is to be governed.”⁸⁷ Similarly, he wrote in *Fletcher v. Peck* that “[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules . . . would seem

83. 42 U.S.C. § 7409 (b)(1) (1994).

84. See *Am. Trucking Ass’ns, v EPA*, 175 F.3d 1027, 1038 (D.C. Cir. 1999).

85. *American Trucking’s* recitation of the case law makes this abundantly clear. See *American Trucking*, 531 U.S. at 474-75.

86. See discussion of *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813) at text accompanying note 5.

87. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

to be the duty of other departments.”⁸⁸ He also wrote in *Wayman v. Southard* that it is the job of Congress to make the rules, but allowed it may leave it to others “to fill up the details.”⁸⁹ That means, in essence, that Congress must itself state the rules, but that those rules do not necessarily have to anticipate every question that may come up. No set of rules can.

The upshot of Chief Justice Marshall’s approach is that Congress must tackle the controversial choices.⁹⁰ Now, under the Court’s current “intelligible principle” test, it is enough for Congress to instruct an agency to pursue some set of goals—be they “guns” and “butter” or “clean air” and “more jobs”—but leave to the agency the controversial choices as to the priorities among those goals.⁹¹

Under this formulation, the executive still has a job to do to, and it is not entirely ministerial. The executive must execute the laws, which of course includes interpreting them.

The distinction between legislative powers and other powers upon which Chief Justice Marshall’s test of delegation was built is still very much part of modern Supreme Court jurisprudence, *except when it comes to delegations of legislative power to agencies*. In the *Steel Seizure* case, the Court struck the President’s seizure of the steel industry because it was a unilateral exercise of a legislative power.⁹² Writing for the Court, Justice Black held that it fell on the legislative side of the line because it was at bottom lawmaking, not law execution.

In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that “All legislative Powers herein granted shall be vested in a Congress of the United States” After granting many powers to the Congress, Article I goes on to provide that Congress may “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by

88. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810).

89. *Wayman v. Southard* 23 U.S. (10 Wheat.) 1, 43 (1825).

90. See SCHOENBROD, *supra* note 2 at 183-84.

91. See David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1225-26 (1985).

92. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952).

this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁹³

The Court also distinguished legislative powers from other powers in *INS v. Chadha*.⁹⁴ In that case, the Court had to decide whether one house of Congress could change the immigration rule applicable to certain individuals or rather whether such an action would have to be undertaken through the full Article I legislative process.⁹⁵ Because one house or even a committee of one house necessarily must have the power to take certain actions on its own, such as adjourn the house or schedule hearings, the Court could not say that all decisions on Capitol Hill must always be made through the Article I legislative process.⁹⁶ The Court decided, however, that the legislative veto did violate Article I because the power being exercised was legislative and thus vested in Congress through Article I and not one of the powers that one house was expressly authorized to take on its own. In his opinion for the Court, Chief Justice Burger wrote, “[e]xamination of the action taken here by one House . . . reveals that it was essentially legislative in purpose and effect. In purporting to exercise power defined in Art. I, §8, cl. 4, to ‘establish a uniform Rule of Naturalization,’ the House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons . . .”⁹⁷ Thus, harking back to Chief Justice Marshall, Chief Justice Burger held that the legislative veto at issue in *Chadha* was the exercise of a legislative power because it changed a rule of private conduct.

The distinction between lawmaking and law execution is a major improvement on the “intelligible principle” test. The rule-of-conduct test rides on the qualitative question of whether Congress is doing the work of a legislature, not the quantitative question of whether Congress has said enough about the goals that lawmakers in an agency should pursue.⁹⁸ The Court today applies a closely related test in deciding whether Congress properly exercises its power under Section 5 of the Fourteenth Amendment “to enforce, by appropriate legislation, the provisions of this article.”⁹⁹ Under that test, Congress

93. *Id.* at 587-88.

94. 462 U.S. 919, 945-46 (1983).

95. *Chadha*, 462 U.S. 919.

96. The Constitution explicitly authorizes a single house of Congress to take such actions as adopting its own rules of procedure. U.S. CONST. art. I, § 5, cl. 2.

97. *Chadha*, 462 U.S. at 952.

98. See Schoenbrod, *supra* note 91 at 1249-52.

99. U.S. CONST. amend. XIV, § 5.

may use its Section 5 power for the purpose of *enforcing* the rights guaranteed by the Fourteenth Amendment, but may not use that power for the purpose of *changing those rights*.¹⁰⁰

Recent scholarship supports the contention that the Court's original test is judicially manageable. An article by Gary Lawson, for example, demonstrates that the various modern efforts to restate the original test produce consistent results across a range of modern cases.¹⁰¹ An article by Michael Rappaport points out that early understandings of legislative power are complemented by early understandings of executive power.¹⁰²

2. *Is Delegation Necessary?*

The claim that delegation is a necessity stems from the misunderstanding that the delegation doctrine would require Congress to make *all* the discretionary decisions in government. Under the original understanding of legislative powers, however, Congress had to make the rules of private conduct, not make the discretionary choices involved in exercising executive and judicial powers, such as enforcing and interpreting rules, managing public property and funds (once appropriated), and conducting foreign relations.¹⁰³ Kenneth Culp Davis suggests that this original understanding was never taken seriously because, he charges, even the first Congress found that it had to freely delegate legislative power.¹⁰⁴ These charges are erroneous. Professor Rappaport shows that they are based upon the misunderstanding that the executive function was to have no discretionary power.¹⁰⁵

The argument that delegation is a necessity of government today is based upon the same error. Congress can delegate to the executive discretion in enforcing and administering the laws it lays down. For example, should Congress require, much as it did in the Clean Air Act, that existing air pollution sources reduce emissions to at least the average achieved "by the best performing 12 percent of the existing

100. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

101. See Lawson, *supra* note 40, at 378-95.

102. See Rappaport, *supra* note 40, at 303-09.

103. See Lawson, *supra* note 40, at 394; Rappaport, *supra* note 40, at 313; SCHOENBROD, *supra* note 2, at 180-191.

104. See Rappaport, *supra* note 40, at 310 (citing KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 47-48 (University of Illinois Press 1971) (1969)).

105. See Rappaport, *supra* note 40, at 310.

sources” in the same category,¹⁰⁶ the administrator would have discretion in determining how to categorize sources and interpret the data on their emissions, but still Congress would have laid down the rule of conduct.

At least some of the Justices believe that government could function if Congress had to take responsibility for the laws that are now made by the agencies. Writing in a law review while still an appellate judge, Justice Breyer pointed out that the demise of the legislative veto in *Chadha* posed no insuperable obstacle to Congress reviewing agency regulations. It could, if it wished, enact legislation that would keep new agency regulations from going into effect until enacted through the Article I legislative process. Justice Breyer anticipated the objection that Congress could not handle the workload by pointing out that the legislation could provide for fast-track treatment of agency regulations.¹⁰⁷

One might think that a power hungry Congress would leap to implement Justice Breyer’s idea. But it carries a hidden sting. Legislators would become responsible for all of the laws. Unlike with the legislative veto, legislators implementing Justice Breyer’s alternative could not confine their accountability to those rare occasions when political capital is to be made by putting a regulation to a vote. Thus, Justice Breyer’s alternative would force them to make all of the hard choices in lawmaking. That would be a significant change from current practice and is not the way to guarantee reelection.

Justice Breyer made it clear that even though his idea was an intellectual possibility, he was not advocating it.¹⁰⁸ It would be surprising if he did because he has also revealed in other contexts that he prefers the laws to be made by elite, expert civil servants rather than elected lawmakers.¹⁰⁹ The implicit but unmistakable point in his article on *Chadha* is that legislators could have power over agency lawmaking if they had the stomach to take the responsibility that comes with it. That they lack.

There are hints that other Justices believe that government could

106. Clean Air Act, 42 U.S.C. § 7412(d)(3)(A) (2000).

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

108. See *id.* at 797-98.

109. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 55-63 (1993).

work without delegation. Justice Scalia called for the Court to enforce the delegation doctrine before he became a judge.¹¹⁰ Justice Thomas, in his concurrence in *American Trucking*, seems to hope for a time when the Court can enforce the delegation doctrine: “[o]n a future day . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”¹¹¹ Chief Justice Rehnquist, in his concurrence in the *Benzene* case, called for the Occupational Safety and Health Act to be struck on delegation grounds.¹¹²

Still other Justices, from their various perspectives, may well sympathize with the Chief Justice or Justices Scalia and Thomas. Especially likely to do so are Justices who believe that the national government has gone too far in taking over matters that should constitutionally be left to the states. The delegation doctrine, from this perspective, would bolster the judicial and political safeguards of federalism.¹¹³ At the same time, “real federalism”¹¹⁴ would make it easier for Congress to avoid delegation, perhaps even without a scheme like Justice Breyer’s. It is worth noting, however, that a robust delegation doctrine does not in itself reduce the scope of Congressional power, but rather requires Congress to take more direct responsibility for its exercise.

3. *Was The Delegation Doctrine Enforced In Only Two Cases?*

The third element in the argument that delegation is nonjusticiable is that the Court has managed to enforce it in only two cases, both decided in 1935. In the writings of some Justices, the implication is that these cases were not the product of any ordinary judicial temperament, but rather the ill-considered splutterings of a politicized Court antagonistic to the New Deal.¹¹⁵ The implication is wrong because those decisions drew support from across a broad ideological spectrum. Justice Brandeis voted with the eight-to-one majority in

110. See Scalia, *supra* note 82.

111. *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

112. *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring).

113. See Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069 (2001).

114. See MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 2* (1999).

115. See, e.g., *Fed. Power Comm’n v. New England Power Co.*, 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring).

*Panama Refining*¹¹⁶ and Justices Cardozo and Brandeis were part of the unanimous Court in *Schechter*.¹¹⁷

In any event, the Court has seen fit to enforce the delegation principle on many other occasions without formally invoking the doctrine. For one example, in *INS v. Chadha*, the Court held, in effect, that Congress may not delegate its legislative powers to one or two houses of Congress.¹¹⁸ The Court claimed that this was a case about compliance with the bicameralism and presentment clauses of Article I, Section 7, and not about delegation,¹¹⁹ but that claim does not pass the blush test. The reason that the Court gave for why the legislative veto in *Chadha* violates Section 7 is that the legislative veto was the exercise of a legislative power.¹²⁰ By that reasoning, the delegation of legislative power to an agency violates Section 7, even if it does not violate the delegation doctrine.¹²¹

The majority in *Chadha* offered the additional rationale that a legislative veto is different from delegation to an agency because the latter is subject to judicial review for compliance with the terms of the statute.¹²² Yet, to the extent that the delegation to an agency is broad, the statute places little if any constraint on it. This is a functionalist distinction with little if any functional content.

There are additional examples of the Court stopping delegations of legislative powers. In *Clinton v. City of New York*, the Court, having concluded that the line item veto power was legislative, held that Congress could not delegate it to the President.¹²³ While claiming to be deciding the case under the Presentment Clause, the Court actually analyzed the case in delegation terms.¹²⁴

In earlier cases, the Court struck statutes that incorporated state law into federal law and thus delegated national legislative power to state legislatures.¹²⁵ In another early case dealing with a vague federal

116. 293 U.S. 388 (1935).

117. 295 U.S. 495 (1935).

118. 462 U.S. 919, 952, 959 (1983).

119. *See id.* at 954-55.

120. *See id.* at 952-55.

121. *See id.* at at 986-87 (White, J., dissenting); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 131-32 (3d ed. 2000).

122. *See Chadha*, 462 U.S. at 966 n.10.

123. *Clinton v. City of New York*, 524 U.S. 417 (1998).

124. *See id.* at 439. For a more extended argument that *Clinton v. City of New York* is a delegation case, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2366-67 (2001).

125. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W.C.*

criminal statute, the Court held that Congress may not delegate its legislative power to prosecutors, judges, and juries.¹²⁶ This case—*United States v. L. Cohen Grocery Co.*—illustrates the essential connection between delegation and the void-for-vagueness-cases.

Finally, the Court has interpreted statutes delegating power to agencies in order to avoid questions of constitutionality.¹²⁷ The Court cannot know when it is necessary to construe a statute to avoid delegation problems unless it thinks it has a judicially manageable test to know when a delegation problem exists.

There is one thing that the Court has not done to keep Congress from delegating its legislative power—stopping it from delegating to agencies acting under cloak of expertise.¹²⁸ The exception to prove the rule is *Hampton v. Mow Sun Wong*,¹²⁹ where the Court held that it was unconstitutional for Congress to empower the Civil Service Commission to decide whether aliens could hold civil service jobs. The Court, however, negated the suggestion that it was about to stop delegation to administrative agencies by claiming that its decision was based on “due process,” not the delegation doctrine.¹³⁰ The attempt to have it both ways was far-fetched, as the dissent showed.¹³¹

There is an essential similarity between *Clinton v. City of New York* and *Hampton v. Mow Sun Wong*. Both cases seemed like aberrations from the Court’s earlier decisions because they struck delegations to agencies or the President, as dissents in both cases pointed out.¹³² What distinguishes these cases from the delegations that pass muster is that the power delegated quite clearly required the exercise of political, and not expert, judgment. These were the sorts of

Dawson & Co., 264 U.S. 219 (1924).

126. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921).

127. See *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980); *Nat’l Cable Television Ass’n, v. United States*, 415 U.S. 336, 340-42 (1974); *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

128. *Mistretta v. United States*, 488 U.S. 361, 412 (1989), in which the Court upheld a delegation “to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines,” comes within the Progressive rationale for delegation, because the New Deal Progressives came to favor transferring power not only to expert agencies but also to courts. *Id.* See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000).

129. 426 U.S. 88 (1976).

130. *Id.* at 116-17.

131. See *id.* (Rehnquist, J., dissenting) at 117, 122-24; see also Tribe, *supra* note 121, at 982-83 (discussing *Hampton* in the delegation context).

132. *Clinton* 524 U.S. at 483-86 (Breyer, J., dissenting); *Hampton*, 426 U.S. at 123-24 (Rehnquist, J., dissenting).

delegations that even Progressives would have had no difficulty in seeing as unconstitutional delegations of legislative power. Yet the difference between such delegations and those that are routinely upheld is only in appearance and not in content because agencies make policy when they make the laws and are not in fact above politics.¹³³

III. TOO BIG TO BE STRUCK

Although the reasons that the Court gives for refusing to enforce the delegation doctrine make little sense, its refusal does make sense. Were it to apply its original, judicially manageable test to delegations across the board, the Court would strike as unconstitutional most of the federal government's regulation of the private sector and the states as it presently operates.

The enormous scale on which the Constitution is being violated and the impact of those violations on core constitutional values is what prompts some people, myself included, to have such grave concerns about delegation. Ironically, however, the enormous scale of the constitutional violation also makes it impossible for the Court to strike it all of a sudden.

Consider the practical problem that the Court would face in enforcing the delegation doctrine, a problem similar in scale to that the Court faced when it first struck school segregation. The southern state governments had structured themselves in reliance on a now-discarded understanding of the Constitution. In the school desegregation cases, however, the Court had a ready way to manage the transition to constitutional compliance that would be unavailable in delegation cases. The plaintiffs in the school desegregation cases sought injunctions, and the Court instructed the lower courts to draft them to allow time for the transition.¹³⁴ In contrast, in delegation cases, the relief sought is a declaration that the regulation issued by an agency is unconstitutional. A court would sound silly saying that a regulation is constitutional for now, but will be unconstitutional after a while.

Justice Scalia, before becoming a judge, suggested that the Supreme Court allow a gradual transition away from unconstitutional declaration by announcing that it would enforce the delegation

133. See *supra* text accompanying note 20.

134. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

doctrine, but apply it only to statutes enacted after the announcement.¹³⁵ This method of gradually transiting away from delegation was, however, subsequently foreclosed by the Court's holding that, if once a newly announced constitutional test is given retrospective effect in one case, it must be applied retrospectively in all cases.¹³⁶ The rationale was that selective prospectivity makes it look as if the Court was functioning as a political rather than a judicial institution.¹³⁷

While a judicially created mechanism to manage a transition away from unconstitutional delegation would likely make the Court appear somewhat political, the Court would need to draw upon all of its judicial grandeur to have any hope of weathering the political storm that would follow a decision to stop delegation to federal agencies. The Court would run into vehement opposition from Congress. During hearings suggesting that Congress embrace its lawmaking authority and eschew delegation, Democrats on the committee were incredulous.¹³⁸

The Republicans also would bash the Court quicker than one can say "Enron" for making a transition away from unconstitutional delegation. Where the Republican leadership would line up is made clear by recent legislative developments. When a buzz on delegation began in the early 1990s and with a Democrat in the White House, a Republican asked me to help craft legislation that would force Congress to take responsibility for the laws. The result was a bill—the Congressional Responsibility Act of 2001—modeled on Justice Breyer's alternative to the legislative veto.¹³⁹

For legislators, sponsoring this bill was politically productive. It cast them as willing to take responsibility and in favor of giving their constituents their due voice in lawmaking. It also gave them a handy club with which to criticize as undemocratic regulations promulgated by the administration of a President from the opposing party.

Many of these sponsors wanted to bring the bill to the floor. Yet the

135. See Scalia, *supra* note 82, at 27.

136. See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991).

137. *Id.* at 541-44; *Id.* at 549 (Scalia, J., concurring).

138. *The Role of Congress in Monitoring Administrative Rulemaking: Hearing on H.R. 1036 and H.R. 1704 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 105th Cong. 41-42 (1997).

139. Congressional Responsibility Act of 2001, H.R. 105, 107th Cong. (2001). For a discussion of Justice Breyer's alternative to the legislative veto, see *supra* text accompanying note 107.

Republican leadership took active steps to stop them. They made sure that the bill went no further than several subcommittee hearings in the House. Their reluctance to hold floor votes on the bill is understandable. Republicans, no less than Democrats, use delegation to avoid hard choices and to make it easier to pass legislation that makes them look good back home. Besides, if the Republicans had brought the Congressional Responsibility Act of 2001 to the floor, the Democrats would have painted the bill as a Republican effort to strip Americans of needed regulatory protection.

Against this background, it is likely that if Republican appointees to the Court joined in a decision enforcing the delegation doctrine, Republicans in Congress would deride the appointees so that they would not themselves be derided by the Democrats in Congress.

Some people, no doubt, would side with the Court against Congress. Many ordinary people still hold the traditional belief that elected legislators should take responsibility for the laws. The cab driver quoted at the beginning of this Article is one of them. Yet other people, often highly educated ones, are of a different mind. They are schooled to believe in regulation by experts. And it is natural that they should take to this teaching: through it, they or people like them get to participate in lawmaking without being elected as lawmakers. They function as agency officials, lawyers, lobbyists, and experts in making the laws at the agency level. Less-educated people are differently situated. For them, delegation is an end-run on the one small piece of political power they have—the vote. President Roosevelt perceived something like this division of opinion when he rejected the suggestion of his advisers to press for a pro-delegation constitutional amendment partly out of fear that ordinary voters would be offended by freeing the lawmakers they elect from responsibility for the laws. As the President's press secretary put it, the President did not seek a constitutional amendment approving delegation for fear that they "might lose a number of [their] congressmen."¹⁴⁰

Perhaps the dichotomy in public opinion that I am suggesting is overdrawn, but the conclusion is the same—the Court probably could not, in the current political climate, make stick a sudden decision to stop delegation. The last time the Court attempted to do so, it ran into the Court-packing plan and the humiliating "switch in time that saved

140. See Leuchtenburg, *supra* note 59 at 385-86 (quoting Raymond Clapper MS Diary, Feb. 8, 1937, paraphrasing and quoting Roosevelt's press secretary Stephen Early).

Nine.”¹⁴¹ Even if a majority on the Court could be mustered today, surviving the political storm would be made more difficult by the sixty years of intervening case law approving delegation and the considerable transition required to return to a government without delegation.

IV. WHAT IS TO BE DONE?—FEDERALISM CASE LAW AS THE MODEL

For most of the twentieth century, delegation doctrine and federalism doctrine moved in tandem. The Progressives called for both empowering agencies and centralizing control in Washington of what had been, up until then, local matters. The Court’s efforts to curb delegation and centralization prompted the Court-packing plan under whose pressure the Court bent.¹⁴² As of 1990, the Court seemed altogether unlikely to place limits on delegation or centralization. Congress could, it seemed, legislate on any topic, no matter how local. Federalism, like the delegation doctrine, was seen as an antiquated idea. Yet in the past decade, a five-Justice majority has struck statutes for exceeding the powers of Congress or narrowly construed them to avoid federalism-based constitutional issues.¹⁴³

While these decisions have produced some teethgnashing in the press¹⁴⁴ and academia,¹⁴⁵ as well as legislation to skirt the Court’s decisions,¹⁴⁶ the Court has taken only baby steps. The decisions have touched the powers of Congress only at the margins. *United States v.*

141. GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, *CONSTITUTIONAL LAW* 175 (4th ed. 2001).

142. See PURCELL, *supra* note 128, at 33-38.

143. See *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997); *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159 (2001). I am referring here to these Article I cases and not to the parallel line of cases decided under and discussing the Eleventh Amendment. *E.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

144. See *e.g.*, Timothy M. Phelps, *Judicial Revolution; Recent Cases Reveal Slant Towards States*, *NEWSDAY*, May 29, 1995, at A13; Linda Greenhouse, *Focus on Federal Power: Close Vote on Term Limits Shows Extent of Court’s Division Over “First Principles,”* *N.Y. TIMES*, May 24, 1995, at A1.

145. See, *e.g.*, Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *YALE L.J.* 441 (2000); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *COLUM. L. REV.* 215 (2000).

146. *Gun-Free Schools Act of 1994*, 20 U.S.C. § 8921 (2000); *Religious Freedom Restoration Act of 1993*, 42 U.S.C. § 2000bb (2000).

Lopez, striking the Gun Free School Zones Act, limited the extent to which Congress could use its commerce power to regulate non-economic activity. As the Court pointed out, the legislators had already gotten out of the act what they had wanted, the opportunity to cast a symbolically popular vote that would, in fact, do nothing for their constituents.¹⁴⁷ Indeed, by giving Congress an occasion to reenact the statute in slightly different form, *Lopez* gave the legislators the opportunity to cast yet another self-congratulatory vote. The decision itself left Congress free to regulate intrastate activity that is colorably economic in nature and so did not jeopardize the great bulk of statutes passed pursuant to the Commerce Clause. In general, the Court's recent Commerce Clause cases have "tinkered with existing doctrine rather than challenging its foundations."¹⁴⁸

City of Boerne v. Flores, striking the Religious Freedom Restoration Act of 1993, and *Morrison v. United States*, striking the Violence Against Women Act, held that statutes passed pursuant to section 5 of the Fourteenth Amendment must be aimed at implementing the rights in the Fourteenth Amendment, not supplementing them.¹⁴⁹ They left Congress free to regulate in ways colorably necessary to enforce those rights. *New York v. United States*¹⁵⁰ and *Printz v. United States*¹⁵¹ held that Congress may not require state legislatures to legislate or state executive branch officials to execute federal law. *Solid Waste Agency v. U.S. Army Corps of Engineers*¹⁵² invoked federalism in interpreting narrowly a statute that might have been interpreted narrowly anyway on purely statutory grounds.

These decisions leave unaffected the great bulk of what Congress does.¹⁵³ Justice Anthony Kennedy implied as much in his concurrence in *Lopez*: "[T]he absence of structural mechanisms to require [the political branches] to undertake this principled task [determining whether they were acting within Congress's enumerated powers], and

147. *United States v. Lopez*, 514 U.S. 549 (1995).

148. Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 479 (2002).

149. See *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997); *United States v. Morrison*, 529 U.S. 598 (2000).

150. 505 U.S. 144 (1992).

151. 521 U.S. 898 (1997).

152. 531 U.S. 159 (2001).

153. See, e.g., Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643 (1996).

the momentary political convenience often attendant upon their failure to do so, argue against a *complete* renunciation of the judicial role.”¹⁵⁴

Although these cases symbolize federalism rather than realize it, they are nonetheless important to those who place a high value on it. They keep alive the claim that our national government is one of limited powers. They also introduce the claim into current politics.¹⁵⁵ In response to these decisions, Congress has held hearings on the constitutionality of expansive national legislation whose validity had previously been taken for granted.¹⁵⁶ Congress has also trimmed the reach of at least one new statute to minimize its vulnerability to constitutional challenge.¹⁵⁷

In sum, the Court has begun a conversation with Congress on federalism. It is hard to know where the conversation will go, but as long as it continues, there is a prospect that federalism-based limits on the power of Congress will return in increments or in vastly different times.

As with federalism, the Court has also taken baby steps in the delegation context. It has kept alive the idea that Congress should not delegate its legislative powers not only by saying so in cases such as *Loving* and *Clinton v. City of New York*, but also by giving the idea operational meaning in some of the cases discussed in the previous section. These decisions are all baby steps because they are all framed in terms that do not commit the Court to stopping Congress from delegating to agencies.

154. 514 U.S. at 578 (emphasis added).

155. For a more elaborated explanation of essentially the same understanding of the federalism cases, see MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* 79-150 (1999).

156. See *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. (1999); *Religious Liberty Protection Act of 1998: Hearing on S. 2148 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998); *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998). See also *States Rights and Federal Remedies: When Are Employment Laws Constitutional?: Hearing Before the Senate Comm. on Health, Education, Labor and Pensions*, 107th Cong. (2001); *Protecting Religious Liberty: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. (1999).

157. Religious Land Use and Institutionalized Persons Act of 2000, Pub L. No. 106-274, 114 Stat. 803 (2000) is far narrower than the bill originally introduced—Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

V. WHY NO BABY STEP IN *AMERICAN TRUCKING*?

In *American Trucking*, a giant step was never possible, but a baby step was. The giant step would have been to hold that the statute unconstitutionally delegates legislative power. *American Trucking* was the worst possible case for such a holding. The provision at issue ordered the EPA administrator to promulgate ambient air standards sufficient to protect health with an adequate margin of safety. The principle to guide the agency here is seemingly more intelligible than most statutory provisions authorizing agencies to make regulatory rules. If the Clean Air Act were to fall, so too would most delegations. Moreover, there is strong public support for the Clean Air Act and its principle that human health must be protected from pollution. A decision striking the Clean Air Act would set up the Supreme Court to be attacked as an enemy of public health and safety.

The plausible baby step in *American Trucking* was to interpret the statute to make the principle in the statute more intelligible and so to reduce the scope of the delegated power. The seemingly clear statutory principle guiding the EPA in setting ambient air quality standards formulation intentionally evaded a tough choice. For most pollutants, there is no threshold above which air pollution is unhealthy and below which it is safe. As pollutant levels are reduced towards zero, there still is some diminishingly small threat to health. The legislative history and reality made clear that EPA was not to set the ambient standards at zero. So EPA would necessarily have to leave some threat to health. The statute evaded the question of how much.

The evasion was intentional. As the author of the Clean Air Act, Senator Edmund Muskie, later admitted, “[o]ur public health scientists and doctors have told us that there is no threshold, that any air pollution is harmful. The Clean Air Act is based on the assumption, although we knew at the time it was inaccurate, that there is a threshold. When we set the standards, we understood that below the standards that we set there would still be health effects.”¹⁵⁸

Congress is no more anxious to wrestle with the question of how safe is safe enough now than in the 1970s. There was much criticism of the *American Trucking* regulations by Democrats and Republicans

158. *Clean Air Act Amendments of 1977: Hearings Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Public Works*, 95th Cong. 8 (1977).

alike,¹⁵⁹ and there was a legislative process in place that would have allowed an expedited vote on the regulations.¹⁶⁰ Although the regulations are more important than most of what fills the days of legislators, Congress took a pass on a momentous policy decision that an appointed agency head had made without meaningful standards.¹⁶¹

The question of how safe is safe enough was thus delegated to the administrative process. One conceivable way of answering the question was taken off the table when, in the 1970s, the EPA, with the approval of the D.C. Circuit, interpreted the Clean Air Act to bar it from considering costs in setting ambient air standards.¹⁶² As the attorney for the environmental side in that case, I had pressed the EPA to adopt that interpretation even though I knew that the EPA would necessarily consider the costs of the ambient standard and their political repercussions. I thought that I would get a stronger ambient standard for my clients if the EPA did not have to explain how it balanced costs concerns against health concerns. Today, it is widely understood that the agency does consider costs while maintaining an official posture of not doing so.¹⁶³ This way, the agency need not justify how it takes costs into account and so has maximum flexibility to bend with the changing political winds.

When it came to setting the ambient air standards at issue in *American Trucking*, the EPA also denied that it must show that the health risks it was acting to stop are significant.¹⁶⁴ To show that the

159. See e.g., *Agency Chief Answers Bipartisan Attacks on Air Proposals, Says No Decision Made*, 28 ENV'T REP. 150, 150 (1997); *Moderates in Senate Seek United Position on Proposals to Tighten Ozone, PM Rules*, 28 ENVIRONMENT REPORTER 262, 262 (1997).

160. See Congressional Review Act, 5 U.S.C. §§ 801-808 (2000).

161. For a discussion of the standard and why it is vague, see *supra* text accompanying notes 83-84.

162. *Lead Indus. Ass'n, v. E.P.A.*, 647 F.2d 1130 (D.C. Cir. 1980).

163. See Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999).

164. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,688 (July 18, 1997) (to be codified at 40 C.F.R. §50); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,883 (July 18, 1997) (to be codified at 40 C.F.R. §50). During the above rulemakings, the EPA Administrator asserted that Congress and the courts gave her the right to render decisions that do not use quantification "or any other metric" to determine "what risk is 'acceptable.'" *Id.* at 38688 These decisions are thus based on "no generalized paradigm" and are therefore "largely judgmental in nature." *Id.* at 38883; See also Brief of the Manufacturers Alliance/MAPI Inc., The Aluminum Ass'n, and the Steel Manufacturers Ass'n as Amici Curiae in Support of Respondents at 5 n.4, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) *Browner v. Am. Trucking Ass'ns*, (No. 99-1257) (citing EPA Brief at 43, *Am. Trucking Ass'ns v. E.P.A.*, 175 F.3d 1027 (D.C. Cir. 1999) (No. 97-1441), where, in the Court of Appeals, the EPA Administrator continued to insist that "nothing in the statute requires [her] to make any specific

risks are significant would have been inconvenient for the agency. It would have had to define what it meant by a “significant” threat to health and it would have been obligated to set all its health standards in keeping with that definition. As with the cost issue, the advantage for the agency lay in maintaining the flexibility to bend with the changing political winds.

The Supreme Court had faced a case like *American Trucking* before. In *Industrial Union Dep’t v. Am. Petroleum Inst.*, the Occupational Safety and Health Administration had set an occupational health standard for benzene in the workplace without regard to the significance of the risk.¹⁶⁵ The regulation was set at a level at which it would eliminate insignificant health risks at great expense. Noting that Congress had ducked the issue of how safe was safe enough, Justice Stevens, writing for a four Justice plurality, interpreted the statute to require the agency to regulate against significant risks only.¹⁶⁶ Otherwise, he argued, the statute might be invalid under the delegation doctrine.¹⁶⁷ A fifth Justice, Justice Rehnquist, would have struck the statute on delegation grounds.¹⁶⁸

The result in *American Petroleum Institute* is consistent with the Progressives’ idea of delegation. In their era, public health professionals routinely made decisions about the significance of health risks. The Progressives would have had no difficulty conceiving of such decisions as a job of execution that a legislature could properly leave to an expert agency. Although there is obviously some discretion to decide which health threats are significant, there is nothing like the discretion left to an EPA Administrator who can regulate in the name of health without regard to whether the risks to be guarded against are significant. The *American Petroleum Institute* decision has, in fact, put OSHA regulations on a more disciplined footing, with the result that business is less subject to the varying whims of the agency, and also with the result that OSHA regulations are upheld in court far more regularly than those of the EPA.¹⁶⁹

The Supreme Court thus seemingly had a ready way to take a baby

‘findings’ or to structure her decisionmaking in any particular way.”).

165. See *Industrial Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 623 (1980).

166. *Id.* at 639-40.

167. *Id.* at 646.

168. *Id.* at 672 (Rehnquist, J., concurring).

169. See JONATHAN H. ADLER, ENVIRONMENTAL PERFORMANCE AT THE BENCH: THE EPA’S RECORD IN FEDERAL COURT, (2000), available at <http://www.rppi.org/environment/ps269.html> (last visited Nov. 6, 2002).

step in *American Trucking* to do what it had done in *American Petroleum Institute*. This is what Professor Hamilton and I suggested in our amicus brief.¹⁷⁰

The Solicitor General, however, sought to co-opt the significance issue by taking the position that the statute actually confines EPA to regulating against risks that are significant.¹⁷¹ He did so most directly at oral argument. The first question from the bench was “Did those effects have to be medically significant,” and he answered affirmatively in the strongest possible terms.¹⁷² In upholding the Clean Air Act against the delegation challenge, the Court relied on his oral representations about the interpretation of the Act and compared the Act as so interpreted to the outcome in *American Petroleum Institute*.¹⁷³ In the end, “significance” had been read into the statute without invoking the delegation doctrine.

There was a counter to the Solicitor General’s tactic to avoid the delegation issue. It could have been pointed out to the Court that the agency had promulgated the regulations and defended them in the Court of Appeals under one reading of the statute (that the agency does not have to show that the threat to health is significant), but now was defending them under another reading of the statute (that the agency does have to show that the threat to health is significant). Rising to speak to argue after the Solicitor General, the advocate for the industry side, Edward Warren, did not point out that the agency had changed its interpretation of the statute.¹⁷⁴ He understood the significance issue and its connection to delegation because he won the victory in *American Petroleum Institute*. He instead devoted his attention to another goal—getting the Supreme Court to hold that the Clean Air Act requires EPA to consider costs in setting ambient air quality standards.

Having lost the cost issue before the D.C. Circuit a quarter century

170. Brief of the Manufacturers Alliance/MAPI Inc., The Aluminum Ass’n, and the Steel Manufacturers Ass’n as Amici Curiae in Support of Respondents, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) (No. 99-1257).

171. His brief stated, “the health effects justifying a NAAQS must be ‘adverse’ in the sense that they are medically significant and not merely detectable.” Brief for the Petitioners at 24, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) (No. 99-1257) (internal citation omitted).

172. Oral Argument of Petitioner at 4, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) (No. 99-1257).

173. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 464 (2001).

174. Oral Argument of Respondents at 20-36, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) (No. 99-1257).

before, industry could get EPA to consider its costs only with the help of Congress or the Supreme Court. The cost issue had been industry's primary environmental goal in Congress throughout the mid-1990s. Despite devoting considerable resources to getting legislation requiring EPA to consider costs, industry had fallen well short of its goal. Now, Mr. Warren stood before the Supreme Court telling it that the way to reduce the scope of the delegation to EPA was to require it to consider costs.

Mr. Warren was arguing at a considerable disadvantage. Industry tends to sound cynical in calling for costs to be considered in environmental regulation because it comes across as seeking to sacrifice other people's lives to increase its own profits. That was part of the reason industry had lost in Congress. It was an even more uphill battle in the Supreme Court because the D.C. Circuit had repeatedly rejected industry's position, and Congress had left its interpretation untouched when it subsequently reenacted the statute in 1990.¹⁷⁵ Yet, for industry, getting its costs to be weighed in the balance was the brass ring, and Mr. Warren and his clients went for it.

Justice Stevens reacted to Mr. Warren's argument with a quip whose tenor was altogether predictable: "Are you saying . . . that although the terms, 'requisite to . . . protect the public's health' are too vague and too standardless, it would be all right if [the statute] said, 'are requisite to protect the public health provided it doesn't cost too much?'"¹⁷⁶ Justice Scalia's opinion unanimously rejected the argument that EPA can consider costs in setting ambient standards.¹⁷⁷

Yet other aspects of the opinion interpreted the Act to give industry advantages in how the standards are implemented. One passage seemed to require EPA to consider costs in implementing the ambient air quality standards.¹⁷⁸ Another passage approved a holding of the D.C. Circuit that placed roadblocks in the way of implementing the standard for ozone.¹⁷⁹ The delegation doctrine did poorly in *American Trucking*, but Mr. Warren's clients fared quite well.

They might well have done better if he had pressed the significance issue in the Supreme Court. Industry petitioners did take it up in the

175. Clean Air Act, Pub. L. No. 101-549, 104 Stat. 2399 (amended 1990).

176. Oral Argument of Respondent, at 35-36, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (No. 99-1257) (internal quotations marks supplied).

177. *American Trucking*, 531 U.S. at 468-71.

178. *Id.* at 467.

179. *Id.* at 476-86.

post-*American Trucking* remand to the D.C. Circuit, pointing out that EPA had promulgated the standards on the basis that it had limited itself to protecting against threats to health that are significant. At this stage, however, the issue was a loser. The once-reversed Court of Appeals panel upheld the standards by accepting EPA's argument that it could not be expected to quantify degrees of risk.¹⁸⁰ EPA could not have made any such argument when arguing to the Supreme Court that the scope of its discretion was narrowed by the requirement that it regulate against only those risks that are significant.

Business has never been a reliable friend of the delegation doctrine. Large national corporations were part of the drive towards delegation in the early 1900s. They pressed for transferring key regulatory issues from state legislatures to federal administrative agencies.¹⁸¹ They were strong proponents of the National Industrial Recovery Act that the Court struck in the two delegation decisions of 1935.¹⁸² They also urged Congress in the mid-1960s to shift environmental regulation from the state level to a federal agency that they hoped would be ineffectual.¹⁸³

VI. WHY IT IS IMPORTANT TO UNDERSTAND THE POLITICS OF DELEGATION CASE LAW

There are benefits from understanding that, for at least some Justices, the delegation case law is driven by the fear of the ire of Congress should it be kept from passing the buck to agencies.

Such an understanding suggests a way of explaining the diverse lines of cases that get discussed under the heading of "delegation." The Court made an exception to the principle that the elected legislators should make the law based upon the Progressives' notion that delegation of technical questions to officials acting on the basis of expertise was not delegation. Thus, while upholding delegations to expert agencies, the Court of the early twentieth century refused to uphold delegations to state legislatures or the criminal justice system as in the early void-for-vagueness case of *United States v. L. Cohen*

180. *Am. Trucking Ass'ns, v. E.P.A.*, 283 F.3d 355, 378 (D.C. Cir. 2002) ("EPA has no obligation either to identify an accurate 'safe level' of a pollutant or to quantify precisely the pollutant's risks prior to setting primary NAAQS.").

181. See generally ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967).

182. SCHOENBROD, *supra* note 2, at 38-39.

183. *Id.* at 59.

*Grocery Co.*¹⁸⁴ The nearly unanimous decision in *Panama Refining* and the unanimous decision in *Schechter Poultry* dealt with a delegation that did not fit the Progressive model of experts resolving technical issues because, in these cases, it was clear that the rules that the President was signing into law had their origins in private deals made in industry committees.

More recently, the pattern remains the same. While finding itself unable to repeal the exception made for delegations that fit the Progressive rationale, the Court refuses to broaden it. The Court struck delegations to political actors acting on political questions in cases such as *Chadha* (one or two houses of Congress taking legislative action)¹⁸⁵ and *Clinton v. City of New York* (the President vetoing budget items).¹⁸⁶ The Court struck the delegation to an agency of matter that plainly lay outside its area of expertise in *Hampton v. Mow Sun Wong*.¹⁸⁷ The Court has also sometimes limited delegation to expert agencies without declaring open war on such delegations by narrowly constructing the agency's statutory powers in many cases.¹⁸⁸

The Court's real rule of decision is that delegations are permitted if and only if they fit the Progressive model. This rule of decision is without substance because it is all about the appearance rather than the reality of what happens in the very political agency rulemaking process. The Court's rule of decision is thus vacuous, but ironically its official reasoning for refusing to police delegation is that it lacks a judicially manageable test.

For the longer term, this understanding of the case law suggests that the Court might someday police delegations to agencies. As the Court writes, the delegation doctrine is permanently nonjusticiable. Yet, should there be a change in the present political climate that makes it impossible for the Court to police delegations of seemingly technical matters to agencies, the Court could change with it. As the Court has acknowledged, "[i]n constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's

184. 255 U.S. 81 (1921).

185. 462 U.S. 919 (1983).

186. 524 U.S. 417 (1998).

187. 426 U.S. 88 (1976).

188. See *supra* note 34.

constitutional duty.”¹⁸⁹

The circumstances that supported the decisions of the early twentieth century in support of delegation have changed in part. We no longer hold the Progressives’ belief in the objectivity of experts or the New Dealer’s belief that agency regulations are perfectly democratic because Congress can repeal them. What has not changed is the power of the interests that benefit from delegation—the elected legislators in Congress, all those in government whose income and professional standing come from agency lawmaking, and the major corporations, national advocacy organizations, and other private interests that participate with agency lawmaking. Such arrangements have sunk their roots into the American political landscape and will be tough to dig out.¹⁹⁰

Strange things do, however, happen in politics. Budget deficits once seemed like a permanent and politically unassailable feature of government, but then for a while seemed excusable only in times of emergency. “Unfunded mandates” were once thought an unquestionable tactic, but this too changed after that phrase came into common parlance.¹⁹¹ The drive against budget deficits and unfunded mandates, whatever their merits and despite their less-than-full-success, are examples of another deep-seated feature of the American political landscape—a popular sense that government officials have found ways to elude accountability to the electorate and should be reined in. This popular sense has found expression in many other ways, including the Republican “Contract With America,” with its claim to “restore accountability to Congress,”¹⁹² and the movements to place term limits on legislators, to prevent legislators from giving themselves salary increases that go into effect before they are reelected,¹⁹³ and to reform campaign finance. There is reason to doubt whether any of these movements will actually make government more accountable, or, in any event, sate the popular appetite to make it

189. *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992).

190. See generally, MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

191. See *Unfunded Mandates Reform Act of 1995*, 2 U.S.C. §§ 1501-1571 (1995).

192. *Contract With America* (1994), available at <http://www.house.gov/house/Contract/CONTRACT.html>.

193. See *Congress Rejects Pay Raise: Public Outrage Overwhelms Lawmakers*, 49 *FACTS ON FILE WORLD NEWS DIGEST*, Feb. 10, 1989, at 87. In 1992, the last state ratified the long-pending Twenty Seventh Amendment barring congressional pay increases from taking effect until after the next election.

so.¹⁹⁴ The hunger to make government accountable may someday fix on delegation, which in my opinion is a more deserving and potentially fruitful target. Should that happen, the politics that deter the Court from policing delegation to agencies would have changed.

It is, of course, not the Court's place to make the political case against delegation. On the other hand, the Court does have a role to play in explaining the Constitution to Congress and the people. Unfortunately, however, the Court has at times explained the Constitution in ways that effectively amount to colluding with legislators in escaping their responsibility for the laws. Those older cases holding that delegation is constitutional because it does not undermine democratic accountability legitimated violations of the Constitution by Congress. The modern cases that say that the Court cannot police delegation because there is no test to distinguish constitutional lawmaking from unconstitutional delegation do so too. If the Justices cannot tell the constitutional from the unconstitutional, neither can the legislators—so they are off the hook.

The Court has, however, begun to find ways to discharge its role of explaining the Constitution. It now states that the Constitution forbids delegation of legislative power and did so over the objection of Justice Stevens, who preferred the formulation that some degree of delegation is permissible.¹⁹⁵ The Court also states that the delegation doctrine serves important constitutional purposes. There is one more thing that the Court should do: refrain from repeating the error that there is no judicially manageable test of unconstitutional delegation. *American Trucking* did not literally repeat the error.

American Trucking comes close to being the best that the Court can do for now when it comes to ruling on the constitutionality of delegating seemingly technical issues to seemingly expert agencies: uphold them on the basis of precedent rather than reference to the constitutional text or constitutional values. Such an approach makes the permissive approach to delegation brittle and therefore subject to chipping and even breaking should new political pressures come to

194. See Thad Kousser & Ray LaRaja, *The Effect of Campaign Finance Laws on Electoral Competition: Evidence from the States*, POLICY ANALYSIS No. 426 (Cato Institute, Feb. 14, 2002), available at <http://www.cato.org/pubs/pas/pa-426es.html> (arguing that campaign finance reform renders incumbent legislators even more remote from democratic accountability by making it more difficult for challengers to overcome the advantages that incumbents have in running for reelection).

195. Compare *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 with *id.* at 489-90 (Stevens, J., concurring in part, concurring in the judgment).

bear. Such an approach also makes it easier to take more baby steps in support of the principle that the elected legislators should make the law. It can do so in cases in which it narrowly construes statutes to avoid delegation problems and in cases in which it prevents the practice of delegation from spreading. Such cases provide opportunity to further explain why the Article I lawmaking process is critical to democratic accountability and liberty.

Were it to become clear that there is a discernible constitutional standard which Congress must obey—that, in other words, the delegation doctrine is an underenforced constitutional norm¹⁹⁶—pressure could be placed upon Congress to put in place mechanisms to live up to its responsibilities. Congress has adopted a number of structural statutes designed to help it overcome the political pressures that individual legislators feel to run excessive budget deficits and impose unsuitable unfunded mandates.¹⁹⁷ Similar structural measures are needed to help Congress overcome the political pressures that individual legislators feel to evade their constitutional responsibilities. Elizabeth Garrett and Adrian Vermeule have proposed structural legislation that would force the Houses of Congress to take seriously the question of whether the legislation it enacts conforms to the Constitution.¹⁹⁸ The House and the Senate have offices of legal counsel, but they are not charged with advising whether pending legislation is constitutional. Their job is to protect the legislators rather than to protect the Constitution. This should change.

Finally, a clearer understanding of the principle that elected lawmakers should take responsibility for the laws is also important from a global perspective. Many countries want to emulate the public law of the United States because it is rightly seen as contributing to our political freedom, economic prosperity, and civil liberty.¹⁹⁹ The dominant feature that makes our public law work is that governmental elites are accountable to the people. Delegation, however, is a failure amid the success. It detracts from that democratic accountability. It

196. See Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

197. See Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat 1388-573 (1990); Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1501-1571 (1995).

198. See Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001).

199. See Steven G. Calabresi, *An Agenda for Constitutional Reform*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 22, 22 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

reflects a failure by the Supreme Court in holding the politicians to ground rules of government that keep them accountable. It is a failure that need not have happened if the Court had not wandered from its assigned path during the early decades of the twentieth century. If the Court's failure is understood for what it is, other countries are less likely to emulate our mistake.

VII. CONCLUSION

The principle that the elected legislators should make the laws has most of the essential elements of a vibrant constitutional doctrine: a long pedigree rooted in the text and purposes of the Constitution, a strong appeal to popular ideas of what is just and right, and a test of ancient lineage that the Court could apply with consistency. What the doctrine is lacking, at least for now, is political viability. That, however, is no reason for the Court to bury the doctrine. Congress and the President also have responsibilities to uphold the Constitution. With them, the Court should continue the conversation that the Justices began with *Loving* and *Clinton v. City of New York*. The Court was not much of a conversationalist in *American Trucking*, but the legislators, in their continuing flight from responsibility will, no doubt, provide the Justices with fresh topics of conversation.