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Delegation Doctrine: Could the Court Give It Substance, The

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THE DELEGATION DOCTRINE: COULD THE COURT GIVE IT SUBSTANCE?†

David Schoenbrod*

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INTRODUCTION

Article I of the Constitution begins: "All legislative Powers herein granted shall be vested in a Congress . . ."¹ The Supreme Court has long found a limit in article I on Congress' power to delegate the power of legislation to other branches of government — the so-called delegation doctrine.² Unchecked delegation would undercut the legislature's accountability to the electorate and subject people to rule through ad hoc commands rather than democratically considered general laws.³

The precise extent of the constitutional limit on delegation appears to present a dilemma, however, since Congress clearly cannot be required to decide everything. The Court has sought to resolve this seeming dilemma by permitting a statute to delegate legislative power so long as it provides an "intelligible principle"⁴ to guide the delegate. Since the early part of this century, the Court has said in essence that a statute may be vague so long as it is either not too vague or no vaguer than necessary.⁵

This test itself is vague. It has allowed the interpretation of the delegation doctrine to swing like a pendulum with the changing politics of the Court and the times. Into the early 1930s, the Court held that fairly amorphous statutes provided meaningful standards.⁶ The interpretation swung sharply away from broad delegation in 1935 when two decisions⁷ found violations of the delegation doctrine in a

1. U.S. CONST. art. I, § 1. Article I goes on, of course, to involve the President in the legislative process through the presentment clause and veto power.

2. *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41-48 (1825).

3. *See* notes 86-133 *infra* and accompanying text. A delegate can and sometimes does promulgate general rules, while Congress sometimes does enact rules that are meant to apply to only a few subjects. The equal protection, bill of attainder, and *ex post facto* clauses of the Constitution are not widely effective constraints on regulation that lacks generality. The delegation doctrine, although it does not directly address the problem of lack of generality, would indirectly encourage regulation that is more general by requiring Congress to do the legislating.

4. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

5. *See, e.g.*, *United States v. Grimaud*, 220 U.S. 506, 516-17 (1911); *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904). *See also* notes 24-54 *infra* and accompanying text.

6. *See, e.g.*, *Federal Radio Commn. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933) (upholding delegation to FRC to grant radio licenses "as public convenience, interest or necessity requires"); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 401 (1928) (upholding so-called flexible tariff provision designed to "equalize . . . differences in costs of production" between foreign nations and the United States); *United States v. Grimaud*, 220 U.S. 506, 507 (1911) (upholding delegation to Secretary of Interior under Forest Reserve Act to make rules and regulations necessary "to improve and protect the forest . . . and to secure favorable conditions of water flows" in national forests).

7. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

New Deal statute because it delegated in broader strokes than anything that had come before⁸ and because some Justices opposed the policy of that statute.⁹ Those two decisions helped to set in motion the "court packing plan" and criticism that doctrinaire jurists were hobbling the efforts of President Roosevelt and Congress to save the nation from the disaster of the Depression. New appointments and, perhaps, some bowing to political pressure quickly brought the Court back to a more permissive view of delegation. Although the Court never disavowed its 1935 decisions and continued to articulate essentially the same delegation test, it has never again held a statute unconstitutional on the basis of the delegation doctrine.¹⁰

The "intelligible principle" test as so applied has allowed the legislative branch to avoid hard choices. Congress can leave it to an agency or other delegate to promulgate rules of private conduct in furtherance of congressional goals, even though there are conflicts among the goals. A statute might, hypothetically, order an agency to issue air

8. The section of the National Industrial Recovery Act struck down in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), authorized the President to establish "codes of fair competition" for a virtually unlimited number of industries and trades. 295 U.S. at 521-22. Justice Cardozo termed the statute "delegation running riot," amounting to a complete transfer of Congress' power under the Commerce Clause. 295 U.S. at 553 (Cardozo, J., concurring). Many commentators have cited the statute reviewed in *Schechter* as the broadest delegation ever attempted, and one unlikely to be tried again. See, e.g., 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 176 (2d ed. 1978); Recent Cases, 49 HARV. L. REV. 332, 333 (1935).

Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935), dealt, however, with a different section of the NIRA. The delegation in this instance seemed more in line with legislation the Court had previously upheld. It authorized the President, through rules and regulations, to restrict the interstate transportation of petroleum produced in excess of the amount permitted by state law. 293 U.S. at 406-07. In a dissenting opinion, Justice Cardozo found that the statute's declared policy and structure provided standards sufficient to support the delegation. 293 U.S. at 435 (Cardozo, J., dissenting). As with delegations the Court had previously found valid, the "hot oil" provisions were such that "[d]iscretion [was] not unconfined and vagrant. It [was] canalized within banks that kept it from overflowing." 293 U.S. at 440 (Cardozo, J., dissenting).

Subsequent commentators have agreed with Cardozo. See, e.g., 1 K. DAVIS, *supra*, at 175; Jaffe, *An Essay on Delegation of Legislative Power (pts. I & II)*, 47 COLUM. L. REV. 359 & 561, 573 (1947); Note, *Rethinking the Nondelegation Doctrine*, 62 B.U. L. REV. 257, 277 n.93 (1982).

9. See J. ELY, *DEMOCRACY AND DISTRUST* 132 (1980); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 10 (1982); Jaffe, *supra* note 8, at 573.

10. The fate of the doctrine in the post-New Deal era prompted one commentator to note that the "intelligible principle" test had become "all but a vestigial euphemism, virtually shorn of practical meaning." Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power*, 72 NW. U. L. REV. 443, 446 (1977). The cases support the observation. See, e.g., *Fahey v. Mallonee*, 332 U.S. 245 (1947) (upholding portions of the Home Owners Loan Act of 1933 authorizing the Federal Home Loan Bank Board to prescribe regulations and conditions for the liquidation of savings and loan associations); *Yakus v. United States*, 321 U.S. 414, 420 (1944) (upholding Emergency Price Control Act authorizing the President to appoint a Price Administrator to set maximum wartime prices "in the interest of the national defense and security"); *United States v. Rock Royal Co-op.*, 307 U.S. 533, 545 n.4 (1939) (upholding Agricultural Marketing Agreement Act authorizing the Secretary of Agriculture to fix minimum prices for farm commodities at levels deemed to be "reasonable" and in "the public interest").

pollution rules that promote such goals as health protection and minimization of the costs of pollution control. The delegation doctrine is ritualistically invoked, but fails to check agency discretion or to ensure electoral accountability for the rules promulgated.

Nonetheless it was long felt that there was no alternative if government was to cope with war, economic downturns, and other tribulations.¹¹ In theory, broad delegation is essential to efficient, speedy pursuit of government's goals. Practice shows, however, that delegates are often less capable than Congress of resolving the political conflicts in an issue.¹² Delegation can set in motion a protracted game that frustrates statutory goals. For example, my own analysis of the Clean Air Act suggests that government is sometimes less able to cope *with* delegation than *without* it.¹³

The pendulum may again have begun to swing against broad delegation. Commentators and judges have begun to recall the delegation doctrine's fundamental purposes.¹⁴ Some recent Supreme Court opinions suggest a possible interest in reinvigoration of the doctrine.¹⁵ Administrative agencies no longer have the reputation of being panaceas.¹⁶ Voters have shown concern that Congress dispenses regulatory powers without recognizing the long term costs of achieving the promised benefits.

Can the Supreme Court produce a better test of delegation? Without an adequate test, a court deciding whether to strike down a statute is exercising legislative power that, as the delegation doctrine itself dictates, only Congress may use. Is there a test that would provide a coherent basis for judicial decision, or is delegation a matter of politics

11. Representative of much contemporary thinking is Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). In this extensive article, Stewart begins with the necessity of delegation as a credo and emphatically dismisses the delegation doctrine as a central strategy in dealing with administrative discretion. *Id.* at 1672-73.

12. See Gewirtz, *The Courts, Congress and Executive Policy-making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS., Summer 1976, at 46, 58-59; Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1190 (1973).

13. Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 789-98 (1983).

14. See, e.g., J. ELY, *supra* note 9, at 131-34; T. LOWI, *THE END OF LIBERALISM* 92-124, 298-305 (1969); Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

15. See, e.g., *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 541 n.75 (1981); 452 U.S. at 543-48 (Rehnquist, J., dissenting); *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 645-46 (1980); 448 U.S. at 672-88 (Rehnquist, J., concurring); see also *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (invalidating a delegation of legislative power to a legislative body where the delegated power was not to be exercised in accordance with full legislative procedures).

16. See, e.g., W. DOUGLAS, *GO EAST, YOUNG MAN* 217 (1974); *THE CRISIS OF THE REGULATORY COMMISSIONS* (P. MacAvoy ed. 1970). See generally Jaffe, *supra* note 12; T. LOWI, *supra* note 14, at 92-104, 302-05.

and policy which the courts should avoid? These are the central concerns of this Article.

I believe that the Court can do better. The dilemma of having to choose between abandoning the delegation doctrine's vital purposes or imposing all of the functions of government on Congress is only apparent. What creates the appearance of a dilemma is a failure to recognize that government involves executive and judicial as well as legislative powers. The test of permissible delegation should look not to what quantity of power a statute confers but to what kind — statutes should be permitted to create an occasion for the exercise of executive or judicial power, but not to delegate legislative power. A statute that creates occasion for the exercise of executive or judicial power does not delegate in the root sense of the word, which involves the giving away of one's own power to another. In regulating private conduct, for example, the statute must state the general rules of conduct, but can leave the method of application of those rules to the executive and judicial branches. In other words, the statute itself must speak to what people cannot do; the statute may not merely recite regulatory goals and leave it to an agency to promulgate the rules to achieve those goals.

This approach would serve the doctrine's purposes yet be sensitive to practicalities. Past delegation cases stretched words to find that Congress had provided an intelligible principle in order to uphold statutes critical to essential governmental functions such as national defense.¹⁷ This was often unnecessary because many of these statutes authorized the exercise of executive or judicial powers rather than delegating legislative powers.¹⁸ It was also unfortunate because it robbed the delegation doctrine of content and intellectual respectability and blunted its ability to curb flagrant delegations of legislative power.¹⁹ The approach suggested in this Article would allow the Court to reach the same result as in some prior decisions upholding statutes and yet still provide a principled basis for striking down other statutes that fly in the face of the delegation doctrine's purposes.

The distinction between legislative and other powers as the basis for a test of delegation was put forth by Chief Justice Marshall in an

17. See, e.g., *Lichter v. United States*, 334 U.S. 742 (1948); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. United States*, 321 U.S. 414 (1944).

18. See notes 203-67 *infra* and accompanying text.

19. Characteristic of this denigration of the delegation doctrine is the preference of Frankfurter and Landis for modern governmental practicalities rather than "jejune abstractions." Frankfurter & 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).

1825 decision.²⁰ Marshall's opinion recognized that these categories cannot be mechanically defined.²¹ Subsequent delegation decisions failed to follow this opinion for reasons unrelated to its approach to delegation.²² Marshall's approach may appear conceptualistic and perhaps frightening to minds accustomed to broad delegation of legislative power. As will be argued, however, it is appropriate while the Court's current approach is unprincipled and political.

Part I of this Article demonstrates the need for a new approach to the delegation doctrine. It shows that the Court has failed to articulate a coherent test of improper delegation and that the alternative tests offered by commentators are not sufficient. Part II then sets forth a proposed test of improper delegation. The basic principles of an approach prohibiting delegations of legislative power are outlined and illustrated. This Article does not, however, attempt anything so grand as to suggest a final definition of the doctrine or to pass broadly on the validity of statutes. Such an encompassing analysis is made impossible by the rich variety of statutory types and the importance of looking at each statute in context. This Article attempts the humbler task of arguing that the approach to delegation here proposed provides a doctrinal basis for case law development that is more coherent than the Court's current approach. Finally, Part III asks whether the proposed test constitutes a manageable and appropriate exercise of judicial power.

I. THE NEED FOR A NEW TEST OF IMPROPER DELEGATION

Socrates: Then the man who embarks on the search for an art of speaking must first of all make a methodical classification, and find a distinguishing mark for each of the two kinds of words, those which in popular usage are bound to be ambiguous and those which are not.

*Phaedrus: The man who grasps that will have made a very fine discovery, Socrates.*²³

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

21. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). Judge Wright alludes to the possibility of a similar approach to a delegation test in a review essay aptly titled *Beyond Discretionary Justice*, but does not develop the idea. Wright, *supra* note 14, at 586 n.35. The Court's decisions relying, sometimes only in passing, on the "inherent powers" of the Executive also hint at such an approach. See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936); see also text at notes 213-16 *infra*. Cf. *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975) (upholding delegation to Indian tribe "possess[ing] independent authority over the subject matter").

22. Two commentators have suggested, for example, that Marshall's conception of federalism elucidated in *Wayman* may have limited the decision's precedential utility. See S. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* 72 (1975); Note, *supra* note 8, at 270.

23. PLATO, *PHAEDRUS & LETTERS VII AND VIII* 77 (Penguin Books 1973).

Just as one who would speak clearly must learn to distinguish clear from unclear expressions in a methodical way, the judge who would have only the legislature legislate must learn to distinguish proper legislation from improper delegation in a way that is sufficiently coherent to allow judgments of a judicial rather than a legislative nature.

A. *The Supreme Court's Failure to State a Coherent Test*

The Supreme Court has failed to articulate a coherent test to distinguish statutes that improperly delegate from those that do not. The established test asks whether the statute decides major policy issues by laying down an "intelligible principle" or setting "legislative standards."²⁴ A statute that does so is a valid and complete act of legislative power, even if it delegates the making of "subordinate rules."²⁵ These rules are said merely to "fill up the details."²⁶ The language of "intelligible principle" and related rubrics does sound as if the statute might have to state rules of conduct;²⁷ the cases sometimes say that the statute must provide a "standard"²⁸ or a "rule of conduct."²⁹ But the language of these cases is deceiving. It is clear in each instance that what is meant by "intelligible principle," "standard," or even "rule of conduct" is not a rule of conduct but a more or less detailed enumeration of goals, even if these announced goals conflict.³⁰ Accordingly, Congress need state neither "subordinate" nor any other rules so long as it says enough about the goals that should guide the agency in promulgating the rules that will actually govern private conduct.

24. Jaffe claims to see a difference between the "intelligible principle" test articulated in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), and the "legislative standards" test derived from *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935), and *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935). Jaffe, *supra* note 8, at 569. See also Note, *supra* note 8, at 275-79. But, as actually articulated by the Court, the difference is not at all so clear.

25. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935).

26. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). Chief Justice Marshall coined this phrase in *Wayman*. It has been used in the context of the more modern approach to delegation. *E.g.*, *United States v. Grimaud*, 220 U.S. 506, 517 (1911).

27. See *Yakus v. United States*, 321 U.S. 414, 424 (1944); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421-22 (1935).

28. See, *e.g.*, *United States v. Rock Royal Co-op.*, 307 U.S. 533, 574 (1939); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935).

29. See, *e.g.*, *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (three-judge panel).

30. See *McGautha v. California*, 402 U.S. 183, 284 (1971) (Brennan, J., dissenting); *Yakus v. United States*, 321 U.S. 414, 423-24, 427 (1944); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421-22 (1935); *United States v. Grimaud*, 220 U.S. 506, 521 (1911); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (three-judge panel).

The test to determine how much Congress must say about its goals and the extent to which it must say how conflicts between its goals are to be resolved has not been articulated, except to the extent that Congress may leave the "details" to the agency. But "[w]hat is a 'detail' is a question of degree."³¹ The cases do not indicate what distinguishes a major issue from a detail. The Court's stated delegation doctrine thus allows the delegation of some quantity of power to the delegate without providing any yardstick with which to measure that limit. The test of whether a statute is overly ambiguous is, thus, without substance and so no test at all of whether Congress has met its obligation.

Further incoherence is introduced by an exception to the general doctrine that holds that a statute that lacks an "intelligible principle" may nonetheless be upheld in cases of "necessity."³² Necessity is evident when action must be taken while Congress is out of session or more quickly than the legislative machinery can possibly move.³³ However, "necessity" has also been invoked to justify delegation of decisions on the grounds that they are technical, complicated, or require frequent adjustment³⁴ even though Congress itself does sometimes decide just such questions.³⁵ "Necessity" as used by the Court is therefore a question of degree concerning the allocation of legislative time, a matter as to which the Court has shown no inclination to state standards.³⁶

It is not just the decisions of the 1920s and the 1940s that articu-

31. Jaffe, *supra* note 8, at 362.

32. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). See generally *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring).

33. [B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress — in giving the Executive authority over matters of foreign affairs — must of necessity paint with a brush broader than that it customarily wields in domestic areas. *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (emphasis added). Accord *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 324 (1936). See also *United States v. Grimaud*, 220 U.S. 506, 516 (1911) ("In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management.").

34. See, e.g., *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 (1976) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

35. See, e.g., note 299 *infra*.

36. In *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928), for example, the Court affirmed that Congress could not delegate "legislative power" to the Executive, but conceded that a certain amount of interbranch "co-ordination" was required to govern effectively. 276 U.S. at 406. In other words, some delegation is inevitable. However, the Court failed to posit a meaningful constitutional test of such delegation posing as interbranch "co-ordination," noting only that "[i]n determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." 276 U.S. at 406 (emphasis added). Such reasoning is plainly circular and unenlightening.

lated this incoherent test. Much the same test also appeared in the 1935 decisions striking down the New Deal legislation, *Panama Refining Co. v. Ryan*,³⁷ and *A.L.A. Schechter Poultry Corp. v. United States*.³⁸ The same rubrics continue to appear in the recent opinions that would reinvigorate the delegation doctrine.³⁹ Although this wide range of opinions employs the same words, the opinions differ in nuance and differ widely in how they would apply the doctrine. The test has become so ephemeral and elastic as to lose its meaning,⁴⁰ and "has long been regarded as theoretically unsatisfactory."⁴¹

If not well articulated, is the test at least consistently applied? While the Court has seemed prepared to uphold almost any statute as acceptable delegation, application has in fact not been uniform. The Court has created and applied a more stringent test of improper delegation to strike down statutes in special categories of cases. *Kent v. Dulles*,⁴² construing a statute granting a broad discretion to deny passports, held that where "activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are

37. 293 U.S. 388 (1935).

38. 295 U.S. 495 (1935). Though *Panama Refining* and *Schechter* replaced the term "intelligible principle" with "legislative standards," the test articulated by the Court was essentially the same. Both decisions stressed that the Constitution limited delegations. However, both also carefully pointed out, as had previous opinions, that such a limit would not impede the practical realities of governing:

[T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.

295 U.S. at 530; 293 U.S. at 421.

39. In the most recent call for the revitalization of the doctrine, Justice Rehnquist, echoing the words of Justice Cardozo in *Schechter*, 295 U.S. at 551 (Cardozo, J., concurring), inveighed against "uncanalized delegation of legislative power." *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring). He failed, however, to articulate a new, useful measure of such delegations, relying instead on the amorphous, pliable version of the doctrine developed in *Hampton* and *Panama Refining*. 448 U.S. at 674-75. Despite his apparent distaste for open-ended delegations, Justice Rehnquist, following the lead of earlier decisions, declined to support a rigid constitutional test by concluding that an otherwise invalid delegation will pass constitutional muster if it is "justifiable in light of the 'inherent necessities' of the situation." 448 U.S. at 676 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)).

40. Indeed, while never explicitly repudiating the constitutional requirement for an "intelligible principle" or "legislative standards," the Court has been able to avoid it by alternately holding that broad delegations are permissible in long-regulated fields because courts have experience and precedents to rely on, *see, e.g., Fahey v. Mallonee*, 332 U.S. 245, 250 (1947), and also permissible in virgin areas of regulation because it is impracticable to require Congress to set precise standards where there is no experience at regulation, *see, e.g., FCC v. RCA Communications*, 346 U.S. 86, 94-96 (1953). *Cf. United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (holding that FCC had authority to regulate cable antennae television even though it did not exist at the time FCC enabling legislation was enacted).

41. J. FREEDMAN, *CRISIS AND LEGITIMACY* 78 (1978).

42. 357 U.S. 116 (1958).

involved, we will construe narrowly all delegated powers that curtail or dilute them."⁴³

While one can surely agree that the ability to travel with a passport should not hinge on administrative decisions unguided by any legislated standard, one still wonders what else is entitled to this higher level of protection against delegated power. *Kent v. Dulles*' formula of "activities or enjoyments, natural and often necessary to the well-being of an American citizen" could, on its face, include the ability to work, to carry on a profession, or to operate a business, but such a wide construction would subject most, if not all, regulatory legislation to this more stringent standard. *Kent v. Dulles* did not identify the rights to which the more stringent standard applies, and subsequent Court opinions have not provided enlightenment on the question.

Commentators have generally understood *Kent v. Dulles*' more stringent standard to apply to statutes involving "protected freedoms" as opposed to statutes that regulate property.⁴⁴ No opinion of the Court has attempted to justify applying a looser standard of delegation in the case of statutes that delegate the power to regulate property,⁴⁵ and I will argue that there may well be no principled justification for such a distinction.⁴⁶

The Court's failure to articulate and justify its approach is all the more apparent in cases where it has narrowed or struck down statutes on vagueness and other due process grounds rather than delegation. The invalidation of vague criminal statutes has been justified partly by concern for notice to the would-be defendant, but also by concern about the wide power delegated to unelected officials.⁴⁷ In *Hampton v. Mow Sun Wong*,⁴⁸ the Court cited "due process" as the reason to construe a statute narrowly and thereby strike down a Civil Service Commission regulation making resident aliens ineligible for many federal jobs.⁴⁹ Justice Rehnquist, in dissent, argued that the Court was using

43. 357 U.S. at 129.

44. See, e.g., B. SCHWARTZ, ADMINISTRATIVE LAW 47-48 (1976). In a concurring opinion, Justice Brennan wrote that "the numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake." *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring).

45. Justice Brennan's concurring opinion in *Robel* does attempt a justification. See notes 350-53 *infra* and accompanying text.

46. See notes 354-65 *infra* and accompanying text.

47. See, e.g., *Smith v. Goguen*, 415 U.S. 566, 575 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-70 (1972).

48. 426 U.S. 88 (1976).

49. 426 U.S. at 116. The Court's due process concern was that since Congress was the body that allowed the aliens to reside in the United States, it would be wrong for it to allow a lower level of government to decide to remove one of the advantages of such residency, eligibility for federal employment.

the phrase "due process" to obscure the application of a special standard as to delegation in that case, a charge which the Court did not address.⁵⁰

Whether or not a theory could be constructed to explain the Court's behavior in delegation, vagueness, and related cases, the Court itself has not articulated such a reasoned theory. The Court and many of its members have avoided explication of the delegation doctrine and the implicit definition of legislative power in recent decades. Not since 1948 has any opinion for the Court's majority even attempted to deal in a substantial manner with the delegation doctrine.⁵¹ A number of dissents and concurrences have forcefully argued one side or another of delegation issues,⁵² but the opinions for the Court have either avoided the issue altogether or treated it only in passing.⁵³ When an opinion for the Court has relied on delegation grounds in recent years, it has strained to frame the result in terms of statutory construction rather than unconstitutionality, thereby avoiding the full-scale treatment of the doctrine that a constitutional decision would require.⁵⁴

The Court's inattention to the delegation doctrine from the late 1940s through the 1960s is perhaps understandable because delegation appeared to be a dead issue. The Court had not declared any statute unconstitutional for improperly delegating power to a government body since *Panama Refining* and *Schechter*. A leading commentator flatly advised attorneys in 1958 that delegation claims were so far-fetched that making them would discredit one's other claims.⁵⁵ Jus-

50. 426 U.S. at 122 (Rehnquist, J., dissenting).

51. See *Lichter v. United States*, 334 U.S. 742, 774-78 (1948).

52. See, e.g., *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 545-48 (1981) (Rehnquist, J., dissenting); *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring); *California Bankers Assn. v. Shultz*, 416 U.S. 21, 91 (1974) (Brennan, J., dissenting); *McGautha v. California*, 402 U.S. 183, 271-87 (1971) (Brennan, J., concurring); *Arizona v. California*, 373 U.S. 546, 624-27 (1963) (Harlan, J., dissenting in part). For earlier discussions, see *H.P. Hood & Sons v. United States*, 307 U.S. 588, 603-08 (1939) (Roberts, J., dissenting); *United States v. Rock Royal Co-op.*, 307 U.S. 533, 582-83 (1939) (McReynolds & Butler, JJ., dissenting).

53. See, e.g., *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 541 n.75 (1981) (dismissing the delegation issue in a footnote as a matter of statutory interpretation); *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 645-46 (1980) (favoring narrow construction of statute to avoid delegation problems); *California Bankers Assn. v. Shultz*, 416 U.S. 21, 59 (1974) (noting only limited aspect of delegation issue but upholding it as "well established"); *McGautha v. California*, 402 U.S. 183, 196-208 (1971) (failing to mention delegation issue); *United States v. Robel*, 389 U.S. 258, 266-68 (1967) (invalidating statute on first amendment rather than delegation grounds); *Arizona v. California*, 373 U.S. 546 (1963) (failed to mention delegation issue).

54. See *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 645-46 (1980); *National Cable Television Assn. v. United States*, 415 U.S. 336, 341-43 (1974); *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

55. 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 75 (1st ed. 1958).

tice Marshall wrote in 1974 that the doctrine "has been virtually abandoned by the Court for all practical purposes" except where personal liberties are involved.⁵⁶

The lack of attention to delegation is also understandable in terms of the relatively slight division that the subject generated within the Court through the early 1960s. The Court acted with few if any dissents on the delegation grounds when it struck down the statutes in *Panama Refining* and *Schechter*⁵⁷ and later when it upheld statutes against challenges on delegation grounds.⁵⁸ The leading experts on administrative law, although concerned about vague statutory mandates, agreed that the answer was not in judicial invalidation of statutes, and instead urged that Congress write better laws⁵⁹ or argued that courts must force agencies that make rules to narrow their own discretion as a substitute for legislative specificity⁶⁰ or worried that perhaps nothing could be done.⁶¹

More recent events, however, have made the Court's inattention to its unsatisfactory doctrine less excusable. A growing number of Justices have voiced support for the application of the doctrine. Justices Harlan, Douglas and Stewart cited the delegation doctrine in a dissenting opinion in the 1963 case of *Arizona v. California*.⁶² In 1974 Justice Douglas wrote an opinion for the Court in *National Cable Television Association v. United States*⁶³ invoking delegation concerns to narrow a statute that would otherwise allegedly delegate the power to tax.⁶⁴ Justice Marshall wrote in dissent that this was the first decision

56. *Federal Power Commn. v. New England Power Co.*, 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring).

57. The *Schechter* decision was unanimous with only Justice Cardozo, joined by Justice Stone, filing a brief concurring opinion. 295 U.S. at 551-55. Cardozo was the lone dissenter in *Panama Refining*, 293 U.S. at 433-48. Significantly, he did not disagree with the Court's doctrinal assumptions, only with their application to the statute under review. See Note, *supra* note 8, at 277 n.93.

58. See, e.g., *Fahey v. Mallonee*, 332 U.S. 245 (1947) (no dissents); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946) (no dissents); *Yakus v. United States*, 321 U.S. 414 (1944) (one dissent on delegation issue); *Federal Power Commn. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (one dissent); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (one dissent). See generally Jaffe, *supra* note 8, at 577.

59. See H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 22, 163-73 (1962); Jaffe, *supra* note 12, at 1198.

60. See Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 725-30 (1969); Leventhal, *Principled Fairness and Regulatory Urgency*, 25 CASE W. RES. L. REV. 66, 70-75 (1974).

61. See Stewart, *supra* note 11, at 1672-73.

62. 373 U.S. 546, 625-26 (1963) (Harlan, J., dissenting in part).

63. 415 U.S. 336 (1974).

64. 415 U.S. at 342.

that had relied upon *Schechter* since 1936.⁶⁵ Finally, in 1981, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*⁶⁶ five members of the Court voted to overturn an action taken under the Occupational Safety and Health Act. Four of them reached this result by, *inter alia*, narrowly interpreting the Act to avoid unconstitutionally broad delegation.⁶⁷ The fifth, Justice Rehnquist, argued that the portion of the Act should in fact be struck down as unconstitutional,⁶⁸ a position with which Chief Justice Burger evidently agreed in a subsequent case.⁶⁹ For the first time since *Panama Refining* and *Schechter*, a majority of the court found delegation problems with a regulatory statute.⁷⁰

American Petroleum was apparently no aberration. In 1983, the Court handed down *Immigration and Naturalization Service v. Chadha*,⁷¹ which struck down the legislative veto provision in the immigration law on the theory that such provisions improperly delegate legislative power because they allow legislative action without use of the full legislative process involving both houses of Congress and the President.⁷² This rationale, Justice White correctly observed, is inconsistent with the Court's usual practice in delegation cases, which is to uphold law making outside the legislative process.⁷³ The majority attempted to distinguish its prohibition against delegating full legislative power to one or both houses of Congress from its willingness to uphold delegations to the executive or agencies, but was unconvincing.⁷⁴ Professor Tribe has concluded that the most plausible explanation of *Chadha* is as a transition to "a significant judicial tightening of the

65. 415 U.S. at 354 n.2 (Marshall, J., dissenting).

66. 448 U.S. 607 (1980).

67. 448 U.S. at 645-46. The opinion also made the argument that Congress would not have given the agency such broad powers without a clear statement. 448 U.S. at 645.

68. 448 U.S. at 671-88 (Rehnquist, J., concurring).

69. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., joined by Burger, C.J., dissenting).

70. This assessment excludes cases involving "protected freedoms" or personal rights. See notes 41-46 *supra* and accompanying text.

71. 462 U.S. 919 (1983).

72. 462 U.S. at 944-59. Senator DeConcini has proposed a constitutional amendment that would allow acts of Congress containing legislative veto provisions to be passed, effectively overruling *Chadha*. See S.J. Res. 135, 98th Cong., 1st Sess. (1983); see also DeConcini & Faucher, *The Legislative Veto: A Constitutional Amendment*, 21 HARV. J. ON LEGIS. 29 (1984). Hearings on the proposed amendment were begun by the Constitution Subcommittee on March 2, 1984. See [1983-84 Transfer Binder] 1 CONG. INDEX (CCH) 20,542 (Nov. 21, 1984).

73. *Chadha*, 462 U.S. at 985-87 (White, J., dissenting).

74. The majority argued that the agency was subject to judicial review to ensure compliance with a statute, citing *Yakus v. United States*, 321 U.S. 414, 425 (1944). *Chadha*, 462 U.S. at 953 n.16. However, this argument based on judicial review requires courts to act as legislators. See notes 89-116 *infra* and accompanying text.

limits within which Congress may entrust *anyone* with lawmaking power."⁷⁵

Advocating the use of the delegation doctrine can, moreover, hardly be thought the exclusive domain of the reactionary or the doctrinaire. Thinkers as diverse as Skelly Wright,⁷⁶ John Ely,⁷⁷ William Douglas,⁷⁸ and James Freedman⁷⁹ have expressed interest in its revival.⁸⁰ Most recently, Professors Peter Aranson, Ernest Gellhorn, and Glen Robinson called for the renewal of the doctrine in an article that concluded that "the idea of a change in constitutional rules governing legislative delegations has acquired a fresh dignity."⁸¹

Those who would reinvigorate the doctrine risk the charge of being result-oriented unless they can provide a test with logical coherence, substance, and constitutional underpinning. Some Justices express concern about economic regulation statutes that delegate broadly but seem not to be bothered by statutes that permit executive officials broad scope to arrest people for "contemptuous" use of the American flag⁸² or deny jobs to resident aliens.⁸³ Other Justices have exactly the opposite set of concerns.⁸⁴ Indeed, the dissenters in *American Petro-*

75. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 17 (1984) (emphasis in original).

76. See Wright, *supra* note 14, at 582.

77. See J. ELY, *supra* note 9, at 131-34.

78. See W. DOUGLAS, *supra* note 16, at 217.

79. See J. FREEDMAN, *supra* note 41, at 78-94.

80. For other calls for a renewed delegation doctrine, see T. LOWI, *supra* note 14, at 297-303; Koslow, *Standardless Administrative Adjudication*, 22 ADMIN. L. REV. 407 (1970); Note, *supra* note 8, at 314-20.

81. Aranson, Gellhorn & Robinson, *supra* note 9, at 67 (emphasis omitted).

82. See *Smith v. Goguen*, 415 U.S. 566 (1974).

83. Compare *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 545-48 (1981) (Rehnquist, J., dissenting), and *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 671-88 (1980), with *Hampton v. Mow Sun Wong*, 426 U.S. 88, 122 (1976) (Rehnquist, J., dissenting), and *Smith v. Goguen*, 415 U.S. 566, 591-604 (1974) (Rehnquist, J., dissenting). In *American Petroleum*, 448 U.S. at 676-82, Justice Rehnquist forcefully argued that the term "to the extent feasible" was a constitutionally inadequate standard for administrative implementation of occupational health and safety rules. Yet, he found no delegation problems with the Civil Service Commission's rule barring the federal employment of noncitizens even though the enabling statute contained no hint of a standard by which to assess such a rule. See *Mow Sun Wong*, 426 U.S. at 122-23. Justice Rehnquist was similarly unconcerned about the broad delegation of enforcement discretion at issue in *Goguen*. 415 U.S. at 591-604 (Rehnquist, J., dissenting).

84. Justices Marshall and Brennan have advocated a more vigorous application of the delegation doctrine to statutes "creating 'the danger of overbroad, unauthorized and arbitrary application of criminal sanctions in an area of [constitutionally] protected freedoms.'" *Federal Power Commn. v. New England Power Co.*, 415 U.S. 345, 353 (1974) (Marshall, J., concurring) (quoting *United States v. Robel*, 389 U.S. 258, 272 (1967) (Brennan, J., concurring) (language altered in original)). See also *Schall v. Martin*, 104 S. Ct. 2403, 2430-33 (1984) (Marshall, J., joined by Brennan and Stevens, JJ., dissenting) (deploring the unfettered discretion accorded family court judges in finding the "serious risk" of future criminal behavior that permits pretrial detention of juveniles); *McGautha v. California*, 402 U.S. 183, 271-87 (1971) (Brennan, J., joined by Douglas

leum objected that the delegation involved was in line with those that the Court had previously upheld and that the delegation doctrine was being used as a pretext to mask policy objections to the Act.⁸⁵ However, the dissenters, who set out to defend the practices of the Court from the late 1930s through the recent past, also are open to charges of pursuing a result-oriented, unprincipled jurisprudence; the incoherence of the "intelligible principle" test and the Court's invocation of a tougher test of improper delegation for some cases produces results but not principles.

B. *The Supreme Court's Failure to Fulfill the Doctrine's Purposes*

Despite the inadequacy of what the Court says about delegation, it nonetheless asserts that what it does in practice fulfills the doctrine's purposes.⁸⁶ The Court is wrong. As Justice Harlan stated:

and Marshall, JJ., dissenting) (deploring lack of standards for jury's decision to sentence prisoner to death as a violation of delegation doctrine).

They have, however, found considerably fewer delegation problems in statutes regulating economic interests. In *American Petroleum*, 448 U.S. at 717-18 n.30, Justice Marshall, in a dissenting opinion joined by Justices Brennan, White, and Blackmun, explicitly rejected Justice Rehnquist's position that the Occupational Safety and Health Act unconstitutionally delegated authority to the enforcement agency: "I am frankly puzzled as to why the [delegation] issue is thought to be of any relevance here." Justice Marshall concluded that "Congress ha[d] made 'the critical policy decisions'" Justice Rehnquist found lacking. 448 U.S. at 717-18. Similarly, Justices Marshall and Brennan found no delegation problems with the "fees" imposed by the FCC under the statute the majority narrowed by construction because of delegation concerns in *National Cable Television Assn. v. United States*, 415 U.S. 336, 352-54 (1974) (Marshall, J., joined by Brennan, J., dissenting).

85. See 448 U.S. 607, 717-18 n.30 (Marshall, J., dissenting). See also Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 Nw. U. L. Rev. 1064, 1065-74 (1981).

86. See *Yakus v. United States*, 321 U.S. 414, 424-26 (1944); see also *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (three-judge panel).

The use of delegation to strike down New Deal legislation in 1935, despite upholding amorphous statutes before and afterwards, gave rise to the suspicion that the doctrine was no more than a pretext invoked by courts to repeal legislation that they disliked. See Jaffe, *supra* note 8, at 573-74. See also *National Cable Television Assn. v. United States*, 415 U.S. 336, 360 (1974) (Marshall, J., dissenting) (suggesting that the majority occupied itself with purported delegation infirmities in order to narrow a statute it disfavored despite contrary legislative history). As Dean Ely has noted, the delegation doctrine has long been viewed as a device for striking down disfavored legislation, perhaps because of its contemporaneous use with the Court's substantive due process flirtations and its restrictive interpretation of the commerce power. J. ELY, *supra* note 9, at 132. He concluded, however, that this is "a case of death by association." *Id.* at 133.

Whatever the 1935 Court's motives, the doctrine was and is more than an artifact of the confrontation between the Court and the New Deal Administration. Many opinions from the early 1800s through 1935 stated a limit on delegation. See, e.g., *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested."); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) ("[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch. . . ."); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825) ("It will not be contended that Congress can delegate to the

The principle . . . serves two primary functions vital to preserving the separation of powers required by the Constitution. *First*, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.⁸⁷

Each of these two purposes — accountability and judicial review — has been prominently discussed in the delegation case law and literature.⁸⁸

Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”). These early statements seem an empty formality because they so often upheld amorphous legislation through artificial reasoning. This may have more to do with the legal style of the early part of the century than lack of real concern about the breadth of delegation. *See generally* A. SUTHERLAND, *THE LAW AT HARVARD* 174-75 (1967). It is necessary to point out artifice in legal reasoning, but better still to try “to appreciate the latent wisdom in many a prejudice and fiction.” Kessler, *Arthur Linton Corbin — A Tribute*, 64 *YALE L.J.* 164, 164 (1954).

It is often written that no statute fell on delegation grounds until 1935. *See, e.g.*, *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 985 (1983) (White, J., dissenting); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 51, 62 (1965); Jacoby, *Delegation of Powers and Judicial Review: A Study in Comparative Law*, 36 *COLUM. L. REV.* 871, 871-72 (1936); McGowan, *Congress, Court, and Control of Delegated Power*, 77 *COLUM. L. REV.* 1119, 1127 (1977); Schoenbrod, *supra* note 13, at 826 n.458; Note, *supra* note 8, at 275-76. At least one earlier case, however, *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), cited delegation concerns in the course of striking down a statute. The decision most prominently cited the fifth and sixth amendments, but delegation concerns were integral to the Court’s reasoning. *See* 255 U.S. at 87, 92. Only one of the Court’s major delegation opinions has cited *Cohen Grocery* in a delegation context. *See* *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947).

Whatever the early case law, leading jurists took the delegation doctrine seriously. Professor Freund wrote in 1928 that delegation is proper only “where there are no controverted issues of policy or of opinion.” E. FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* 218 (1928). The architects of the Rules Enabling Act, including Chief Justice Taft, were significantly concerned about improper delegation in drafting the Act’s language. *See* Burbank, *The Rules Enabling Act of 1934*, 130 *U. PA. L. REV.* 1015, 1073-75, 1106-07 (1982).

87. *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part) (emphasis in original) (footnote omitted).

88. Only recently have opinions explicitly appealed to accountability as a fundamental purpose of the doctrine. *See* *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring); *McGautha v. California*, 402 U.S. 183, 272 (1971) (Brennan, J., dissenting); *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring). Previously, the Court implicitly invoked accountability concerns by reference to the separation of powers and its underlying rationale. *See* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). Numerous commentators have emphasized accountability in their calls for the doctrine’s reinvigoration. *See, e.g.*, Jaffe, *supra* note 8, at 359; Schwartz, *supra* note 10, at 445; Wright, *supra* note 14, at 583-85.

Judicial review has been a primary concern of the Court in delegation cases since 1944. *See* *Yakus v. United States*, 321 U.S. 414, 426 (1944). *See also* *American Petroleum*, 448 U.S. at 686 (Rehnquist, J., concurring); *Robel*, 389 U.S. at 275 (Brennan, J., concurring); *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947); *American Power & Light Co. v. SEC*, 329 U.S. 90, 106 (1946); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (three-judge panel). For commentaries on the relationship between judicial review and the delegation doctrine, see Leventhal, *supra* note 60, at 67-71; McGowan, *supra* note 86, at 1123-30; Wright, *supra* note 14, at 580-82; Note, *supra* note 8, at 269-96.

1. *Judicial Review*

The Supreme Court cases try to overcome the lack of a criterion to differentiate major issues from "details" by restating the question in terms of whether the statute provides an adequate basis for judicial review.⁸⁹ The statute is valid if it "sufficiently marks the field within which the Administrator is to act so that it may be known by a reviewing court whether he has kept within it in compliance with the legislative will."⁹⁰ A statute that fails to make key choices reflects little in the way of legislative will and so will allow a wide range of "lawful" agency activity. For delegation not to undercut judicial review, the Court must require statutes to make the important policy choices — that is, require Congress to exercise the legislative power itself.

The Court has nonetheless long upheld statutes that authorize officials to promulgate rules of conduct, where the chief statutory constraint on those rules is the admonition to achieve a multiplicity of conflicting policy goals without instructions about how the conflicts in goals are to be reconciled.⁹¹ Such statutes leave the pivotal policy choices to administrators because the legislation expresses generalized wishes without making the hard choices which the Constitution assigns to Congress.

Even if the statute provides that the goals shall be balanced, it will seldom tell how the balancing is to be done. Do such statutes set the stage for meaningful judicial review of the agency's choice of priorities among competing policy goals? So long as the agency follows statutory procedures, gives lip service to each goal and cloaks its decision with a modicum of rationality, the agency will be permitted wide latitude in assigning the relative weight that each goal should get.⁹² The statute provides no standard against which to measure the agency's

89. See, e.g., *Yakus v. United States*, 321 U.S. 414, 425-26 (1944); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (three-judge panel). See generally L. JAFFE, *supra* note 86, at 70-71; Note, *supra* note 8, at 281.

90. *Yakus v. United States*, 321 U.S. 414, 425 (1944).

91. Indeed, the Court has explicitly found that such statutes fulfill Congress' legislative function:

The fact that Congress accepts the administrative judgment as to the relative weights to be given to these [conflicting] factors in each case when that judgment in other respects is arrived at in the manner prescribed by the statute, instead of attempting the impossible by prescribing their relative weight in advance for all cases, is no more an abandonment of the legislative function than when Congress accepts and acts legislatively upon the advice of experts as to social or economic conditions without reexamining for itself the data upon which that advice is based.

Opp Cotton Mills v. Administrator, 312 U.S. 126, 145-46 (1941). Thus, not only is Congress able to delegate the resolution of policy conflicts to an administrative agency, the latter is free to alter its resolution with "each case." See notes 111-14 *infra* and accompanying text.

92. See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416-17 (1971).

weighing of the goals but rather assigns that task to the agency. It is hard for the court to supervise the agency's choice without intruding upon the agency's policy-making province.⁹³ For courts to assume the weighing of goals is no solution at all. In effect, this approach treats the problem of delegation to the agency by turning it into a delegation to the courts.

Judge Harold Leventhal argued that the courts could provide meaningful judicial review without intruding upon the agency's policy-making role:

Congress has been willing to delegate its legislative powers broadly — and courts have upheld such delegation — because there is court review to assure that the agency exercises the delegated power within statutory limits, and that it fleshes out objectives within those limits by an administration that is not irrational or discriminatory. Nor is that envisioned judicial role ephemeral, as [*Citizens to Preserve Overton Park v. Volpe*] makes clear.⁹⁴

Judge Leventhal overstates the extent to which judicial review controls administrative discretion in most cases. *Overton Park*⁹⁵ is an exception because the Court was able to construe the statute to give the delegate very little discretion to weigh conflicting goals. It involved the Secretary of Transportation's approval of the placement of a federal highway through a park under a statute that pursued the conflicting goals of park preservation and economy in highway construction. As Judge Leventhal noted, the normal grounds for reversal would be limited to the Secretary's exceeding statutory limits or exercising discretion within those limits irrationally or discriminatorily. The Court reversed the Secretary by construing the statute to make the goal of park preservation paramount: "the very existence of the statutes indicates that protection of parkland was to be given paramount importance. . . . [i]f the statutes are to have any meaning."⁹⁶ The Court did not consider the possibility that the Congress intended to avoid a choice between the conflicting goals — that it intended to punt —

93. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). See also *Yakus v. United States*, 321 U.S. 414, 449-52, 454-59 (1944) (Roberts, J., dissenting); *H.P. Hood & Sons v. United States*, 307 U.S. 588, 605-07 (1939) (Roberts, J., dissenting); *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 33-37 (D.C. Cir. 1972) (en banc), cert. denied, 426 U.S. 941 (1976); Koslow, *supra* note 80, at 407; McGowan, *supra* note 86, at 1125-26; Stewart, *supra* note 11, at 1696-97. But see Rodgers, *A Hard Look at Vermont Yankee: Environmental Law under Close Scrutiny*, 67 GEO. L.J. 699 (1979).

94. *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 68 (D.C. Cir. 1972) (en banc) (Leventhal, J., concurring) (footnote omitted) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)), cert. denied, 426 U.S. 941 (1976). See also Rodgers, *Judicial Review of Risk Assessments: The Role of Decision Theory in Unscrambling the Benzene Decision*, 11 ENVTL. L. 301, 317 (1981).

95. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

96. 401 U.S. at 412-13 (footnote omitted).

although at least one careful analysis of the statute argues that, when enacted, "the statutory language was understood as an ambiguous compromise between highway advocates and environmentalists."⁹⁷ Had the Court not read the statute to so confine the Secretary's discretion, the Court, in order to reverse, would have had to find that the Secretary had exercised that discretion irrationally or discriminatorily. Under this test, the Secretary would have been left with great latitude because there are usually many ways to balance conflicting goals that are neither irrational nor discriminatory as those words are used in defining the standard of judicial review.⁹⁸

The Court cannot apply its approach to *Overton Park* widely because most policy areas demand a balancing of goals rather than making one of the goals paramount. It is the statutes that leave an administrative agency to reconcile conflicting goals that raise delegation concerns. In such cases judicial review is least potent.

Courts have looked to administratively created standards to put meaning into such statutory schemes and thereby into judicial review. The Supreme Court used such an approach in the 1944 *Yakus* decision.⁹⁹ Professor Davis developed and extended it in his writings,¹⁰⁰ and Judge Leventhal relied on *Yakus* and Professor Davis in the leading modern case, *Amalgamated Meat Cutters v. Connally*.¹⁰¹ The Economic Stabilization Act of 1970 at issue in *Amalgamated Meat Cutters* authorized the President "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries."¹⁰² The goals were to reduce inflation while avoiding the inequities, shortages, and other problems usually generated by price controls.¹⁰³ The Act was a classic case of Congress leaving it to the delegate to balance conflicting goals. As Judge Leventhal wrote: "Congress was acting in a setting where all were agreed on the need to control inflation but opinion was sharply divided on the optimum measures for the Government to use."¹⁰⁴ Judge Leventhal did try to point to an instance where the 1970 Act was "precise in its limita-

97. R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 679 (1978) (footnote omitted).

98. See Stewart, *supra* note 11, at 1676-88.

99. *Yakus v. United States*, 321 U.S. 414, 426 (1944); see also *Fahey v. Mallonee*, 332 U.S. 245 (1947).

100. See 1 K. DAVIS, *supra* note 8, at 206-16; Davis, *supra* note 60, at 725-30; see also Jaffe, *supra* note 8, at 580.

101. 337 F. Supp. 737 (D.D.C. 1971). Judge Leventhal, a circuit judge on the Circuit Court of Appeals for the D.C. Circuit, was sitting by designation on a three-judge district court panel.

102. 337 F. Supp. at 764.

103. 337 F. Supp. at 749-52; see also 337 F. Supp. at 764-72 (selected legislative history).

104. 337 F. Supp. at 750.

tions"¹⁰⁵ on the Executive's power, but noted in an article published after the opinion that this instance was "academic."¹⁰⁶ He ultimately sought to find the standards that would set the stage for judicial review in administrative practice — both the "common lore"¹⁰⁷ of price control policy developed in wartime and the standards that the President was expected to promulgate under the 1970 Act.¹⁰⁸ But, as Judge Leventhal himself noted, the Executive is not bound by action under earlier statutes¹⁰⁹ and can amend the rules that it adopts under the current law. It is true that such amendments would be subject to judicial review, but it is far easier for an administrator to change the way discretion is exercised than the way that a statute is interpreted.¹¹⁰

The Court has made clear in two recent cases that an agency has considerable scope to change the policy that it adopts under delegated power. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*¹¹¹ overturned a change in policy, but stated that a court must allow a change if it is rationally related to the goals of the statute,¹¹² a test that an agency can ordinarily satisfy. Subsequently, *Chevron, U.S.A. v. Natural Resources Defense Council* affirmed an agency's change of policy.¹¹³ The Court stated that "an agency to which Congress has delegated policy-making responsibilities

105. 337 F. Supp. at 747.

106. Leventhal, *supra* note 60, at 68.

107. *Amalgamated Meat Cutters*, 337 F. Supp. at 748.

108. *See* 337 F. Supp. at 756-59.

109. *See* 337 F. Supp. at 748.

110. *See* notes 270-73 *infra* and accompanying text.

111. 463 U.S. 29 (1983).

112. *See* 463 U.S. at 42-44. The Agency, during the Carter Administration, had issued a rule requiring auto manufacturers to install passive safety devices such as air bags or automatic seatbelts. The Agency later effectively repealed the rule, apparently because of the Reagan Administration's different priorities. 463 U.S. at 59 (Rehnquist, J., dissenting in part). The Agency, however, gave other reasons for its action: it said that manufacturers would install automatic seatbelts instead of air bags and that the public would disarm the automatic seatbelts. 463 U.S. at 38-39. The Court reversed the Agency's action. Nonetheless, the case illustrates just how tenuous judicial control of Agency priorities is. The Court made clear that the Agency could amend its rules for any reason rationally related to the act's goals. 463 U.S. at 46-48. It also made clear that it was the Agency's province to weigh the act's competing goals in making amendments. 463 U.S. at 51-57. Indeed, under previous administrations, the Agency had frequently amended the rules, reflecting a wide range of possible rules. 463 U.S. at 34-38. The Reagan Administration's amendment might well have passed judicial review if the Agency had done a better job of lawyering. The first stated ground for reversal was that the Agency gave no reason whatsoever for not requiring manufacturers to install airbags in all cars, even though the auto manufacturers had arguments as to why such a requirement would not be feasible. 463 U.S. at 46-50.

Some of the Court's dicta could be read as creating a strong presumption of validity for existing regulations, but Professor Smythe argues persuasively that it would be a mistake to use the dicta in this way. Smythe, *Judicial Review of Rule Recission*, 84 COLUM. L. REV. 1928, 1934-35 (1984). The Supreme Court, moreover, has not done so. *See* text at notes 113-14 *infra*.

113. 104 S. Ct. 2778 (1984).

may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments."¹¹⁴ In short, previously announced agency rules control future agency action only to a limited degree and do not shield those rules from shifts in the political winds.

Judge Leventhal's notion that the judicial review makes Congress "willing to delegate its legislative powers broadly"¹¹⁵ suggests that Congress is giving up its own power out of generous concern for the public's good. Often, however, Congress is simply anxious to avoid responsibility¹¹⁶ and is giving away not something of its own, but rather the public's right to hold its representatives accountable. Once sacrificed, this right cannot be retrieved through the exercise of judicial review.

2. Accountability

Legislators are classically understood to be held accountable by standing for reelection based upon their votes on legislation. The approach to delegation developed in *Yakus*¹¹⁷ and *Amalgamated Meat Cutters*¹¹⁸ as well as in Professor Davis' writing¹¹⁹ clashes with this notion of accountability because the legislature could let the delegate choose, in the first instance, how to balance conflicting goals. As John Ely said:

[T]he common case of nonaccountability involves not a situation where the legislature has drawn a distinction whose range of [goals] won't be readily apparent, but rather a situation where the legislature (in large measure precisely in order to escape accountability) has refused to draw the legally operative distinctions, leaving that chore to others who are not politically accountable.¹²⁰

Among those who would uphold statutes that establish goals and leave administrators to establish rules, there are two views as to accountability. Professor Davis seems ready to jettison accountability as

114. 104 S. Ct. at 2793.

115. *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 68 (D.C. Cir. 1972) (Leventhal, J., concurring), *cert. denied*, 426 U.S. 941 (1976).

116. See Fleishman & Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS., Summer 1976, at 1, 25-31 (discussing the Economic Stabilization Act, which was at issue in *Amalgamated Meat Cutters*); Schoenbrod, *supra* note 13, at 756-66 (discussing the Clean Air Act, which was at issue in *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1972), *cert. denied*, 426 U.S. 941 (1976)).

117. *Yakus v. United States*, 321 U.S. 414, 426 (1944). See also *Fahey v. Mallonee*, 332 U.S. 245 (1947).

118. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (three-judge panel). See text at notes 101-10 *supra*.

119. See 1 K. DAVIS, *supra* note 8, at 206-16.

120. J. ELY, *supra* note 9, at 130-31.

one of the delegation doctrine's fundamental purposes and to direct all energies to the control of administrative discretion.¹²¹ The other view is that accountability is still maintained. The notion, articulated by the Court in *Yakus*¹²² and by Judge Leventhal in *Amalgamated Meat Cutters*,¹²³ among others,¹²⁴ is that courts will force administrators to articulate administrative standards through regulations that will then be subjected to legislative scrutiny, and which the legislature can reverse by amending the statutes or bringing pressure to bear in oversight hearings or the appropriation process. In this view, we should not be tied to classical notions of accountability, based upon legislatures expressing choices in authorizing legislation, but rather should look more broadly at the accountability produced by the legislative-administrative-judicial system as a whole.¹²⁵

This argument raises two troublesome questions: first, whether as a matter of fact, the new approach provides equivalent accountability and, second and more importantly, whether as a matter of theory it is compatible with the constitutional text.

As for the factual question, there are certain obvious differences from the classical model. Congress is not initiating the law-making process, subject to a possible presidential veto, but asking the executive branch or independent agencies to make rules subject to formal or *de facto* legislative veto. The veto may occur through an amendment to the statute or informal pressure from a congressional committee or even an influential member of Congress. In the classical model, law can be made only by congressional action. In the alternative model, administratively promulgated law can be sustained by congressional *inaction* or modified by informal action by a committee or individual member. Thus, under the alternative model, controversial choices can be made without votes being taken and responsibility being publicly assumed by members of Congress. The making of choices becomes less visible and responsibility more attenuated. Without idealizing accountability under the classical model, it is safe to say that the alternative model makes matters worse. Citizens interested in how their representative has acted on hard issues cannot necessarily get the answer from voting records, but instead must search out what happened

121. See Davis, *supra* note 60, at 713.

122. *Yakus v. United States*, 321 U.S. 414, 423-27 (1944).

123. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759 (D.D.C. 1971) (three-judge panel).

124. *E.g.*, *McGautha v. California*, 402 U.S. 183, 271-87 (1971) (Brennan, J., dissenting).

125. See note 100 *supra*. See also Jaffe, *supra* note 8, at 360; Stewart, *supra* note 11, at 1672-73.

administratively under delegations that the legislature authorized. Even if members of the public could and would penetrate the complexity and stultifying aridity of the *Federal Register* and other agency publications, the member can deny responsibility by claiming personal disagreement with what was done.

In addition, there are a number of practical barriers to the fresh reexamination of delegated issues once the administrative process has begun to chew upon them. Agencies delegated issues too hot for Congress to handle often have even less political capacity than Congress to make the necessary choices.¹²⁶ The hope that administrative action will crystallize an issue for subsequent legislative action may prove unavailing because the agency has also attempted to avoid the issue or to resolve it at a low level of visibility.¹²⁷ Even if there is some administrative action, Congress may fail to disapprove it even if most members would be so inclined because of the considerable inertia in the legislative process.¹²⁸

Legislative inertia is made the more binding by what some political scientists call the "iron triangle,"¹²⁹ composed of the agency, congressional committee staffs, and interest-group lobbyists. The iron triangle represents the most powerful forces at work in the administrative process, those with unique access to information and ability to control the decision-making agenda. The result of that process is likely to have something to offer to the institutional interests of each side of the triangle and each is likely to begin to count on that administrative result in making plans for the future. The iron triangle tends to resist legislative revisions that serve broader public interests.

More significant than whether the alternative model can provide some substitute form of accountability, however, is whether any such substitute is compatible with the framers' plan expressed in the Constitution. It was just such an incompatibility that underlay the Court's rejection in *Chadha*¹³⁰ of the argument that the legislative veto was superior to the alternatives on grounds of practicality and accountability.¹³¹ The Court stated in *Chadha* that "[t]o allow Congress to evade the strictures of the Constitution and in effect enact Executive propos-

126. See Jaffe, *supra* note 12, at 1188-91.

127. See Schoenbrod, *supra* note 13, at 766-76.

128. See Fleishman & Aufses, *supra* note 116, at 16-17.

129. See, e.g., Herbers, *Government Power Poised for a Grand Realignment*, N.Y. Times, June 26, 1983, § 4, at 1, col. 4.

130. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

131. 462 U.S. at 958-59. Such an analysis would also effectively undercut the extreme position as to accountability taken by Professor Davis. See text at note 121 *supra*.

als into law by mere silence cannot be squared with Art. I."¹³²

The exercise of the legislative power thus requires affirmative action on the part of Congress. The Court's current approach purports to square agency lawmaking with accountability by asserting that Congress had a chance to object, but remained silent. Under *Chadha*, this is an impermissible breach of article I because it undermines the electoral accountability which the Constitution places on Congress as a protection of the people against their government. Even if the alternative model may provide some means of accountability and even if it is more practical than that set out in the Constitution, it is not for the legislature or the courts to ignore the constitutional command for the sake of convenience.

There is no support in the Constitution or decisions of [the Supreme] Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. . . . With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.¹³³

The Court's current application of the delegation doctrine, by way of an amorphous and ultimately meaningless definition of legislative power, undercuts the accountability the Constitution seeks to protect.

C. *The Lack of a Sufficient Alternative to the Court's Delegation Test*

The opinions in *American Petroleum* that invoke delegation do little more than cite old rubrics.¹³⁴ Judge Wright calls for a case-by-case approach while frankly admitting that he is not sure what principles would guide the case law.¹³⁵ Dean Ely calls for a return to *Panama Refining* and *Schechter* without recognizing the deficiencies in doctrine that they share with the rest of the case law.¹³⁶ Some commentators have tried to state a standard for the quantity of power that might be delegated but have only embellished the existing test.¹³⁷

132. *Chadha*, 462 U.S. at 958 n.22.

133. *Chadha*, 462 U.S. at 959.

134. *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 646 (opinion of the Court), 672-76 (Rehnquist, J., concurring), 717-18 n.30 (Marshall, J., dissenting) (1980). See also note 39 *supra*.

135. See Wright, *supra* note 14, at 586-87.

136. See J. ELY, *supra* note 9, at 131-34; see also T. LOWI, *supra* note 14, at 300-01.

137. See, e.g., Merrill, *Standards — A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469, 473 (1968) (proposes employment of "doctrine of standards" which amounts only to description of current judicial rhetoric); Note, *supra* note 8, at 314-20 (proposes a review-

There have been, however, major efforts to state a test of delegation in fundamentally new terms by Davis,¹³⁸ Barber,¹³⁹ and Freedman.¹⁴⁰ Professor Davis suggests that the Court look not just at the standards in the statute but also at the regulations and procedures of the agency to see whether the situation as a whole adequately limits the discretion of the delegates.¹⁴¹ Davis' proposal explicitly seeks to control prosecutorial discretion,¹⁴² which has previously not been an object of the delegation doctrine. Whether or not that has merit, his scheme, as pointed out above, does not serve the purposes of the delegation doctrine.¹⁴³

Professor Barber writes, "let us ask whether Congress has authorized rule making by others out of irresolution and in order to evade its responsibilities or as a means to exercising its power of choice among competing policies."¹⁴⁴ At this level of generalization, Barber is not providing a test but rather stating some plausible objectives that a test should try to achieve. Barber would have courts look at the legislative history to "seek statements of the salient issues at the time of enactment in order to determine whether the statutory standards express a clear choice between the alternatives Congress faced."¹⁴⁵ Barber's test would require courts to distinguish "salient" from nonsalient issues. This distinction differs only in terminology from the unclear distinction under the "intelligible principle" test between major issues and details. Barber's test does require courts to define "legislative power" in order to decide whether Congress has failed to exercise that power or rather authorized another branch to do so on its behalf. That is the inquiry at the core of the test that I propose.¹⁴⁶ Finally, Barber's test would require the courts to decide whether Congress failed to decide between alternatives because it was evading responsibility or because it believed that another branch would be better placed to make it. He

ability test that is meaningless for the reasons stated at notes 24-31 *supra* and accompanying text).

138. See 1 K. DAVIS, *supra* note 8, at 206-16; see also Davis, *supra* note 60, at 725-30.

139. See S. BARBER, *supra* note 22, at 36-51.

140. See J. FREEDMAN, *supra* note 41, at 78-94; see also Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307 (1976).

141. See 1 K. DAVIS, *supra* note 8, at 206-16. In many ways Davis' approach is an extension, albeit more forceful and explicit, of the Court's emphasis on judicial reviewability of administrative actions as a means of containing otherwise overbroad delegations. See, e.g., *Fahey v. Malloree*, 332 U.S. 245, 250 (1947); *Yakus v. United States*, 321 U.S. 414, 425 (1944).

142. See 1 K. DAVIS, *supra* note 8, at 213-15.

143. See notes 99-116 *supra* and accompanying text.

144. S. BARBER, *supra* note 22, at 41.

145. *Id.* at 44.

146. See Part II *infra*.

does not adequately explain how courts might go about divining something so subjective as legislative motive.¹⁴⁷

Professor Freedman suggests that the quantity of power that may be delegated should vary with the type of power that Congress is exercising.¹⁴⁸ For instance, he sees greater need to limit delegation when Congress acts pursuant to its impeachment or taxing powers than its commerce power.¹⁴⁹ Freedman does not, however, say what test of delegation should be applied when Congress regulates or exercises other workaday powers, except to indicate that delegation should be more closely scrutinized when done under some clauses of the Constitution than others. Still, Professor Freedman has taken an important step — a step away from the quantitative approach of the “intelligible principle” test, which asks whether Congress has said enough about its goals and resolved the conflicts that are important enough to require “legislative” action.

This Article suggests a test of delegation geared to the *quality* of power conferred upon the Executive rather than its *quantity*. By the quality of power I am not referring, as is Freedman, to the clause of the Constitution pursuant to which Congress legislates but rather to the type of power that the Executive would exercise. Legislation under the commerce clause, for instance, might give the Executive the power to establish rules of conduct or the power to interpret them. The former would, for me, constitute legislative power; the latter would not.

Professors Aranson, Gellhorn, and Robinson call for constraints upon “delegating legislative authority,”¹⁵⁰ with the emphasis in the original. The purpose of their valuable article was not to provide a test of improper delegation and they do not say how they would distinguish legislative from other powers. It is this delicate problem that

147. Barber does purport to deal with the motive issue, S. BARBER, *supra* note 22, at 47, but his discussion focuses on the propriety of courts using legislative history along with the actual text of statutes to aid in interpretation. The courts have sometimes held legislation unconstitutional where improper motives were patent, such as the recent case dealing with a New Jersey statute that sought to avoid the prohibition on school prayer by requiring a period for silent reflection. See *May v. Cooperman*, 572 F. Supp. 1561 (D.N.J. 1983). However, motives are likely to be less clear in the regulatory area, especially if the Court should happen to adopt Barber's test and so give Congress an incentive to indulge in vague generalizations or disingenuousness on the issue of motive. It is useful here to distinguish between motive and purpose. The motive behind a congressional action is the subjective individual considerations which induced the legislature to adopt a statute. These may be and usually are multifarious and difficult to ascertain. The purpose of a statute is the regulatory goals it seeks to achieve. These are likely to be evident from the statute itself though they may conflict.

148. See J. FREEDMAN, *supra* note 41, at 85-88.

149. *Id.*

150. Aranson, Gellhorn & Robinson, *supra* note 9, at 65 (emphasis in original).

this Article addresses.¹⁵¹

II. A PROPOSED TEST OF IMPROPER DELEGATION

A. *The Qualitative Approach*

Supreme Court cases from much of the nineteenth century¹⁵² and into the first decades of the twentieth¹⁵³ held that Congress may not delegate "legislative Powers." This would seem to comport with the plain language of the Constitution, which provides in article I, section 1: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."¹⁵⁴ At least since the 1932 case of *Norwegian Nitrogen Co. v. United States*,¹⁵⁵ however, the Court has said that Congress may delegate "legislative Powers" within limits. *Panama Refining*,¹⁵⁶ *Schechter*,¹⁵⁷ and the recent opinions of Justice Rehnquist¹⁵⁸ also state that delegation of legislative powers is limited but not prohibited.

Modern commentators make fun of the early cases that purported to forbid delegation of *any* legislative power.¹⁵⁹ As Professor Jaffe put it, "every statute is a delegation of lawmaking power to the agency

151. As this Article was being edited for publication, Professors Wallace Rudolph and Janet Rudolph published an article that also bottoms the delegation doctrine on the concept of legislative power. Rudolph & Rudolph, *Free Government and the Doctrine of Non-Delegation of Legislative Power*, 19 NEW ENG. L. REV. 551 (1984). However, their concept of "legislative power" embraces the troublesome "intelligible principle" test. They distinguish, as I do, between statutes that authorize regulation of conduct and statutes that authorize the management of public property and the conduct of foreign affairs, but they see the Court as having adhered to these distinctions. *Id.* at 563-69. In my view, however, the Court has overlooked these distinctions frequently. See Part II. B. *infra*.

152. See, e.g., *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.").

153. See, e.g., *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) ("That the legislative power of Congress cannot be delegated is, of course, clear."). See generally 1 K. DAVIS, *supra* note 8, at 150-51; Note, *supra* note 8, at 261-66.

154. U.S. CONST. art. I, § 1.

155. 288 U.S. 294, 305 (1933) ("What is done by . . . the President . . . is in substance a delegation, though a permissible one, of the legislative process."). See also *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."). It is noteworthy that *Shreveport Grain*, decided in the same term as *Norwegian Nitrogen*, seemed to say precisely the opposite. See note 153 *supra*.

156. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935).

157. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935).

158. See note 39 *supra* and accompanying text.

159. See, e.g., 1 K. DAVIS, *supra* note 8, at 150-51; Jaffe, *supra* note 8, at 567; Note, *supra* note 8, at 261-67.

appointed to enforce it.”¹⁶⁰ On this analysis, that is so both because the legislature may deliberately refuse to make choices or, even if the legislature tries to settle the outstanding issues, “[l]anguage and experience alike can never be so divinely comprehensive as to make clear provision for all future cases.”¹⁶¹ Implicit in this position are two assumptions which Professor Jaffe does not discuss: first, that it is not possible to distinguish the interpretation that statutes inevitably need from the discretion to make policy; and second, that discretion conferred by a statute involves legislative rather than executive or judicial power. These assumptions are open to question. Take, for example, a criminal code that attempts to restate the elements of common law crimes, such as theft. Are we prepared to say that judicial decisions to resolve ambiguities in that statute are policy making rather than interpretation? Are we also prepared to say that the exercise of prosecutorial discretion not to indict a given suspect is an exercise of legislative rather than executive power?

Although Friedrich Hayek declines to argue against delegation, his writings have suggested to me a way of distinguishing legislative from executive or judicial powers.¹⁶² Hayek argues that, in regulating the private sector, a government that seeks to preserve liberty should issue general rules of conduct rather than empower itself to issue *ad hoc* commands in furtherance of governmental goals. Hayek recognizes that these rules would require application and interpretation,¹⁶³ essentially executive and judicial functions. Hayek also sees no clash with the concept of liberty if government organizes public enterprises, such as the management of public property or national defense, through *ad*

160. Jaffe, *supra* note 8, at 360. See also J. FREEDMAN, *supra* note 41, at 79. Professor Jaffe's view that every statute necessarily delegates legislative power suggests an approach akin to the "intelligible principle" test that focuses on the quantity of power conferred rather than its quality. This approach has proved judicially unmanageable and incapable of fulfilling the delegation doctrine's purposes. See notes 24-85 *supra* and accompanying text.

161. Jaffe, *supra* note 8, at 361 (footnote omitted).

162. See F. HAYEK, *LAW, LEGISLATION AND LIBERTY* (3 vols., 1973, 1976 & 1979) [hereinafter cited as F. HAYEK, *LAW*]. Hayek does not argue that it must be the national legislature rather than agencies or local governments that must issue the general rules; he makes explicit that his argument is not against delegation. F. HAYEK, *THE CONSTITUTION OF LIBERTY* 211-12 (1960) [hereinafter cited as F. HAYEK, *LIBERTY*]. However, his role and perspective are different from the Court's. He is trying to formulate what for him would be an ideal constitution, not interpreting the United States Constitution. His mind, as he acknowledged, is attuned more to Austrian and British institutions than to those in the United States, where provincial and local governments are not delegates of the national legislature. *Id.* at viii. In addition, he is an economist and political philosopher rather than a lawyer. In any event, some of his conceptual framework has proved useful to me and, in return, the test of delegation proposed here would promote Hayek's purpose of governance by general rules.

163. 1 F. HAYEK, *LAW*, *supra* note 162, at 94-123; 2 F. HAYEK, *LAW*, *supra* note 162, at 31-61.

hoc commands rather than rules.¹⁶⁴

This Article argues that Congress may not confer power which is "legislative" in character. However, legislative power includes neither the interpretation or application of a rule nor the exercise of powers that are "executive" in character, including management of public enterprises.

Prohibiting all delegations of legislative power might be criticized as old-fashioned, formalistic, or rigid.¹⁶⁵ While jurists may once have thought that the term "legislative Powers" was self-defining, that is no longer true. It will be shown in the next section that a meaning can be given to "legislative Powers" that has a root in precedent and corresponds roughly to the purposes of the delegation doctrine. The Court's current approach to delegation attempts a more finely tuned analysis, purporting to allow those delegations of legislative powers that do not offend the delegation doctrine's purposes, while the approach proposed here may stop some such legislation. This rigidity is appropriate. The Court is *interpreting* a constitution rather than writing one. The language of article I, "All legislative Powers herein granted shall be vested in a Congress of the United States,"¹⁶⁶ suggests a bar on the delegation of any legislative power; it is hard to see in this clause a textual basis for the delegation of some legislative power but not all.¹⁶⁷ Treating the language as a license for the Court to balance the purposes or *goals* of the delegation doctrine rather than as a *rule* against the delegation of legislative power puts the courts in a legislative role, as the Supreme Court's inability to articulate a consistent rationale for its results suggests. In any event, the Court's approach, supposedly geared to the doctrine's purposes, has failed to serve those purposes.

Finally, the proposed test is doctrinally consistent with recent Supreme Court decisions in delegation and related areas while the current test is not. The opening sentence of article I was read literally in the recent *Chadha* decision invalidating the legislative veto as a delegation of legislative authority.¹⁶⁸ The analogous opening sentence of article III — "The judicial Power of the United States, shall be vested

164. 1 F. HAYEK, *LAW*, *supra* note 162, at 124-44.

165. *See, e.g., Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984).

166. U.S. CONST. art. I, § 1.

167. *See* Stewart, *supra* note 11, at 1672-73 (questioning textual basis for current doctrine). *See also* 1 K. DAVIS, *supra* note 8, at 157-59 (discussing problematic intent of Framers concerning delegations of legislative power).

168. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 945-46 (1983).

in one supreme Court, and in such inferior Courts"¹⁶⁹ — was given a similarly strict reading in *Northern Pipeline Construction Co. v. Marathon Pipe Line Construction Co.*,¹⁷⁰ invalidating a statute giving article III powers to article I bankruptcy courts. In both *Chadha* and *Northern Pipeline*, the opinions refused to balance separation of powers concerns against expediency,¹⁷¹ the factor at the root of the Court's current quantitative approach to delegation. The qualitative approach harmonizes with separation of powers precedents which generally rest upon a distinction between legislative, executive, and judicial powers.¹⁷² The quantitative approach, because it pays little attention to the kind of power that a statute confers, is out of step and confusing to all concerned.

B. *A Proposed Definition of Legislative Power*

1. *Rules of Private Conduct: Rules Statutes Versus Goals Statutes*

Promulgating rules of private conduct is a legislative power, while the interpretation of statutes is ordinarily understood to be an exercise of judicial or executive power.¹⁷³ Some statutes, however, call upon officials to *make* rules of private conduct rather than interpret them. In administrative law, for instance, we speak of agencies issuing legislative as well as interpretive rules.¹⁷⁴ I wish first to propose a way to distinguish the statutes that call for rule making from those that require interpretation and then to discuss whether the distinction is a meaningful one.

169. U.S. CONST. art. III, § 1.

170. 458 U.S. 50, 64-65 (1982) (plurality opinion). This case has been criticized as embodying too strict a view of separation of powers. See Strauss, *supra* note 165, at 629-33. Thomas v. Union Carbide Agricultural Prods. Co., 53 U.S.L.W. 5057 (U.S. July 1, 1985) may involve some backtracking from *Northern Pipeline*.

171. *Chadha*, 462 U.S. at 944-45; *Northern Pipeline*, 458 U.S. at 73.

172. See, e.g., *Chadha*, 462 U.S. 929 (1983); *Northern Pipeline*, 458 U.S. 50 (1982); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring).

173. The judiciary obviously is called upon to interpret statutes in dealing with cases while the executive needs to do so in enforcing or administering the statutes. Congress may also assign the interpretation of some statutes to article I tribunals. See *Crowell v. Benson*, 285 U.S. 22, 51-52 (1932).

174. Judge Leventhal emphasized this distinction in an early case considering the validity of the legislative veto:

One's view of the one-house veto issue may be affected . . . if it should develop that Congress itself distinguished between regulations that are "interpretive," and therefore more aligned with the responsibility of the executive branch, and regulations that are "legislative," that implement or carry forward a statutory mandate in ways not specified by the statute, and with respect to which a more substantial congressional role might be proper. *Clark v. Valeo*, 559 F.2d 642, 659 (D.C. Cir.) (Leventhal, J., concurring) (footnote omitted), *aff'd. sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

I have suggested elsewhere a distinction between what I call "rules statutes" and "goals statutes."¹⁷⁵ Rules statutes state rules demarcating permissible from impermissible conduct; the job of deciding what these rules mean in particular situations is interpretation. Goals statutes state goals, which usually conflict, and delegate the job of reconciling any such conflicts to others who are entrusted with promulgating the rules of conduct necessary to achieve those goals. Goals statutes delegate legislative power.

The rules statute/goals statute distinction can be illustrated as follows. Imagine a national statute that limits air pollution from any power plant to a certain rate of emission. It would be a rules statute because it demarcates permissible from impermissible conduct. Congress is telling the private parties what they may or may not do. In contrast, a statute that empowers an agency to set controls on power plants in order to reduce the total of emissions from all power plants to a certain level would be a goals statute because it does not specify a rule of conduct for plants but rather provides only a goal, leaving to the delegate the balancing of interests necessary for determining how the burden of achieving that goal would be allocated. In this instance the delegate would be deciding how to circumscribe the private parties' conduct.

As another example, imagine a statute that establishes a tax at a given schedule of rates. It would be a rules statute because it provides a rule of conduct — pay the taxes at the rates specified. In contrast, imagine a statute that empowers the Commissioner of Internal Revenue to raise a certain amount of money by imposing taxes as necessary to achieve that goal. This would plainly be a goals statute.

In both examples the goals statutes have relatively simple, specific goals, but create discretion in allocating the burden necessary to achieve them. They would still be goals statutes if the goals were broadened to include not just reducing pollution a certain amount or raising certain revenues, but also promoting equity, stimulating growth industries, and other less specific goals.

The rules statutes also have goals; they may in fact have precisely the same goals as the goals statutes. But the goals in a rules statute are not the legislative act, but rather the purpose of that act, as expressed perhaps in either a preambulatory purposes section or in legislative history. In contrast, the goals in a goals statute are not merely the purposes of the legislative act but are the essence of the legislative act commanding the delegate to achieve the goals.

175. See Schoenbrod, *supra* note 13, at 783-89.

A rules statute requires the legislature to assume more responsibility and hence to be more accountable for the bearing of that responsibility than does a goals statute. In a rules statute, the legislature allocates rights and duties in the very course of indicating the kind of conduct that is permitted or not permitted. In a goals statute, the legislature does not go that far; it indicates legislative hopes and requires a delegate to allocate rights and duties corresponding to those hopes. Given the political nature of the legislative process, a goals statute is likely to express popular hopes that are inherently contradictory and leave the delegate with the unhappy job of dealing with the people's disappointments and conflicts. In a goals statute, the legislature therefore tends to do only half a job — to distribute benefits without taking responsibility for the costs. The bill for the benefits comes later and on the agency's letterhead. The agency gets the blame while Congress gets only the praise.

A goals statute empowers the agency to complete the job by making rules of conduct. As the Court stated in *Fletcher v. Peck*,¹⁷⁶ “[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.”¹⁷⁷

Holding goals statutes that would regulate commerce or tax to be improper delegations would serve the purposes of the delegation doctrine. Goals statutes frustrate judicial review and congressional electoral accountability. They enable legislators to escape the difficult, value-laden choices implicit in balancing competing policy goals and distributing rights and benefits between different groups in the population. It is theoretically possible for Congress to make hard choices in a goals statute. To do so, it would have to state not just goals, but also formulae that the delegate must use to decide how to deal with the conflicts among the goals and decide how the duties sufficient to achieve these goals should be distributed among the population. In the case of air pollution, for example, the legislation would have to state methods to weigh health goals against other goals and other methods to be used to distribute the clean-up burden among industries and within industries. But governance by such complicated formulae boggles the mind; it would exceed the ordinary capacity of science and government to deal with complexity.¹⁷⁸ Goals statutes also mask leg-

176. 10 U.S. (6 Cranch) 87 (1810). Justice Powell recently reasserted this point in his *Chadha* concurrence. 462 U.S. at 967 (Powell, J., concurring).

177. 10 U.S. (6 Cranch) at 136.

178. For a discussion of why such seemingly specific goals are unlikely to be productive in the air pollution field see Schoenbrod, *supra* note 13, at 762-63, 790-94, 798-803.

islators' actions from the public because they operate at the abstract level of purposes while rules statutes make the legislative decisions substantive and concrete by stating what people can or cannot do in the statute.

The rules statute/goals statute distinction suggested here is fundamentally different from the "intelligible principle" notion that has proved so unsatisfactory.¹⁷⁹ The rules statute/goals statute distinction is also different from a distinction between vague and specific standards.¹⁸⁰ A goals statute can be relatively specific in that a goal may be quite precise, *e.g.*, raise so much revenue, reduce power plant emissions by so many tons. At the same time a rule in a rules statute will always be general in the sense that it will require interpretation.¹⁸¹ The need for interpretation comes not just from the ambiguity of language but also from the need to read statutes in context.¹⁸² Indeed, a statute that outlawed "unreasonable" pollution could be considered a rules statute in a society with a clear understanding of what constituted unreasonable pollution which could provide a basis for interpretation.¹⁸³ Without the understanding, however, what was forbidden would be largely in the discretion of some executive or judicial official.

This analysis suggests the necessity of distinguishing rules that require interpretation from statements in the form of rules that in fact call for policy making. What marks a rule, in my view, is its statement of permissible versus impermissible conduct. Thus the statute that prohibited unreasonable pollution in a society where there were established customs as to pollution would qualify as a rule no less than a statute that limited pollution to given numeric quantities. In contrast, a statute that prohibited pollution that an agency deemed unreasonable where there were no established customs would not provide a rule, but would rather call upon the agency to do so. Defining "rule" in terms of the provision of a meaningful statement of proper or improper conduct fits the delegation doctrine's purposes since those purposes depend upon the voters' ability to understand what the legislation means with regard to their own conduct.

Legislated rules will require interpretation, which is not a mechan-

179. See notes 24-85 *supra* and accompanying text.

180. See T. LOWI, *supra* note 14, at 97-107.

181. See Dworkin, *Is Law a System of Rules?*, in *ESSAYS IN LEGAL PHILOSOPHY* 25, 52 (R. Summers ed. 1968); see also H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 156 (tent. ed. 1958).

182. H. HART & A. SACKS, *supra* note 181, at 1156-57, 1219, 1411, 1415-16.

183. Professor Jaffe, for example, noted that the ostensibly vague standard of inferior quality tea under review in *Buttfield v. Stranahan*, 192 U.S. 470, 494 (1904), was anchored in "the settled judgment of the trade." L. JAFFE, *supra* note 86, at 57.

ical process. But it differs in my view from policy making in that rule interpretation must defer to the value judgments explicit or implicit in the statute while policy making requires making value judgments. I recognize that some people hold that there is no difference between interpretation and policy making and that other people, who hold there is a difference, debate how to describe it.¹⁸⁴ Nonetheless, the

184. What, if anything, is the difference between the judgment required in interpretation and in policy making? Debate on this question has generated a large body of literature. See, e.g., authorities cited *infra*. See also Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). That scholars debate how to describe the difference does not mean that it does not exist. H.L.A. Hart steers a middle course between formalism and legal realism. H. HART, *THE CONCEPT OF LAW*, 121-50 (1961); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608 (1958). Formalism, viewing the interpretation of rules as purely deductive, is an error for Hart because it fails to take account of the "open texture" of law. H. HART, *supra*, at 122. Hart holds that rules cannot take account of all situations in advance because "we are men, not gods." *Id.* at 125. Hart also finds error in legal realism, because it views rules as nothing but pretenses covering up judges' exercise of policy-making power. The legal realist is "a disappointed absolutist; he has found that rules are not all they would be in a formalist's heaven . . . and . . . expresses his disappointment by the denial that there are, or can be, any rules." *Id.* at 135.

Hart illustrates his own approach, as distinguished from formalism and legal realism, by the example of a legal rule that "forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles?" Hart, *supra*, at 607. For Hart, the word "vehicle" must have some "core" meaning and a "penumbra" of debatable meanings. *Id.* This "penumbra" must not be ruled upon mechanically "but in the light of aims, purposes, and policies, though not necessarily in the light of anything we would call moral principles." *Id.* at 614. The formalist would err by looking at just the letter of the rule rather than the spirit. The legal realist would take neither the letter of the rule nor the purposes of its framers seriously, but would be guided by personal opinion.

Hart sees an inevitable tension between the letter and the spirit in rules interpretation. Or, in terminology of this Article, an interpreter of a rules statute would have to take account of the statute's goals in interpreting the words in which its rule is written. Concern for the spirit of the rule in interpretation would require reference to the rule's goal to define the meaning of the letter — for example to define the word "vehicle" in Professor Hart's example above. But even if the interpreter reads the letter in the light of the goal, the letter may fail to serve fully the goal or may forbid conduct that does not offend the goal. Assume that the purpose of prohibiting vehicles in the park was to control noise; no interpretation of the rule would allow punishment for playing a loud radio, yet a perfectly silent, full-sized electric car might be forbidden. For the interpreter to disregard the letter of the rule altogether would raise problems such as notice, with its due process implications, and separation of powers.

The tension between letter and spirit faced by the rule interpreter is distinct from the choice faced by the legislature between enacting a rules statute or a goals statute. The legislature could have passed a goals statute — for instance, authorizing the Park Commissioner to issue regulations as necessary to control noise in the parks. The Commissioner could then have dealt, as the need arose, with roller skates, silent cars, and loud radios. Hart, of course, understands that delegation is one way of dealing with the difficulty of drafting rules. H. HART, *supra*, at 127.

But Hart is also clear that the rule interpreter and the one delegated the power to make rules have different duties. At least, when the case is within the core meaning of the rule, the rule interpreter is bound to effect that core meaning. Hart, *supra*, at 612. But what about those penumbral cases where the rule's precise meaning is unclear? Ronald Dworkin contrasts two approaches to such hard cases. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058 (1975). In one, the rule interpreter engages in interstitial legislation. Dworkin seems to identify Hart with this approach. See Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 474, 477 (1977). According to this approach, hard cases turn the interpreter into a policy maker. Dworkin rejected this approach and embraced an alternative in which the interpreter would not have the broad, policy-making discretion associated with legis-

claim that there is a difference between interpretation and policy making is particularly plausible when a rules statute is at issue.

lating. See Dworkin, *supra*, at 1058-60. Under this approach, if the letter of the rule is unclear, the interpreter looks to its purposes and those of related rules. The interpreter uses the purposes to look backward for indicia of the kind of rule that the legislature would have intended to have applied to situations of the kind at hand, while a policy maker would look forward to potential consequences of alternative decisions to see what best serves the purposes.

Dworkin's approach supports the distinction drawn in this Article between legislating rules and interpreting rules. It is therefore necessary to look at some of the criticism Professor Dworkin's work has drawn to see if it undercuts the distinction between legislation and interpretation herein advanced. See, e.g., Soper, *supra*, and authorities cited therein. See also Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983).

One criticism of Dworkin's account of interpretation is that it is impossible to implement. See, e.g., Soper, *supra*, at 502-06. If so, the well-intentioned interpreter could not help but make policy. Dworkin's interpreter would have to deal not only with the letter of the rules and their goals, but also the probability that the goals would conflict and so lead the interpreter in different directions at once. Dworkin would have the interpreter deal with such conflicts in goals by gauging the "weight" of each goal as it is treated in assorted statutes, precedents, and other authorities and then deciding in favor of the interpretation which is most consistent with this balancing of legal concerns. Dworkin, *supra*, at 1082-101. Dworkin acknowledges the difficulty of this task by calling his judge Hercules. *Id.* The herculean labor is apparently meant as an ideal to which mortal judges may aspire. Some of Dworkin's critics argue, however, that the task makes no sense even as an ideal, because Dworkin specifies no method by which Hercules can deduce the "weight" of conflicting goals. See, e.g., Soper, *supra*, at 504.

Dworkin has defined "rule" in a way that makes his position more vulnerable to this criticism than my definition of "rules statute." For Dworkin, a statute that provides that the Commissioner shall issue orders to stop "unreasonable noise" in the park would state a rule, even though the term "unreasonable" lacked social meaning. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 28-29 (1967). Such a statute in my analysis would be a goals statute, impermissible and so never able to cause difficulties for Dworkin's Olympian interpreter. Interpreting a rules statute would be less herculean than interpreting a goals statute. See text at notes 185-88 *infra*.

Another criticism of Dworkin's approach is that, even if it were feasible, it is not what judges do. Soper, *supra*, at 506-09. Dworkin's thesis is at once normative and descriptive — it purports to account both for what judges ought to do and what judges actually do. *Id.* at 473-74. The normative claim that is argued for here is more modest than Dworkin's. My normative claim extends exclusively to the interpretation of statutes unlike Dworkin's, which would seem to include constitutional decisions. Dworkin, *supra*, at 1083-85. Furthermore, my claim is not at all descriptive. Agencies, if not courts, have approached goals statutes as policy makers rather than interpreters. In addition, mistaken views about the delegation of legislative power increasingly have led courts and agencies to interpret other statutes by reference to their goals rather than their rules; section C of this part will deal with this error.

Another criticism of Dworkin is that he exaggerates the difference between himself and Hart — that he has not so much come up with a new approach as misconceived some of those who came before him. See Soper, *supra*, at 486, 507-16; 2 F. HAYEK, *LAW*, *supra* note 162, at 56. Whatever the merits of this criticism in general, there are some grounds for Dworkin's ascribing to Hart the belief that judges should engage in interstitial legislation in hard cases. Hart talks of judges having "fresh choices" in penumbral cases and of "choosing between the competing interests in the way which best satisfies us." H. HART, *supra*, at 125-26. On the other hand, in such passages, Hart is distinguishing his position from formalism and may not have gone so far as to say that interpreters have discretion in the strong sense that legislators do. Hart in some other passages may indeed be saying quite the opposite:

The . . . description of . . . interpretative extension of old rules to new cases as judicial legislation . . . gives no hint of the differences between a deliberate fiat or decision to treat the new case in the same way as past cases and a recognition (in which there is little that is deliberate or even voluntary) that inclusion of the new case under the rule will implement or articulate a continuing and identical purpose, hitherto less specifically apprehended.

Hart, *supra*, at 627. The criticism of Dworkin that he misconceives Hart, if valid, does not detract from the substantiality of the test of legislation offered here, but rather brings to it the considerable aid of Hart.

This is so for three reasons. First, the rules statute would provide a clear answer for many cases. By contrast, under a goals statute, the legislation may well fail to indicate the required result for any category of cases. Congress has in fact legislated in this way as to some extremely important problems.¹⁸⁵

Second, rule interpreters routinely seek guidance as to the meaning of the text of a rule by referring to its goals. In those hard cases where the goals conflict, a rules statute helps the interpreter determine the relative weight of the conflicting goals.¹⁸⁶ Because the rule itself, by definition, indicates the outcome for a wide range of cases, the legislature must set out at least some indications of priority among the goals. In a goals statute, by contrast, the legislature may recite conflicting goals without establishing any priorities among them. In fact, it is extremely difficult for a legislature that wants to express clear degrees of priority to do so in a goals statute. Air pollution legislation may say that health, for instance, is more important than economic costs, but to what degree? It is not very meaningful to say "to a reasonable degree." So a rules statute makes more credible the notion that a rule interpreter is expressing values inherent in the legislation rather than giving vent to personal preferences.

Third, interpreting rules statutes differs from exercising discretion under goals statutes in its meaning for *stare decisis*. *Stare decisis* makes interpretations of rules statutes binding on future cases that are identical and guides decisions in future cases that are similar. Under a goals statute, however, policy decisions made at one time are not necessarily precedent for future decisions nor should they be. Even if a seemingly identical case appears, unsatisfactory results under old decisions, or new circumstances, may argue for reconsideration of the "precedent." The policy maker is free to reverse prior policy for any rational reason,¹⁸⁷ but a court must usually meet a much higher standard to overcome *stare decisis* in changing the interpretation of a statute.¹⁸⁸ This means that where an agency working under a rules statute believes that there should be a change in policy, it must return to the legislature.

The distinction between interpreting rules and making policy by promulgating rules can be illustrated by a series of examples involving

185. See Schoenbrod, *supra* note 13, at 751-56 (discussing the Clean Air Act). See also, e.g., *Consumers Union v. Sawhill*, 393 F. Supp. 639 (D.D.C.), *aff'd. sub nom. Consumers Union v. Zarb*, 523 F.2d 1404 (Temp. Emer. Ct. App. 1975) (analyzing the Emergency Petroleum Allocation Act).

186. See note 184 *supra*.

187. See generally H. HART & A. SACKS, *supra* note 181, at 1302-47.

188. See *id.* at 1368-80.

price regulation statutes. The most common of these statutes require public utility commissions to set the rates charged by natural monopolies so as to produce revenues that are "just and reasonable."¹⁸⁹ "Just and reasonable," although initially an unclear term, had by 1910 become a term of art signifying revenues that would cover the costs of providing the service, including a return on capital commensurate with that earned on investments of similar size and risk.¹⁹⁰ The statutes, as so understood, provided a benchmark for calculating allowable public utility profits — the market value of inputs, including capital, needed to provide the service. The application of that rule would not be a simple arithmetical calculation by any means,¹⁹¹ but such statutes provided a way of reconciling the goals of minimizing rates and attracting capital preferable to leaving all the commissions free to craft their own, unpredictable ways of balancing these goals.¹⁹²

This term of art in rate regulation statutes constitutes a rule because the agency has something against which to gauge the public utility rates — the cost of providing service. Consider, in contrast, the application of the "just and reasonable" rate-making rubric to the regulation of natural gas production in the 1950s.¹⁹³ How was one to measure the worth of natural gas in the ground? It was unlike the labor or other inputs used in monopolies such as public utilities since natural gas did not then have a significant market value independent of the regulated interstate market. That is, the market value of the gas in the ground was a function of the price that could be charged by gas producers. In this context, the Court allowed the Federal Power Commission to depart from the traditional interpretation of "just and reasonable"; the Commission could adopt any method of calculating allowable revenues that served the purposes of the Act.¹⁹⁴ This con-

189. See, e.g., *Smyth v. Ames*, 169 U.S. 466 (1898).

190. "The controlling principle came to be known as the rule of *Smyth v. Ames* . . ." L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 43 (1976). Before *Smyth v. Ames*, it is doubtful that the "just and reasonable" language could be considered precise enough to constitute a rule.

191. The comparable earnings method for calculating required utility revenue of course provides "only a very rough approximation of the amount one would have to pay shareholders to put up capital were the industry in a competitive, rather than a regulated, environment." Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 563 (1979) (footnote omitted). Interpretation is not just a mechanical process. It requires judgment, as the example of rate making for natural monopolies might suggest. Determining a utility's cost of providing service involves more than adding up given numbers. In fixing the value of capital used by the utility, for instance, the Commission would need to determine the rate of return earned on investments of similar riskiness; this is a matter of judgment.

192. See Jaffe, *supra* note 8, at 574.

193. The regulation of natural gas at the wellhead was mandated by the Court in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 685 (1954).

194. See *Federal Power Commn. v. Hope Natural Gas Co.*, 320 U.S. 591, 602-03 (1944).

struction turned the statute into a goals statute.

Also in contrast to the traditional rate-making statutes are various enactments that have given agencies power to regulate prices during times of war or inflation,¹⁹⁵ to prosecute the charging of excessive prices,¹⁹⁶ or to recoup excessive wartime profits.¹⁹⁷ In upholding some of these statutes¹⁹⁸ against delegation challenges, the Court has used traditional public utility rate making as a precedent in finding that the statute provided a standard of decision.¹⁹⁹ That reliance was misplaced since the statutes provided no measure, such as the cost of providing services, with which to gauge what prices or profits were unreasonable or excessive.²⁰⁰ In *Yakus v. United States*, for instance, the Administrator was to set prices by taking the price charged at a given time in the past and then adjusting that price to take account of a wide variety of goals.²⁰¹ If those statutes were to be upheld, reliance ought to have been placed on grounds other than that the statute supplied a clear standard of decision which the agency was merely called upon to apply to the facts of a given case.²⁰²

2. *Independent Executive Powers: The War and Foreign Affairs Example*

Legislation that leaves the Executive Branch with discretion does not delegate legislative power where the discretion is to be exercised over matters already within the scope of executive power. One major example of such executive power created by the Constitution concerns war and foreign affairs. For example, an exercise by Congress of its powers to declare war and provide armed forces to fight that war²⁰³ leaves the President broad discretion to deploy the military forces to accomplish the war's objectives; Congress has enacted a goals statute, but it is not a delegation of legislative power because the President's

195. See *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. United States*, 321 U.S. 414 (1944); cf. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (three-judge panel) (statute authorizing price regulation during "economic emergency").

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

197. See *Lichter v. United States*, 334 U.S. 742 (1948).

198. Not all were upheld; the Lever Act was struck down on vagueness grounds in *United States v. L. Cohen Grocery*, 255 U.S. 81, 82 (1921).

199. See, e.g., *Lichter v. United States*, 334 U.S. 742, 786 (1948); *Yakus v. United States*, 321 U.S. 414, 427 (1944); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746-48 (D.D.C. 1971) (three-judge panel).

200. See Jaffe, *supra* note 8, at 568-70.

201. 321 U.S. 414, 423 (1944).

202. See notes 203-38 *infra* and accompanying text.

203. See U.S. CONST. art. I, § 8, cls. 11-13.

power derives from article II rather than article I.²⁰⁴ The scope of the President's discretion is, however, affected by congressional action. For instance, Congress controls whether and against whom war may be declared. The President's discretion in the conduct of the war is not a delegation because the President is not exercising legislative power; the President is not making law but making war. Similarly, the President's negotiation of a treaty subject to ratification by the Senate²⁰⁵ bears some resemblance to a one-house veto, but in no way involves a delegation of legislative power because the Constitution expressly confers these treaty powers on the President and the Senate. Congress' role regarding wars and treaties is not to delegate its own power. Rather, through the authorization of the use of executive power or the ratification of its use, Congress provides a check on misuse of power by the Executive.

When the President fulfills a role other than lawmaking, executive discretion does not offend the delegation doctrine's purposes. While the delegation doctrine seeks to make legislators accountable to voters for the allocation of rights and duties in society, the primary issue in foreign affairs is, in theory, not allocation of rights and duties within the nation but competition between this nation and others. To be sure, the conduct of a war or the terms of a treaty may affect domestic rights and duties but this will be incidental to their international aspects. Moreover, the presidential power over wars and treaties, with its great potential for abuse, need not be considered nonlegislative on grounds of mere convenience, which cannot justify elimination of the normal checks and balances of the separation of powers.²⁰⁶ Treating the Executive's war and treaty powers as nonlegislative can be justified solely on grounds of national necessity.²⁰⁷

How broad is executive power? As Professor Tribe points out, the provisions of article II, section 1 "that '[t]he executive Power shall be vested in a President' . . . cannot be read as mere shorthand" for the specific enumerations that follow.²⁰⁸ The imprecision of the textual

204. U.S. CONST. art. II, § 2, cl. 1.

205. U.S. CONST. art. II, § 2, cl. 2.

206. *See* *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983).

207. The power to wage war, for example, has been held to be "the power to wage war successfully" in defense of the nation and its Constitution. *See* *Korematsu v. United States*, 323 U.S. 214, 224 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943). *See generally* *Keynes, Democracy, Judicial Review and the War Powers*, 8 OHIO N.U. L. REV. 69 (1981). This power does not, however, go so far as to suspend the Bill of Rights. *See, e.g., United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 88 (1921); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-27 (1866).

208. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 158 (1978). For instance, the President has conducted extensive military operations without declarations of war and entered into agree-

limits on the President's foreign affairs powers combined with the duty to see that the laws be faithfully executed²⁰⁹ "have come to be regarded as explicit textual manifestations of the inherent presidential power to administer, if not necessarily to formulate, the foreign policy of the United States."²¹⁰

The rationale by which the Court has attempted to justify its broad reading of executive powers in matters of war and foreign affairs has been severely criticized,²¹¹ and its precise scope is uncertain.²¹² For now, however, my purpose is not to attempt to define the limits of executive power and the extent to which they are exclusive, concurrent, or authorized by legislative action, but to suggest that the concept can be of use in constructing a better delegation doctrine. To this end, I wish to examine some key cases which did or may have concerned executive powers.

Cargo of the Brig Aurora v. United States,²¹³ probably the first delegation case,²¹⁴ could have been decided through the use of this concept of executive power. The statute at issue was passed in response to British and French edicts allowing violation of United States shipping. Congress embargoed the shipping of both countries for a time, but empowered the President to extend the embargo if he found that either Britain or France continued its offensive edicts.²¹⁵ The Court rejected a claim that the statute delegated legislative power to the President on the ground that the President was doing no more than executing a law by finding a fact.²¹⁶ Under the analysis of this Article, the statute was a rules statute — containing the rule that shipping should be embargoed if either France or Britain maintained certain edicts. The Court could instead have chosen to interpret the statute as an authorization of independent executive power in regard to war and foreign affairs,

ments with other nations without Senate approvals. Whether or not these activities can somehow be justified under any of the article II enumerated powers, established case law supports executive powers beyond those enumerated powers. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Myers v. United States*, 272 U.S. 52, 118 (1926).

209. U.S. CONST. art. II, § 3.

210. L. TRIBE, *supra* note 208, at 164.

211. See, e.g., Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973); Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623 (1972).

212. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

213. 11 U.S. (7 Cranch) 382 (1813).

214. See Jaffe, *supra* note 8, at 562.

215. 11 U.S. (7 Cranch) at 382-83.

216. 11 U.S. (7 Cranch) at 388. See also S. BARBER, *supra* note 22, at 53-59.

but the grounds upon which the Court chose to rely did no violence to the delegation doctrine.

*Field v. Clark*²¹⁷ offered the Court a similar choice. At issue was a tariff statute that removed duties on certain agricultural imports, providing, however, that duties be reimposed on imports from countries that the President found imposed "reciprocally unequal and unreasonable" duties on our exports.²¹⁸ The Court upheld the statute on two alternative grounds. It said that the President in reimposing the tariff was not making law but rather finding fact,²¹⁹ although the tariff statute involved "a wide and uncertain area of judgment."²²⁰ In the alternative, the Court noted many examples of the broad powers conferred upon the President "with reference to trade and commerce:"²²¹

[T]hey all show that, in the judgment of the legislative branch of the government, it is often desirable, if not essential for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.²²²

If a broad view of the President's powers is accepted, the result in *Field v. Clark* is correct.²²³ More troubling, however, is that part of the opinion that depicts an essentially discretionary executive decision about whether foreign tariffs are unequal as findings of fact while piously pronouncing that "Congress cannot delegate legislative power to the President."²²⁴ Such "hopelessly fictional rationalization"²²⁵ led to trouble in subsequent cases.

The statute at issue in *J. W. Hampton, Jr., & Co. v. United States*²²⁶ resembled that in *Field v. Clark*. It provided that the President could increase the duties on imports up to fifty percent when he found this necessary to "equalize . . . differences in costs of production in the United States and the principal competing country."²²⁷ The apparent arithmetic simplicity of the President's task is belied by the need to determine such intricate and uncertain policy matters as appropriate

217. 143 U.S. 649 (1892).

218. 143 U.S. at 692. This standard plainly echoes *Cargo of the Brig Aurora*.

219. 143 U.S. at 692-93.

220. Jaffe, *supra* note 8, at 566.

221. 143 U.S. at 683.

222. 143 U.S. at 691.

223. See Jaffe, *supra* note 8, at 566.

224. 143 U.S. at 692-93.

225. Jaffe, *supra* note 8, at 561.

226. 276 U.S. 394 (1928).

227. 276 U.S. at 401.

wage and profit rates in given industries in this country. Professor Jaffe concluded that "an analysis of the Act and even more the history of its administration shows a tremendous scope for manipulation."²²⁸ The Court's opinion upholding the statute relied squarely on *Field v. Clark*.²²⁹ The rationale that the President was only executing a statute by finding facts or acting according to an established legislative principle or standard was just as much a fiction in *Hampton* as in *Field v. Clark*. *Hampton*, moreover, made little effort to rely on the special powers of the President in foreign affairs, perhaps because it would have been harder to do so. In *Hampton*, the President's inquiry was whether or not our industries were making enough money in the face of overseas competition, which is in large part a matter of domestic, not foreign, policy.

*Panama Refining*²³⁰ and *Schechter*²³¹ relied on *Cargo of the Brig Aurora*, *Field v. Clark*, and *Hampton* in entirely domestic contexts without regard to their roots in matters of war and foreign affairs. Similarly, in the cases dealing with price and profit regulations enacted in response to World War II, the primary ground of decision was not a doctrine of authorization of independent executive power, but rather the fiction that the statutes provided standards.²³² Justice Roberts, dissenting in one of those cases,²³³ as well as Justice Jackson, dissenting in *Korematsu v. United States*,²³⁴ warned that it would be better for the Court to rely on war powers rather than run the risk that the stretching of the Constitution to meet the exigencies of wartime should carry over to peacetime. Grounds for such an approach could have been found in *Field v. Clark*. More recent cases do appear to indicate that in the war and foreign affairs contexts, legislation may leave the President broader powers than would be permissible in domestic matters.²³⁵ Instead of relying entirely or primarily on such grounds, the

228. Jaffe, *supra* note 8, at 569.

229. *Hampton*, 276 U.S. at 409-11.

230. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 423-24, 429-30 (1935).

231. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541 (1935) (citing only *Hampton*, but relying on *Panama Refining* which cited the other cases).

232. See *Lichter v. United States*, 334 U.S. 742, 785 (1948); *Yakus v. United States*, 321 U.S. 414, 419-23 (1944). These cases cited the war more as an explanation of the motive for delegation than as constitutional justification.

233. See *Yakus v. United States*, 321 U.S. 414, 459-60 (1944) (Roberts, J., dissenting).

234. 323 U.S. 214, 244-45 (1944) (Jackson, J., dissenting).

235. See, e.g., *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 684 (1980) (Rehnquist, J., concurring); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 & n.10 (1976); *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *Lichter v. United States*, 334 U.S. 742, 779-80 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). See also Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67 (1983).

World War II cases stated delegation arguments primarily in terms that could apply equally well to the same type of legislation enacted during peacetime and dealing entirely with domestic problems.²³⁶ The warnings of Justices Roberts and Jackson were prescient. These cases supplied the basis for upholding expansive peacetime delegations.²³⁷ As Clinton Rossiter concluded in regard to this line of opinions, "the Court has had little success in preventing the precedents of war from becoming precedents of peace."²³⁸

Analysis of these cases in terms of separate, constitutionally created executive powers could have avoided this result. Where the Constitution gives the Executive independent powers in article II, as it does over war and foreign affairs, action by Congress authorizing their use cannot be an improper delegation of *legislative* powers. It is the *authorization* of the use of the executive powers as appropriate that is the legislative act, not the *exercise* of the executive powers. This distinction lies at the heart of my proposed test.

3. *Management of Public Property Versus Regulation of Private Property*

A statute allowing the Executive broad discretion to manage public property to the extent such management does not govern private conduct is not a delegation of legislative power. The power to regulate and manage public property, though vested in Congress, is not an article I legislative power. It is granted separately, by article IV, in the property clause.²³⁹ Congress' exercise of this seemingly plenary power by vesting it in the Executive, which would then have an article II obligation to execute that power,²⁴⁰ is therefore not subject to limitations placed on the delegation of powers under article I. As discussed below, this was an altogether sensible approach which the Framers

236. See notes 230-34 *supra* and accompanying text.

237. See, e.g., *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (three-judge panel); *Goldstein v. Clifford*, 290 F. Supp. 275 (D.N.J. 1968). Indeed, the holdings of *Yakus* and *Lichter* effectively tolled the death knell for delegation challenges for twenty-five years. These decisions made it unnecessary even to speak about delegation. See generally text at notes 37-70 *supra*.

238. C. ROSSITER & R. LONGAKER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 129 (expanded ed. 1976). In an interesting reversal of the erosion of peacetime precedents by wartime cases, it has been suggested that the Supreme Court initially created the domestic/foreign affairs distinction in *Curtiss-Wright* to "get around *Panama* and *Schechter*." *United States v. Butenko*, 494 F.2d 593, 630 (3d Cir.) (Gibbons, J., dissenting), *cert. denied*, *Ivanov v. United States*, 419 U.S. 881 (1974).

239. U.S. CONST. art. IV, § 3 reads in pertinent part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States . . ."

240. U.S. CONST. art. II.

took to an intricate and special problem of superintending public property. Management of public property should not be considered law making — that is, government of private conduct — because it does not involve, in the words of *Fletcher v. Peck*, “general rules for the government of society.”²⁴¹ There are two points that this section will make in this regard. First, the administration of public property or enterprises has not been and should not be considered legislative. Congress should be able to provide for the operation of, say, federal lands, the postal service, or federal buildings by the enactment of goals statutes that direct the executive branch to achieve goals that Congress articulates. Second, some benefits and privileges conferred by the government, such as welfare and other entitlements programs, should be considered private rather than public property for the purposes of the delegation doctrine and so could be regulated only by legislated rules rather than by discretion authorized in goals statutes.

The management of public enterprises differs critically from the governance of private conduct. As Hayek points out, governance of the *private* sector is normally negative; conduct is prohibited rather than mandated.²⁴² That one may do whatever is not prohibited allows persons, within these bounds, to pursue their own private purposes. For Hayek, this negative character of regulation safeguards liberty and promotes innovation.²⁴³

The management of *public* enterprises, in contrast, is ordinarily positive. If government wants a new federal office building, for instance, the result must be reached by positive mandate rather than prohibition. In such cases, the legislation is addressed to public officials rather than private persons. For example, “the Administrator of the General Services Administration shall construct a building to serve the purpose of” Because such legislation constrains public officials using public resources, framing such legislation in positive terms does not constrain private freedom; the commands are not addressed to private persons. Congress in writing such laws bears more resemblance to a private person directing its agents to administer its holdings than to a ruler of private persons.

It is well established that Congress’ role in regard to public lands is that of “proprietor” rather than law-giver.²⁴⁴ Jaffe writes that “[p]owers granted to manage government property could not be at-

241. 10 U.S. (6 Cranch) 87, 136 (1810).

242. 2 F. HAYEK, *LAW*, *supra* note 162, at 35-38.

243. 1 F. HAYEK, *LAW*, *supra* note 162, at 106-10.

244. See, e.g., *Alabama v. Texas*, 347 U.S. 272, 273 (1954); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915).

tacked as an abdication of the 'law-making' function."²⁴⁵ Similarly, although article III vests the judicial power in article III courts, article I courts may hear cases concerning public lands and other public rights.²⁴⁶ Many state courts find that the delegation doctrine does not apply to the management of public funds on the theory that such management is "proprietary."²⁴⁷

A grant from Congress to the Executive Branch of control over public property neither puts the Executive in the role of making law nor undermines the purposes of the delegation doctrine. John Locke envisioned the prohibition against delegation of legislative power as a protection against being bound by laws not made by the legislature to which one consented to be governed.²⁴⁸ Statutes that control public property ordinarily affect but do not bind private persons. For example, a decision as to the location of a federal office building may have significant consequences for both the locale chosen and those rejected, but the government is not binding private citizens any more than a private corporation choosing the site for its building does.

On the other hand, the Executive might use its power over public enterprises granted in a goals statute in order to regulate private conduct rather than to better the operation of a public enterprise. Such an exercise of power over private conduct should be struck down as a violation of the delegation doctrine. *Hampton v. Mow Sun Wong*²⁴⁹ is a case with delegation overtones that suggests the kind of line that needs to be drawn. There, resident aliens challenged a Civil Service Commission rule that excluded them from federal employment. The Commission, the Court decided, could rely upon its broad statutory authority to set job qualifications based upon essentially job-related purposes. However, to avoid asserted due process problems, the statute was read to deny the Commission broad discretion to set job qualifications for purposes that were not job related, such as favoring citizens or influencing patterns of immigration. Although the opinion was framed in due process terms, the distinction fits the delegation context. The Commission may make rules for the purpose of making public enterprises work better, but may not make rules designed to regulate private conduct.

The regulation of private conduct gives particular urgency to judi-

245. Jaffe, *supra* note 8, at 376.

246. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion).

247. See Koslow, *supra* note 80, at 417-18.

248. J. LOCKE, *TWO TREATISES OF GOVERNMENT* Bk. II, § 141 (Laslett ed. 1960).

249. 426 U.S. 88 (1976).

cial review and accountability as motives for the delegation doctrine. The distinction between an exercise of official discretion over private rights as opposed to public property seemed to make a difference to Justice Douglas, writing for the Court in *National Cable Television Association v. United States*.²⁵⁰ He would find less of a delegation problem in a statute that gives broad discretion to set a "fee" for use of government property, such as the airwaves, than for the regulation of a business that did not have special access to such government property: "[t]he backbone of [cable television] is individual enterprise and ingenuity, not governmental largesse. The regulatory regime placed by Congress and the courts over [cable television] was not designed to make entrepreneurs rich but to serve the public interest"²⁵¹

For Congress to manage public property through agents having broad discretion rather than through narrowly legislated rules is not just convenient but necessary. It is true that Congress sometimes finds it convenient to legislate rules as to the management of public property; it might for example outlaw the harvesting of timber in national parks. There is nothing wrong with Congress' subjecting the management of public property to a rules statute. Much of the management of government property itself, however, must be under goals statutes that grant broad discretion. Consider the example of building construction. No matter how complex rules such as building codes concerning the construction of private buildings become, they still do not tell private persons what buildings they should construct. The legislature cannot deal with the myriad details involved in designing private buildings. How then could Congress write a set of rules that would positively tell the General Services Administration how to go about building the many government buildings? It could not do so and, under the delegation doctrine, it need not do so, because legislative power refers to the governance of private conduct.

The difficulty of providing detailed legislative guidance for the management of public lands was apparently critical in the early delegation case of *United States v. Grimaud*.²⁵² Congress had made it a crime to violate regulations for the use of federal lands which the Secretary of Interior (later, the Secretary of Agriculture) was to promulgate in furtherance of vaguely stated objectives. Grimaud violated a regulation forbidding grazing on federal land without a permit. A divided Court affirmed a lower court that had found the statute to be an unconstitutional delegation, but the result was changed to a unani-

250. 415 U.S. 336 (1974).

251. 415 U.S. at 343.

252. 220 U.S. 506 (1911).

mous reversal of the lower court on reargument after new justices, including one familiar with the practicalities of federal land management, were appointed.²⁵³ The Court's opinion on reargument noted in passing that the Secretary's regulations "do not declare general rules with reference to rights of persons and property," but did not rest on the ground that the Secretary was managing public property.²⁵⁴ Instead, as in *Field v. Clark* and *Hampton*, the Court pretended that a statute giving wide discretion did not in fact do so.²⁵⁵ Because the Court did not rely on the special feature of public property management, *Grimaud* has been cited as permitting goals statutes for the governance of private liberty and property as if the public lands aspect of the case made no difference.²⁵⁶ Similarly, the Court upheld the Federal Radio Commission's sweeping discretion to award broadcast radio licenses on the fictitious ground that Congress had left the Commission to decide no more than details, without reference to the Commission's power over the publicly owned resource of the airwaves.²⁵⁷

For delegation purposes a wide range of government benefits or permissions should not be regarded as government property. At one time, courts might have said that all government benefits or permissions were "privileges" rather than "rights" and that accordingly they gave rise to no private rights. The rights/privileges distinction has, however, been discredited to a substantial degree.²⁵⁸ Professor Charles Reich has shown that, in modern society, many so-called benefits have come to have a meaning for people similar to that of real property in earlier ages.²⁵⁹ Courts have responded to this "new property" concept:²⁶⁰ Procedural protections now accompany many

253. See Jaffe, *supra* note 8, at 567.

254. 220 U.S. at 516. The Court was at this point actually comparing the Secretary's power to that of municipal corporations over municipal affairs.

255. 220 U.S. at 516-18.

256. See, e.g., *Curran v. Wallace*, 306 U.S. 1, 18 (1939); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 428-29 (1935); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

257. *Federal Radio Commn. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 276 (1933). Even Professor Jaffe's article, which said that property management is not law making, stated at a later point that *Grimaud* "confirms the delegability of the rule-making function." Jaffe, *supra* note 8, at 568 (footnote omitted).

258. See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

259. See Reich, *The New Property*, 73 YALE L.J. 733 (1964).

260. See *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970). Courts are far from having precisely defined which government benefits, jobs, or permissions give rise to this "new property." The Court has, however, stressed that "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). While recent cases have been more restrained in their application of this "reliance" or "expectation" theory of prop-

widely distributed or earned payments or privileges, ranging from entitlement programs²⁶¹ to drivers' licenses²⁶² to prisoners' good-time credits.²⁶³ In contrast, the opportunity to get government contracts, use public lands, or acquire a license to broadcast television signals probably would not be treated as property. "New property" is not protected by the takings clause, but has been treated as property for the purposes of procedural protection under the due process clause.²⁶⁴ The "new property" should also be protected by the procedural protections of the delegation doctrine. Its availability should be subject to statutory rules just as if the government were regulating any other private liberty or property.

Professor Peter Simon summarized the Court's understanding of the benefits which give rise to property as follows:

If . . . the legislation or regulations granting the benefit condition its receipt upon the discretionary decision of an administrator, the expectation of the benefit is not "property." Conversely, if . . . continuing eligibility for the benefit turns, by state law, upon the existence or nonexistence of particular facts, the expectation of the benefit is fourteenth amendment "property."²⁶⁵

Translated into the nomenclature of this Article, the benefit is private property if it is available by rule rather than by exercise of discretion. Professor Simon argues that this is appropriate because the policy choice as to whether benefits are to be available by rule or by discretion is political, but once the legislature decides to make a benefit available by rule, the question of procedural adequacy becomes constitutional and belongs in federal courts.²⁶⁶ Congress, if it were providing a benefit, could decide whether it would be available by rule or administrative discretion. But if Congress decided that a benefit should be available by rule, Congress would, in my view of the delega-

erty, the Court has not overruled the *Goldberg* line of cases. See, e.g., *Leis v. Flynt*, 439 U.S. 438 (1979); *Bishop v. Wood*, 426 U.S. 341 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (plurality opinion). Thus, it is still possible to speak in terms of "new property." In fact, with the exception of the plurality decision in *Arnett*, these recent cases all involved state-created benefits, raising potentially thorny federalism issues. Using *Hampton* to illustrate the line that needs to be drawn, it may be said that being able to meet job-related qualifications for a federal position is not a benefit and so is not "new property," but being eligible for federal employment is a benefit and is "new property." See text at note 249 *supra*.

261. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

262. See *Bell v. Burson*, 402 U.S. 535 (1971).

263. See *Wolff v. McDonnell*, 418 U.S. 539 (1974).

264. See *Goldberg*, 397 U.S. 254, 261-62 (1970). See generally Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

265. Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF. L. REV. 146, 153 (1983).

266. *Id.* at 147.

tion doctrine, have to write the rule itself rather than delegate that task. Congress could, on the other hand, decide to make the benefit available on the basis of administrative discretion and authorize the Executive to exercise that discretion without encountering delegation problems. However, Congress is unlikely, as a political and practical matter, to provide that such widely available benefits as Social Security or welfare are to be made available by discretion rather than rule.²⁶⁷

C. *Implications for Statutory Interpretation*

Professor Gewirtz suggests that interpreting a statute to avoid a delegation problem is a "more modest and . . . preferable weapon in the service" of the constitutional principle against delegation than striking the statute down.²⁶⁸ When a statute is susceptible to two meanings, one of which raises a delegation problem, interpreting it to avoid the problem accords with the long-standing judicial preference for avoiding constitutional decisions where narrower grounds are available. This approach serves the goal of minimizing confrontation between the courts and Congress. This statutory interpretation tactic, however, is disingenuous when the statute is not, in fairness, open to the narrower interpretation.²⁶⁹

When Congress has plainly delegated too broadly, construing the statute to avoid delegation problems can readily put the courts themselves in a legislative role. For example, in the recent *American Petroleum* case,²⁷⁰ Justice Rehnquist, concurring in the result, argued that the section of the Occupational Safety and Health Act involved²⁷¹ was unconstitutional because Congress failed to specify the degree of safety that the enforcement agency's standards must attain.²⁷² The agency had taken the position that it should promulgate, in the case of carcinogens, the safest standard feasible, without having to show the significance of the risk being averted. The plurality, however, reversed the agency by invoking the delegation concerns to justify construing the statute to require the agency to demonstrate that its standards are geared to the significance of the risk.²⁷³ Professor Nathanson has argued, however, that the plurality's statutory construction, geared to

267. *See id.* at 190-91.

268. Gewirtz, *supra* note 12, at 65.

269. *See id.* at 71-72 (contrasting the delegation doctrine and the "clear statement doctrine").

270. *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980).

271. 29 U.S.C. § 655(b)(5) (1982).

272. *See* 448 U.S. at 676-77.

273. 448 U.S. at 639-46.

the "significance" of the risk, leaves at least as much room for administrative discretion as the agency's reading, geared to the "feasibility" of the standard, which the plurality found wanting.²⁷⁴ The plurality did not cure the delegation problem in the statute. Rather, it arrogated to itself a significant legislative choice, choosing "significance" of the risk over "feasibility" of the standard.

Professor Gewirtz places his primary reliance not on construing statutes to avoid constitutional problems, but on a related statutory construction device: the "clear statement" doctrine.²⁷⁵ He would have the courts narrow their construction of statutes that seem to allow agencies to make "major" policy changes unless Congress made clear that it wished agencies to have such power.²⁷⁶ One advantage of this approach, according to Professor Gewirtz, is that Congress could reverse the judicial act by making clear that it wanted the agency to have broad discretion.²⁷⁷ This proposal has significant problems. First, it implies that Congress is free to ignore the delegation doctrine so long as it does so openly and expressly. This would reduce the vesting of legislative power in the Constitution from the status of a command to that of a suggestion. Second, the application of the "clear statement" approach is triggered by a judicial finding that there is a "major" policy issue at stake. This test is similar to the criterion that has proved so vacuous and unworkable in the case of the "intelligible principle" test.

Professor Gewirtz has usefully reminded us of the relevance of statutory construction to delegation. Statutory construction, however, cannot provide as extensive a response to the delegation problem as he suggests if the courts are to avoid playing a legislative role in construing statutes raising delegation problems. Yet, there are aspects of statutory construction which Professor Gewirtz does not discuss that could and should be harnessed to serve delegation concerns.

This Article's theory of delegation has an important corollary for statutory construction — that rules statutes should be interpreted on the basis of the text of those rules read in the context of the statute's goals and legislative history. The corollary seems unremarkable, no more than a restatement of a standard precept of statutory interpretation. Nonetheless, the courts have deviated from this precept and from the delegation doctrine by shifting emphasis from judicial inter-

274. See Nathanson, *supra* note 85, at 1070.

275. Gewirtz, *supra* note 12, at 65-67.

276. *Id.* at 66.

277. *Id.* at 72.

pretation of the statute's rules to agency policy on how to pursue the statute's goals. This deviation occurs in at least two ways.

First, modern statutory interpretation has regarded the goals of regulatory statutes as independent grants of regulatory power, quite apart from the substantive body of the statute. For example, Professors Gellhorn and Robinson report "the recent efforts of the FTC, with apparent judicial sanction, to expand its power to police 'unfair or deceptive acts or practices' into a general mandate to safeguard the American public against a wide assortment of consumer ills."²⁷⁸ They state that agency power should derive only from statutes, but lament that "[m]any commentators and all too many administrators and courts seem to overlook this seemingly obvious point in the course of affirming broad and protean administrative powers which go far beyond anything that is discernible within the creative statutes."²⁷⁹ Such power clearly affronts the purposes of the delegation doctrine. If an agency believes that the rules stated in the text of its statute are insufficient to achieve the statute's goals or other laudable objectives, the constitutionally proper course for the agency is to appeal to Congress to amend the statute rather than purport to find an independent grant of power in the goals. Reference to Congress' rules is also the proper course for the courts interpreting the statute.

Second, the courts have lost sight of legislative responsibility in too readily deciding that legislative silence or inaction in the face of an administrative practice outside the scope of a statute constitutes an amendment of the statute ratifying the practice. As already noted,²⁸⁰ standard doctrine holds that there is no amendment by acquiescence because legislators ought to take affirmative responsibility for the amendments and because legislative inaction may mean many things other than legislative approval.

There is, admittedly, an exception to this requirement of affirmative legislative action. If the agency practice has been brought home to Congress, which then reenacts or adopts plenary amendments to the legislation without taking action against this practice, then this subsequent legislation can be considered to amend the statute to allow the practice in question.²⁸¹ This qualification is understandable. Under these circumstances, the change in law has come from action, not inaction. Moreover, since the practice has been brought home to

278. Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 776 (1975) (footnote omitted).

279. *Id.* at 775.

280. See text at notes 125-32 *supra*.

281. See H. HART & A. SACKS, *supra* note 181, at 1302-23.

Congress, its members can be said to have taken responsibility for the practice in voting for the new legislation.

At times, however, the courts have stretched this exception to the point of swallowing the rule. For example, in *Power Reactor Development*,²⁸² the Court faced the question of whether the Atomic Energy Act allowed the Atomic Energy Commission to authorize the construction of a nuclear plant without first finding that it would be adequately safe.²⁸³ The Commission took the position that a lower level of scrutiny before construction sufficed so long as it took a harder look after the plant was built. Some members of Congress in the original debates expressed concern that investment in a plant would bias the Commission's evaluation of the plant's safety after it was built. Justice Brennan, writing for the majority, found that the statute as enacted permitted the Commission's practice.²⁸⁴ Justice Douglas disagreed²⁸⁵ and, in my view, provided a more convincing interpretation of the statute as enacted. The majority argued, as an alternative ground, that whatever the Act originally meant, the failure of Congress to change the Commission's practice amounted to ratification.²⁸⁶ They reasoned that such a view was appropriate because the Commission's practice had been brought home to the Joint Committee on Atomic Energy, which had special responsibility to oversee the Commission's work, even though Congress had not since engaged in a plenary revision of the Act that might have occasioned full congressional consideration of the practice.²⁸⁷ The majority's opinion overlooks the likelihood that the "iron triangle" relationship between the Committee, the Commission and the industry precluded adequate ventilation of broader public concerns.

The approach to statutory construction in a case like *Power Reactor Development*, then, allows laws to be made without legislators having to take responsibility for them, and so defeats one of the primary purposes of the delegation doctrine.²⁸⁸

282. *Power Reactor Dev. Co. v. International Union of Elec., Radio & Mach. Workers*, 367 U.S. 396 (1961).

283. 367 U.S. at 398.

284. 367 U.S. at 406-10.

285. 367 U.S. at 419 (Douglas, J., dissenting).

286. 367 U.S. at 410-14.

287. 367 U.S. at 411-14.

288. Professor Bruff, while seeing little role for the delegation doctrine, has noted a trend in recent Supreme Court decisions toward requiring Congress to act through statutes adopted through the formal legislative process rather than through less formal channels. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 222-26 (1984).

III. THE PRACTICALITY OF THE PROPOSED STANDARD

The Court has consistently stated that it should judge questions of delegation, but, in practice, it has usually deferred to the legislative process on delegation questions. Is there any principled basis for such deference?

*Baker v. Carr*²⁸⁹ teaches that when the Constitution has not reserved an issue for political resolution the judiciary should defer to the judgment of the political branches only in limited circumstances. Two of these may apply to delegation: (1) when there is unusual need for unquestioning adherence to a political decision, and (2) when the question exceeds the capacities of judicial management.²⁹⁰ This Part analyzes the extent to which the courts should defer to delegation by Congress in light of these considerations. Section A asks whether a halt to delegation of legislative power would render government unworkable. Section B asks whether the proposed test is judicially manageable. Section C goes on to argue that delegation implicates constitutional values of sufficient import to warrant striking down otherwise valid statutes.

A. *Can Government Work Without Delegation of Legislative Power?*

Baker v. Carr would not permit the Court to turn aside delegation concerns on the ground that the Court or Congress believes that government would work better with broad delegation. The Court's job is not to decide whether broad delegation of legislative power is good policy, but to enforce constitutional principles. As the Court said in *Chadha*:

[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government

289. 369 U.S. 186 (1962).

290. Specifically, the Court stated:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217. *Baker v. Carr* has been variously interpreted. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 195-97 (1962); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622-23 (1976); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 567-84 (1966). In reviewing *Baker v. Carr*, Professor Scharpf explained that political question reasoning is limited "by a normative qualification: where important individual rights are at stake, the doctrine will not be applied." *Id.* at 584.

and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies.²⁹¹

However, the Court probably would and should turn aside delegation concerns if enforcement of the doctrine would render government unworkable. Accordingly, this Article need not try to make the case that restricting delegation is the best or most convenient policy. Rather it need only establish that restricting delegation as suggested here is a policy within the realm of practicality. If that is so, the mandate of the Constitution that Congress exercise the legislative power itself must prevail.

Many authors have concluded that a delegation doctrine with substance is unthinkable because it would prevent government from functioning.²⁹² These arguments point to vital activities, from conducting foreign policy²⁹³ to controlling pollution²⁹⁴ and regulating domestic trucklines,²⁹⁵ that could not be conducted unless entities other than Congress have decision-making power. This Article does not, however, find in the Constitution a mandate to keep *all* power in Congress, only *legislative* power.

Accordingly, many of the classic examples of the impossibility of government within the confines of the delegation doctrine simply are not problems under the test proposed here. Congress could use goals statutes to deal with public property.²⁹⁶ It could also use them with regard to war powers and foreign affairs;²⁹⁷ the execution of such statutes would involve the exercise of article II powers. However, Congress would have to employ rules statutes in exercising its article I powers, such as levying taxes and regulating commerce.²⁹⁸ This, however, would not be so substantial a change as might first appear. Much tax and regulatory legislation is in the rules format already.²⁹⁹ Recall

291. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983).

292. See, e.g., 1 K. DAVIS, *supra* note 8, at 152-57; Stewart, *supra* note 11, at 1693-97; Strauss, *supra* note 165, at 578-79.

293. See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936).

294. See, e.g., 1 K. DAVIS, *supra* note 8, at 153.

295. See, e.g., *id.* at 154-55.

296. See text at notes 241-67 *supra*.

297. See text at notes 203-38 *supra*.

298. See text at notes 175-202 *supra*.

299. The Internal Revenue Code, while not without ambiguity, is a monument to detailed rule making. 26 U.S.C. §§ 1-1564 (1982). Other examples of detailed statutes include the windfall profits tax, 26 U.S.C. §§ 4986-4998 (1982), and the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1982).

that a rules statute need not be exhaustively precise,³⁰⁰ but must state a rule of conduct, which need not always be elaborate. So, for example, most statutes using the "just and reasonable" standard for public utility rates would pass muster because they were enacted against a background in which "just and reasonable" was agreed to embody the "cost of service" concept.³⁰¹ On the other hand, because the courts rather than the legislature first defined the rule of conduct, statutes that attempted to regulate a utility's profits *prior* to an understanding of what "just and reasonable" meant should have been, in my opinion, struck down. The legislature should have been required to decide what they meant by the phrase. This hardly seems too much to expect. For example, the Interstate Commerce Act of 1887 contained a general provision that railroad rates be "reasonable and just." The courts correctly determined that Congress had not meant this language to control a railroad's overall profits but rather to bar other practices specifically enjoined elsewhere in the Act such as charging more "for a shorter than for a longer distance over the same line, in the same direction," under similar circumstances.³⁰² Congress had failed to be definite about the appropriate rule to control a railroad's overall profits because it had not yet decided to regulate that aspect of their operations, not because Congress was incapable of being clear. It was not until almost two decades later that Congress decided to regulate railroads' overall profits,³⁰³ by which time "just and reasonable" had acquired its settled "cost of service" meaning.

What of the important objectives that Congress has previously pursued through goals statutes? In some instances, Congress could legislate rules of conduct rather than delegate. I have argued elsewhere that this would be not only possible but preferable in dealing with such a complicated and technical problem as air pollution.³⁰⁴ Congress could, moreover, achieve its objectives through means other than controlling conduct directly. Judge Stephen Breyer has shown that regulatory failure often arises from Congress choosing the wrong legislative means to achieve its objective.³⁰⁵ He argues that less intrusive means generally work better.³⁰⁶ For instance, he would use taxes and subsidies, rather than price controls and allocations, to deal with

300. See text at notes 179-83 *supra*.

301. See text at notes 189-94 *supra*.

302. Interstate Commerce Act, ch. 104, §§ 1-4, 24 Stat. 379, 379-80 (1887); see W. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900*, at 131-32 (1982).

303. Act of June 29, 1906, ch. 3591, 34 Stat. 584.

304. See Schoenbrod, *supra* note 13, at 803-18.

305. See Breyer, *supra* note 191, at 550.

306. *Id.* at 552.

windfall profits arising from dramatic shortages.³⁰⁷ Using these less intrusive techniques, Congress could enact less complicated rules and therefore impose a smaller burden on the legislative process.

It is argued, however, that Congress lacks the time and the expertise to do other than delegate broadly.³⁰⁸ The legislative process is both notoriously slow and, during the flurry of activity at the end of a session, notoriously lacking in careful deliberation. However, neither of these criticisms justifies broad congressional delegation by way of goals statutes, since both can also be leveled at agencies when they exercise legislative power in making rules. Agencies have frequently delayed long past congressional deadlines for promulgating regulations, often pleading lack of knowledge, resources, manpower and time. Their decisions may also lack full consideration, especially given the pressures to which they are subject.

Congress may lack the ability to generate expert information, but this is not an argument for delegating regulation. It can request data from agencies before legislating. This is not as politically attractive as giving the impression of immediate action, but real action would also be delayed, albeit not so publicly, in the agency. In some situations, perhaps Congress should not wait for information, but should acknowledge the uncertainties and make a decision on existing information and political pressures, rather than burying the uncertainties and political pressures in agency deliberations.

It could also be argued that a stricter delegation doctrine will simply spur Congress to find a substitute for the agencies, most likely their own committee staffs. What, if anything, would be accomplished by such a substitution? The most significant benefit would be congressional accountability. Whatever actions committee staffs might take, they could not, any more than the agencies, be delegated final responsibility. Members of Congress would have to go on record in response to their committee's recommendations. The record would provide a basis on which voters could assess individual members of Congress. Moreover, committee staffs are hired by and directly answerable to members of Congress. Agencies are not. The public and the media will tie staff activities much more closely to individual members and to Congress as a whole. This fact, too, will make Congress more answerable than a regime allowing delegation to executive agencies.

In any event, it is not clear that Congress would have to enlarge

307. *Id.* at 581-82.

308. *See, e.g.*, 1 K. DAVIS, *supra* note 8, at 152-57. Professors Aranson, Gellhorn, and Robinson question the basic assumption that Congress lacks such time and expertise. *See* Aranson, Gellhorn & Robinson, *supra* note 9, at 6, 21-26.

committee staffs substantially. Some of the past growth in committee staffs is probably due to broad delegation, which has generated the need on Capitol Hill to create a structure to oversee the exercise of delegated power and to service constituents who are subjected to it. Moreover, the President would have an interest in resisting a growth in committee staffs at the expense of the Executive.

Administrative agencies could, and undoubtedly would, have a significant role to play as experts in a world without overbroad delegation. They would obviously interpret, implement and/or enforce the regulations, taxes, or incentives enacted by Congress. Because of this expertise, agencies would also usually play a key role in the enactment of rules statutes. Congress could look to agencies instead of committee staffs to propose legislation, to provide statutory language for concepts initiated in Congress, and for critiques of legislation proposed by private parties. This approach bears some resemblance to one commentator's proposal for reconciling accountability with the modern demand for regulation:

When we think about how the Constitution might be changed to accommodate the sort of large-scale, regulatory government we now seem to need, the legislative veto isn't such a bad place to start. But we would want a "veto" system that *required* Congress to vote up or down on every major rule proposed by the bureaucracy.³⁰⁹

This Article's proposed process resembles in many ways the present relationship between Congress and the agencies, but there would be critical differences. The delegation doctrine, in the form proposed here, would not prevent Congress from pursuing important objectives, but it could no longer mandate the achievement of laudable goals and leave a delegate to figure out how to get there. Congress itself would have to establish the regulations, taxes, or incentives. This means that Congress would have to take responsibility for the costs of achieving its objectives. Compelling responsibility is very much compatible with the purposes of the delegation doctrine. It is also kinder to would-be beneficiaries than goals legislation that raises hopes which no delegate could possibly fulfill.

It is also argued that broad delegation is more efficient because an agency can take the time to craft regulations and take account of a multiplicity of competing goals. My analysis of the Clean Air Act concludes that the theoretical advantages of broad delegation failed to materialize in practice.³¹⁰ Congress took credit for promising popular objectives, but left the hard job of allocating achievement costs and

309. Kaus, *Vetoed Veto*, THE NEW REPUBLIC, Aug. 8, 1983, at 10, 11 (emphasis in original).

310. See Schoenbrod, *supra* note 13, at 789-98.

resolving inevitable disputes to entities with less political might than Congress.³¹¹ The Act broke down in practice because of the difficulty of putting the statutory scheme into operation.³¹² Broad delegation spawned a need for legislative oversight and amendment that has consumed quite large amounts of legislative time over a protracted period.³¹³ The enactment of a goals statute did not set in motion a political process leading to a maturation of public opinion and a consensus, but rather lost the moment when public attention focused most strongly on the air pollution issue.³¹⁴ The upshot has been an ongoing inability to resolve disputes. Congress could have made decisions more quickly, more finally and more effectively than the administrative process of the Clean Air Act³¹⁵ and with more sensitivity to varying circumstances.³¹⁶

Government without delegation of legislative power is, in my view, not only sufficiently practical to permit the Court to enforce a strong delegation doctrine, but also preferable. This conclusion would, however, be harder to justify in the face of some great national emergency such as a world war or a major domestic disaster such as a widespread plague. Professor Belknap has shown effectively that the Court has embraced the concept of an emergency to broaden governmental powers to deal with wars but refused to apply the same concept to domestic emergencies.³¹⁷ He argues that the Court should apply the emergency concept in the domestic context as well on the theory that an emergency exception will allow better enforcement of the Constitution when there is no emergency.³¹⁸ However, emergency powers lend themselves to abuse. As Professor Belknap himself points out, "supposedly temporary powers became a permanent feature of American government."³¹⁹ The delegation doctrine would not, however, prevent effective action against a domestic emergency. In a true emergency, Congress would be willing to convene very quickly. Changes might be made in the procedures of the two chambers to allow faster action on proposals made by the Executive. The necessity for such a congressional response might also have the salutary effect of making the declarations of such emergencies less routine. There is, in my view, more

311. *See id.* at 762-66.

312. *See id.* at 748-51.

313. *See id.* at 798-803.

314. *See id.* at 818-19.

315. *See id.* at 812-13.

316. *See id.*

317. Belknap, *supra* note 235, at 79-84, 96-100 (1983).

318. *Id.* at 106-08.

319. *Id.* at 100.

danger of an imagined emergency subverting the delegation doctrine or some other important part of the Constitution than of the delegation doctrine preventing an effective response to a true emergency.

Perhaps the core of some people's fear of a world without delegation is a distrust of the political process and a preference for the administrative and judicial processes that now receive delegated power. Professor Bruce Ackerman, who expresses this preference consistently and articulately, has a vision of reasoned, principled deliberation replacing the self-interested, chaotic tugging and hauling of the political process.³²⁰ But, as Alan Watts has taught, neither the body politic nor a natural person may overcome itself:

[T]here is really no alternative to trusting man's nature. This is not wishful thinking or sentimentality; it is the most practical of practical politics. For every system of mistrust and authoritarian control is *also* human. The will of the would-be saint can be as corrupt as his passions, and the intellect can be as misguided as the instincts. . . . The alternative [to faith in our own nature], as Freud saw, is the swelling of guilt "to a magnitude that individuals can hardly support."³²¹

The body politic will produce legislated rules that are not of one piece and sometimes unwise, but the same charge can be leveled at regulation produced by the interaction of agencies, courts, and congressional committees in the context of delegation. And it was the body politic that produced our countermajoritarian Constitution, including the first amendment and the first sentence of article I conferring legislative power on the legislative process.

B. *Is the Proposed Test Judicially Manageable?*

Distinguishing between the powers of the legislative, executive, and judicial branches is clearly difficult. The distinctions required by the proposed test of delegation, however, are ones with which the Court already wrestles. Specifically, constitutional adjudication already has to face the problem of defining the outer boundaries of the President's article II powers in regard to war and foreign affairs.³²² Constitutional litigation must also distinguish between government benefits that are and are not covered by due process.³²³ The only additional distinction that the proposed test of proper delegation requires

320. See Priest, Book Review, 93 YALE L.J. 1625, 1631-32 (1984).

321. A. WATTS, PSYCHOTHERAPY EAST AND WEST 121 (1975) (emphasis in original).

322. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827); see also *Mobil Oil Corp. v. Department of Energy*, 610 F.2d 796 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980).

323. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

is that between "rules" and "goals." The distinction between rules and goals is, however, one that is old and basic to law, though robbed of its meaning in the delegation context so long as the strange gloss that the Court put on "intelligible principle" prevails.³²⁴

To say that the proposed test rests upon recognized distinctions does not mean that the distinctions are already fully delineated. Judge Skelly Wright, in urging a reinvigoration of the delegation doctrine, disclaimed an ability to define all its contours in advance and urged reliance on case law development.³²⁵ This Article, I hope, lays the foundation for sound case law development by setting forth principles that accord with the doctrine's purposes and are more coherent and more substantial than the interpretation now espoused by the Court.³²⁶

The proposed test concededly suffers from a present vagueness, but that alone is no objection. As Professor Jaffe wrote: "nearly every doctrine of constitutional limitation has been attacked as vague. Essentially the charges go to the institution of judicial review as we have it rather than specifically to the delegation doctrine."³²⁷

Under the proposed test of delegation, no less than in constitutional adjudication generally, there is a risk that members of the Court will use constitutional doctrine as a pretext to advance their private policy views. Still, the proposed test provides less opportunity for such judicial intrusion into policy matters than does the current approach to delegation. This is so not just because of the unexplained and incoherent nature of the current approach. More significantly, the current approach to delegation allows Congress to enact open-ended regulatory statutes under which it is all but impossible for courts to provide meaningful judicial review without getting involved in policy matters.³²⁸ Judge McGowan wrote that such broad delegations lead to the danger of an "imperial" judiciary.³²⁹

Thus, at worst, the proposed test poses no more risk of judicial usurpation than the current approach to delegation. The proposed test should, with proper judicial development, be substantially more

324. See text at notes 24-36 *supra*.

325. See Wright, *supra* note 14, at 587, 593-96.

326. See text at notes 152-72 *supra*.

327. See Jaffe, *supra* note 8, at 577.

328. See Stewart, *supra* note 11, at 1676-88. See also text at notes 92-98 *supra*. I have shown in the context of the Clean Air Act the many ways that goals statutes, unlike rules statutes, force courts into many policy-making roles. Schoenbrod, *supra* note 13, at 816-18.

329. McGowan, *supra* note 86, at 1120.

manageable than the Court's current unintelligible, unprincipled approach to delegation.

C. *Delegation and Constitutional Values*

The Court has stated that judicial enforcement of the delegation doctrine is warranted by two purposes — congressional accountability and judicial review. These two purposes protect and separate the respective powers of the various branches of government. Limiting the delegation would also serve a third purpose — the protection of private persons' liberty and property. These three purposes of the doctrine overlap, of course, and the same constellation of purposes could be subdivided in other ways.³³⁰ However, it is important that protection of liberty and property should be seen as an additional, distinct purpose to emphasize that the delegation doctrine not only serves to maintain etiquette and restraint within government, but also to protect the people's rights. Except where protected freedoms have been recognized, the Court has paid scant regard to the protection of rights as a purpose of the delegation doctrine, at least until *Chadha*.³³¹

In *Chadha*, the Court insisted on a legislative process involving both houses of Congress and the President as a safeguard against "bad laws" and "despotism" as well as a "way to preserve freedom."³³² The legislative process safeguards liberty and property by its being more cumbersome than the administrative process; the legislature must also act on a more general basis than other branches because of the crowded legislative agenda and because legislation that is too narrowly focused may be constitutionally suspect.³³³ As Justice Powell stated in his *Chadha* concurrence, "Congress is most accountable politically when it prescribes rules of general applicability."³³⁴ A statute that states a general rule curtailing liberty or property will probably affect many people and so require broad support to gain passage.³³⁵ An administrator, in contrast, is insulated somewhat from electoral and other political concerns and can curb liberty or property on a

330. See Note, *supra* note 8, at 261-64.

331. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 958-59 (1983). For earlier recognition of this purpose, see Jacoby, *supra* note 86, at 906-07; Jaffe, *supra* note 8, at 583, 586. See also notes 217-35 *supra* and accompanying text.

332. 462 U.S. at 948-49, 958-59.

333. See, e.g., U.S. CONST. art. I, § 9, cl. 3; *Chadha*, 462 U.S. at 962 (Powell, J., concurring); *United States v. Brown*, 381 U.S. 437, 440-45 (1965).

334. 462 U.S. at 966 (Powell, J., concurring). In *Chadha* the Court could have invalidated the legislative veto provision without touching all legislative vetoes by ruling that Congress was engaging in nonlegislative activity. See 462 U.S. at 964-67 (Powell, J., concurring).

335. See F. HAYEK, *LIBERTY*, *supra* note 162, at 154-55; Aranson, Gellhorn & Robinson, *supra* note 9, at 65.

case-by-case basis. As Dean Ely argued: "Much as liberals may not like it, one reason we have broadly based representative assemblies is to await something approaching a consensus before government intervenes."³³⁶

In short, requiring the legislative process to enact rules rather than delegate rule-making powers to others would help to filter out governmental actions that intrude on freedoms without serving the felt needs of the public. Professors Aranson, Gellhorn and Robinson have stated this notion in the language of welfare economics.³³⁷ Broad delegation cannot be explained as a means to "help legislators create public goods and suppress public bads"³³⁸ but does make it easier for legislators to "aid concentrated groups and fulfill their demands for private goods."³³⁹

These authors draw upon a large social science literature which presupposes that legislators seek primarily to get reelected, whether for selfish or for altruistic purposes.³⁴⁰ Legislators therefore seek at least to appear to respond to the sometimes conflicting electoral preferences of their constituency. Of particular interest here are cases where a possible government action will benefit a concentrated, private interest at the expense of the public generally.³⁴¹ Broad delegation can help legislators deliver private benefits that would be difficult to deliver directly through legislation: "[T]he members of [concentrated and well-organized groups] understand the congressional source of their benefits. But the rest of the electorate, which bears the net costs, remains uninformed and will shift some of the blame to the agency."³⁴² Legislators can, in other words, get credit and campaign contributions from the concentrated interest group for the private benefit delivered through the agency, while making it appear to those who bear the cost that the agency is to blame.

Legislators may also have a "perverse incentive" to enact cumbersome regulatory schemes: "[T]hey can then intervene on behalf of

336. J. ELY, *supra* note 9, at 133-34 (footnote omitted).

337. Aranson, Gellhorn & Robinson, *supra* note 9, at 6.

338. *Id.* at 6.

339. *Id.* at 7. These writers offer a second explanation of delegation which they call "a public-policy 'lottery.'" *Id.*

340. *Id.* at 38.

341. An example might be the exclusion of competitors from an industry, thereby benefiting existing firms at the expense of consumers and future competitors. Another example would be an exemption of a particular industry from pollution controls, benefiting that industry at the expense of environmental interests.

342. Aranson, Gellhorn & Robinson, *supra* note 9, at 57. Well organized groups will concentrate their power and campaign contributions to get private benefits for themselves, rather than to keep others from getting private benefits. *Id.* at 40.

their constituents, providing casework, the most intensely divisible of private political benefits.”³⁴³ As still another way of getting political support or campaign contributions, “Congressmen can also threaten adverse agency actions against ‘uncooperative’ constituents. Imposing costs . . . by threatened agency action is certainly far easier than doing so by statute”³⁴⁴

The need for the legislature to act in general terms and to get widespread support provides a political protection for liberty and property that complements the judicial protection accorded under equal protection and due process.³⁴⁵ Discrimination or takings can often be dressed up as properly targeted administrative regulation and the courts in most cases must defer to the agency’s judgment that the regulation is appropriate. Use of the legislative process thus furthers that aim of our governmental structures stated by the Court in *Yick Wo v. Hopkins*:

not . . . to leave room for the play and action of purely personal and arbitrary power. . . . For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails³⁴⁶

In recognition of the safeguards offered by the legislative process, the Court has applied a stricter test of proper delegation where it perceives “personal liberties” to be at stake.³⁴⁷ The Court has also set out to make the safeguards of the legislative process available by invoking rubrics other than delegation, such as vagueness³⁴⁸ and due process.³⁴⁹ However, such protection has not been required when business is regulated for economic, social, health, or other purposes.

No opinion for the Court has attempted to justify this differing application of the delegation doctrine. Justice Brennan’s concurrence

343. *Id.* at 58.

344. *Id.* at 58-59 (footnote omitted).

345. Professor Mashaw also sees the use of public law for private purposes as an invasion of constitutional rights, but would deal with the problem through closer judicial review of statutes’ purposes. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 875-76 (1980).

346. 118 U.S. 356, 369-70 (1886). *Yick Wo*’s language has been cited in a delegation context by both Justice Brennan, see *McGautha v. California*, 402 U.S. 183, 272 n.22 (1971) (Brennan, J., dissenting), and Professor Davis, see Davis, *supra* note 60, at 733.

347. See, e.g., *Kent v. Dulles*, 357 U.S. 116, 129 (1958). B. SCHWARTZ, *supra* note 44, at 47-48.

348. See, e.g., *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921).

349. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). See also notes 47-50 *supra* and accompanying text.

in *United States v. Robel*³⁵⁰ asserted that fundamental rights deserve a higher degree of protection than other constitutional interests. Yet, he did not define what distinguishes the two categories, nor is his justification for the difference in treatment convincing. Justice Brennan argued that the statute at issue in that case was enforceable through criminal sanction,³⁵¹ but this is no different from many cases delegating business regulations where the statutes provided for criminal sanction.³⁵² Justice Brennan also argued that the "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people."³⁵³ This argument is also applicable to delegations of economic regulation.

Is there a principled way to justify the Court's more permissive approach to delegations of power to regulate business and property? The propriety of the Court's approach is not self-evident, even though property has sometimes received less judicial protection than other constitutional interests. Judge James Oakes, in a thoughtful essay on "property rights,"³⁵⁴ notes the double standard under which the Court in recent decades has deferred far more to the legislature on issues of property than on civil rights, but he argues that property also involves civil rights. He suggests that "we are entering a [new] phase, in which substantive constitutional content will once again be given to property rights"³⁵⁵ Judge Oakes points, for example, to the "new property"³⁵⁶ of vital concern to individuals on all economic levels.³⁵⁷ The lesser protection afforded to economic interests is assuredly not because property is not a right; the fifth amendment speaks of "life, liberty, and property." As the Court stated in *Lynch v. Household Finance Corp.*:

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property"

350. 389 U.S. 258, 269-82 (1967) (Brennan, J., concurring).

351. 389 U.S. at 275-76.

352. See, e.g., *Yakus v. United States*, 321 U.S. 414, 444-46 (1944); *Curran v. Wallace*, 306 U.S. 1, 7 (1939); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 311-12 (1936).

353. 389 U.S. at 276.

354. Oakes, "Property Rights" in *Constitutional Analysis Today*, 56 WASH. L. REV. 583 (1981).

355. *Id.* at 597.

356. See Reich, *supra* note 259, at 733. See also Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

357. Oakes, *supra* note 354, at 598.

in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. . . . That rights in property are basic civil rights has long been recognized.³⁵⁸

Nor does the famous and increasingly criticized³⁵⁹ footnote in *United States v. Carolene Products Co.*³⁶⁰ justify the more deferential approach to congressional delegations of power to regulate property rather than individuals. Although a full treatment of this topic is beyond the scope of this Article, a few observations are in order. *Carolene Products* suggested that courts, in assessing the rational basis for legislation, should defer to the legislature's judgment to a lesser extent when a statute may (1) violate a "specific prohibition" of the Constitution, (2) impede the accountability of the legislative process, or (3) work against groups isolated from the political process. In any one of the enumerated situations, the court is supposed to scrutinize the legislature's justification for its action to a greater extent than it would in dealing with whether there is adequate justification for an ordinary regulatory statute.

The second specially scrutinized classification in *Carolene Products*, which deals with legislation that undercuts legislative responsiveness to the electorate, supports close scrutiny of all delegation of legislative power, although the first³⁶¹ and third³⁶² classifications

358. 405 U.S. 538, 552 (1972).

359. The critiques come from diverse perspectives. *E.g.*, Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 703-05 (1984); Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

360. 304 U.S. 144, 152 n.4 (1938).

361. As to the first of the enumerated categories, "property" is the subject of a "specific prohibition" of the Constitution. *See* U.S. CONST. amend. V & XIV. However, the protection of property can be said to differ from, for example, first amendment rights in that the legislature has broad power to regulate property for public purposes; *Carolene Products* thus sanctions less scrutiny of statutes that regulate property on the theory that the Constitution lets the legislature decide about property regulation in the first instance. This logic does not, however, sanction deference to the legislature, if, in improperly delegating property regulation, the legislature has sidestepped its constitutionally assigned duties.

362. The third category of special scrutiny in *Carolene Products* — legislation that affects discrete and insular minorities — comes closer to explaining why delegations affecting property receive less scrutiny than those affecting persons if the legislative process protects property interests more adequately than personal interests. This justification has serious problems. It ignores *Carolene Products'* first two categories which would justify scrutiny of all delegation of legislative power. It also overlooks the fact that property interests are deprived of the full protection of the legislative process when the legislature legislates broadly. Moreover, legislation authorizing regulation of personal interests is not limited in its effects to discrete and insular minorities and legislation authorizing regulation of property may well affect these minorities as well. For instance, land use laws can, in regulating property, serve to exclude minorities from wealthy suburbs.

In any event, it is not so easy to distinguish statutes that touch personal from those that touch property rights. This is so, first, because of the interdependence of property, liberty, and other rights. *See* note 358 *supra* and accompanying text. It is also so because economic regulation affects not only the property rights of the regulated but both the personal and property interests

might also support close scrutiny. Under the second classification, delegation requires close scrutiny because delegation undercuts the accountability of the legislation process.³⁶³ This is no less true when Congress delegates the regulation of concentrated, propertied interests. Such interests will sometimes support vague delegations to agencies to dissipate public pressure for more specific legislative action.³⁶⁴ Propertied interests may be better able than most individuals to hold legislators accountable for the use of delegated power, but the analysis of Professors Aranson, Gellhorn, and Robinson suggests that even propertied interests will not always be able to defend themselves against the private interests of legislators and administrators in maximizing their power. Such incapacity leads to regulatory complication and a stifling of innovation, which hurts the powerful as well as the weak.

To the extent that *Carolene Products* can be read as a statement of those areas where the judiciary has more institutional competence than legislatures to resolve issues, *Carolene Products* supports scrutiny of delegations. The courts have had long practice in characterizing powers as legislative or otherwise. This is an area in which Congress has no special expertise. Congress should be held disabled from resolving constitutional questions of delegation because members of Congress have a conflict of interest stemming from the political advantages of passing the buck.³⁶⁵ So the judiciary does not lack institutional competence to deal with delegation issues under the test

of the beneficiaries of regulation as well. For example, air pollution legislation affects the interests of both pollution sources and pollution victims. Courts have said that the public health and environmental interests sought to be protected by some regulatory legislation deserve special judicial solicitude. *See, e.g., Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971). Such legislation should not be vulnerable if attacked on delegation grounds by would-be beneficiaries of regulation who have been disappointed in administrative action, but invulnerable when attacked by a regulated business that believes an agency has used its broad discretion to regulate its property too strictly.

363. It could be argued, however, that the electorate agrees to broad delegations when it elects and reelects legislators that enact them. Professor Davis had indeed suggested that consent of the electorate to delegations should bar judicial invalidations. *See* 1 K. DAVIS, *supra* note 8, at 150-51. Such an approach would, however, also have legitimized the legislative veto, and the Court accepted no such argument in *Chadha*.

It is doubtful, in any event, that the electoral process is an effective check on legislators' propensity and motives to delegate. Take the Clean Air Act as an example. Legislative leaders in 1970 acknowledged that there was strong public antagonism to past legislative approaches to air pollution which granted broad discretion to officials. *See* Schoenbrod, *supra* note 13, at 819-22. Congressional leaders promised to make the "hard choices," and passed a statute that appeared to do so. *Id.* at 746-47. The statute was too long and complicated for voters to understand that the key choices were in fact avoided; it would have taken the kind of legal analysis that courts can perform to show that the statute lacked legally meaningful standards. *Id.* at 762-66.

364. *See* Schoenbrod, *supra* note 13, at 820-21.

365. *See generally* Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984).

proposed in the Article, but does lack competence to judge convenience, which is at the core of the Court's past approach to delegation.

In sum, the Court's practice of not scrutinizing most delegations is not only contrary to what the Court says it should do but also positively harmful to important constitutional values.

CONCLUSION

The delegation doctrine is alive, but not well articulated or coherently applied by the Supreme Court. The Court continues to invalidate governmental action out of concern that Congress has delegated decisions that should be made in the legislative process, but under rubrics other than delegation, such as due process or vagueness, or even special, narrow versions of the delegation doctrine, such as a stringent approach to cases involving certain rights or favoring statutory constructions that avoid constitutional clashes. Nowhere has the Court attempted to explain how its various approaches to delegation by Congress relate to one another. Thus, the Court's approach to delegation simultaneously fails to serve the doctrine's purposes and, because it is incoherent, invites judicial usurpation of legislative powers.

The failure by the Court is of long standing. The opinions have opportunistically rationalized expedient results by citing empty formulae rather than doing the harder work of reconciling the Constitution's text to the pressures the Court felt in dealing with specific fact patterns. In *Grimaud*, the Court grounded its decision on the fiction that the statute in question had, in fact, set standards, rather than trying to reconcile its concern that Congress cannot manage public lands with the delegation doctrine.³⁶⁶ In *Panama Refining* and *Schechter*, the majority of the Court found it expedient to strike down statutes, but did so by using the same meaningless test that had been used in *Grimaud* to uphold an equally general statute.³⁶⁷ In cases like *Curtiss-Wright* and *Field v. Clark*, the Court was moved, at least in part, by the need for broad Executive discretion to deal with international affairs but in the former created an exception to the delegation doctrine,³⁶⁸ while, in the latter, pretended as in *Grimaud* that an essentially open-ended delegation had real content.³⁶⁹

366. *United States v. Grimaud*, 220 U.S. 506 (1911). See notes 253-56 *supra* and accompanying text.

367. *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). See notes 37-40 *supra* and accompanying text.

368. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). See note 33 *supra* and accompanying text.

369. *Field v. Clark*, 143 U.S. 649 (1892). See notes 217-25 *supra* and accompanying text.

This incoherent case law has tarnished the very real purposes of the delegation doctrine and has left the Court without a coherent definition of what delegation is improper. The Court is ill equipped to deal with future delegation questions, particularly if the membership of the Court shifts, creating support for striking down statutes under the empty terms of the traditional test.³⁷⁰

This Article has attempted to draw the outline of a definition of delegation that gives the doctrine substance and coherence. But it is only an outline, not a detailed code. The concepts that I propose are somewhat elastic and therefore risk being manipulated. That, however, is in the nature of constitutional tests. The approach presents a lower risk of result-oriented manipulation than the Court's present test, which is inarticulate, inconsistent, disconnected to the doctrine's purposes, and disingenuous. As Justice Brennan put it in *McGautha v. California*, "candor compels recognition that our cases regarding the delegation by Congress of lawmaking power do not always say what they seem to mean."³⁷¹

Candor also compels recognition that, in failing to do its job, the Court has allowed Congress and the President to avoid their job of making, in public view, the rules to govern private conduct, to the detriment of the Constitution and those who live under it.

370. See note 39 *supra*.

371. *McGautha v. California*, 402 U.S. 183, 273 (1971) (Brennan, J., dissenting).