

Theory of Legislative Delegation

Peter H. Aranson

Ernest Gellhorn

Glen O. Robinson

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Recommended Citation

Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson, *Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1982)
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A Theory of Legislative Delegation*

Peter H. Aranson†, *J*
Ernest Gellhorn††
& Glen O. Robinson†††

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* An earlier version of this essay was prepared for delivery at the Annual Meeting of the American Political Science Association (Conference Group on the Political Economy of Advanced Industrial Societies), Denver, Colorado, September 2-5, 1982. Both this essay and its earlier version summarize a longer essay, *The Legislative Creation of Legislators: Public Choice Perspectives on the Delegation of Legislative Power*, prepared for a Liberty Fund, Inc., Conference on Constitutional Limits to the Delegation of Regulatory Authority, principal paper by P. Aranson, E. Gellhorn, and G. Robinson, sponsored by the Law and Economics Center of Emory University, Atlanta, Georgia, October 1981.

† Professor of Economics, Department of Economics, and Special Research Administrator, Law and Economics Center, Emory University.

†† Dean and Galen J. Roush Professor of Law, Case Western Reserve University.

††† John C. Stennis Professor of Law, University of Virginia.

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INTRODUCTION

The American Constitution plainly embodies a system of separation of powers.¹ Its first three articles vest legislative, executive, and judicial powers in separate institutions; establish distinctive organizational forms; assign particular responsibilities; and provide differing procedures for choosing each branch's officials. The Constitution, however, does not clarify how rigidly these powers must be separated. Each article's language appears exclusive,² yet the text includes terms susceptible to a contrary interpretation.³ Furthermore, as the intensely pragmatic founders acknowledged, governmental functions do not always divide neatly in practice.⁴ As with the general separation-of-powers principle, the Constitution is also vague concerning the principle's specific applicability to delegations of powers. Even after two centuries of interpretation, the meaning and significance of the separation-of-powers principle, as applied to congressional delegations of lawmaking powers to the President, executive departments, or independent agencies, remain obscure.

The arguments for the separation of powers find their most complete expression in Montesquieu, who urged limits on governmental power because he feared that governors might abuse their authority.⁵ Montesquieu relied on the separation-of-powers principle to control such abuse. This principle, as incorporated in the Constitution, suggests three related but distinct concepts.

First, separate branches should perform the distinct tasks of legislation, administration, and adjudication. Each branch should have a different organizational form, internal process, and method of appointment or selection. However, the separation-of-powers concept

¹ See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 28-33 (1965); Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385 (1935).

² See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress. . . ."); U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President. . . ."); U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts. . . .").

³ See, e.g., U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper. . . .").

⁴ See, e.g., THE FEDERALIST NO. 47 (J. Madison).

⁵ See B. DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151-52 (1949).

does not require that these divisions extend beyond identifying where the primary responsibility and power to perform certain functions must reside. Indeed, a related concept holds that there must be a limited sharing of lawmaking and other powers. The idea that branches of government must share powers in order to check them rests implicitly on the ability of one branch of government to counter the powers of another branch. For example, the executive enjoys a veto over legislative enactments, while one house of the legislature must advise and consent to the executive's principal appointments. Additionally, a working application of the separation-of-powers principle requires legal authority to decide when one branch has trespassed on another branch's powers or on those powers reserved to the states or the people.⁶

When the framers first considered the Federal Constitution, a tension emerged between the purist's belief that only absolute separation could avoid a tyrannical abuse of power, and the pragmatist's desire to accommodate the realities of governing. As that debate shows, the pragmatists prevailed. For example, in defending the Constitution's provision for the separation of powers as sufficient to satisfy Montesquieu's concerns, Madison argued that a total separation was unreasonable. Madison's view of separation of powers was limited to the idea that one branch of government should not exercise the entire power of another.⁷

Madison's practical view of the separation-of-powers concept also provides an analogy and support for the doctrine of American constitutional law that the powers of one branch of government should not be wholly delegated to another.⁸ The two ideas, however, are not completely synonymous, in that the separation-of-powers principle may be violated in several ways that do not involve delegations.⁹ The delegation doctrine also has a theoretical application to the transfer of any government power. The transfer of judicial power to executive agencies,¹⁰ of executive power to the legislature,¹¹ or of legislative power to

⁶ This has been the prevailing assumption since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), when the Supreme Court assumed power over the actions of the other branches, which have yet to establish a reciprocal power over actions of the Court.

⁷ See THE FEDERALIST, *supra* note 4.

⁸ See, e.g., L. JAFFE, *supra* note 1.

⁹ One commonly encounters the following arguments: that the President has usurped Congress's power to declare war; that the Supreme Court has usurped Congress's power to regulate the economy; that Congress has usurped the President's executive power, and so on. Such alleged usurpations may violate the separation-of-powers principle, but they do not involve delegations of power. Of course, a fine line exists between delegations and usurpations. For example, the President or an agency might assert the existence of a power that Congress would have granted nonetheless, or would have refused to grant had the President or agency not acted preemptorily.

¹⁰ Agency exercise of judicial power was once thought to present a delegation problem with respect to some factual adjudications. See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932) (requiring *de novo* judicial examination of agency determinations of "constitutional facts"). Agency adjudications are no longer believed to present a delegation problem. See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3:10-(2d ed. 1978).

¹¹ See *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating delegation of administrative

the executive¹² provide examples of this application. Only this last application, however, has figured prominently in constitutional jurisprudence, and it is the concern of this article.

The delegation of legislative power is an old concern, older than the Constitution or even than the separation-of-powers principle. According to Locke, one of the four unbreachable boundaries confining legislative authority was that:

The *Legislative cannot transfer the Power of Making Laws* to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others. . . . And when the people have said, We will submit to rules, and be govern'd by *Laws* made by such Men, and in such Forms, no Body else can say other Men shall make *Laws* for them; nor can the people be bound by any *Laws* but such as are Enacted by those, whom they have Chosen, and Authorised to make *Laws* for them. The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making laws, and place it in other hands.¹³

Locke's insistence that legislators cannot delegate their legislative authority derives from an ancient rule of agency law: power entrusted to an agent as a consequence of his special fitness cannot be delegated, because such a delegation would be inconsistent with the purposes of the initial transfer.¹⁴ Locke's formulation makes this private-law principle one of public law: as agents of the people, legislators cannot transfer their power to others. The rule's theoretical import for government is less a fear of the delegate's possible misuse of power than a belief that the people have agreed to relinquish their most important power only to representatives that they alone have chosen. For the contractarian tradition that Locke represents the lawmaking power is central, because through it the people relinquish private autonomy and accept collec-

powers to legislative agency composed of those officials not "officers of the United States" subject to presidential appointment).

¹² See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹³ J. LOCKE, *TWO TREATISES OF GOVERNMENT* 380-81 (2d Treatise) (Cambridge University Press, 1960). The other three boundaries are that (1) established laws do not vary among different classes of people; (2) the good of the people should be the only object of legislation; and (3) there should be no taxation except with the consent of the people or that of their deputies. *Id.* ch. 11.

¹⁴ For a skeptical view of the historical connection between the delegation doctrines in agency law and in constitutional law, see Duff & Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168 (1929).

tively imposed obligations.¹⁵ In this contractarian view, laws derive their legitimacy from the consent of the governed and, in the American polity, the constitutional delegation of lawmaking power to the Congress establishes this consent. Consequently, because agency actions are not subject to direct public approval, their legitimacy must derive from the legality of the congressional enactments that authorize them.

In Locke's uncompromising formulation, the delegation doctrine resembles a pristine form of the separation-of-powers concept. One could not apply it literally in a world of extensive interactions among branches of government. Locke's edict thus bears approximately the same relationship to the theory and practice of modern government as does Montesquieu's limited statement of the separation-of-powers principle.

These formulations, however, are not useless abstractions, for they provide benchmarks against which one can measure the legal and political practices of modern government. In particular, they allow an assessment of whether the supposed "needs of modern governance" have overwhelmed protections based on the separation of powers and the strictures against the delegation of legislative authority that are central to the Constitution's structure. Additionally, the basic notions of accountability and control that Locke and Montesquieu articulated are critical to the modern development of the delegation doctrine. These principles support the idea that the exercise of legislative and executive powers shall be subject to judicial review, thus ensuring that legislators exercise only those legislative powers that the people and the Constitution have given to them.

This article examines certain causes and consequences of the congressional delegation of legislative authority to executive-branch agencies and independent commissions. Section I reviews the judicial history of the delegation doctrine. Although the doctrine's development remained sparse until this century, a large number of cases decided between 1892 and 1934 provided judicial validation to increasingly expansive congressional grants of legislative authority. Courts kept the doctrine alive only in dictum, until the Supreme Court revived it in three cases to invalidate New Deal delegations. These few cases, however, remain the only instances in which the Court employed the delegation doctrine to strike down congressional grants of legislative authority, for the Court soon returned to accepting broad delegations. Indeed, most contemporary commentators regard the doctrine as dead, even though the Court refuses to bury it.

¹⁵ The sensitivity of this grant of power is apparent in the special and detailed processes for selecting legislators and regulating the consideration and adoption of laws. *See* U.S. CONST. art. I, §§ 2-4; art. II, § 1; art. III, § 1; *see also* J. MASHAW & R. MERRILL, INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM 102-46 (1975).

Our analysis of the cases concludes by suggesting a model to explain the positions of *individual* justices in delegation cases. This model postulates that an increase in delegated legislative authority will increase "agency costs," (costs engendered by a divergence of the agent's goals and those of the principal) but will also diminish the principals' (legislators') decisionmaking costs (the cost of securing agreement on a course of action). A justice's preferred position on delegation is attainment of the degree of delegation that minimizes the sum of these two costs. As a particular delegation becomes more expansive, it will reach an optimum, then exceed it, and eventually reach the threshold of constitutional acceptability. The model ultimately proves unsatisfactory in explaining the delegation doctrine's *aggregate* development both for the entire Court and over extended periods of time, because each justice's attitudes toward costs are highly subjective and vary from issue to issue and from term to term. However, the model does suggest a normative framework in which delegations might be evaluated.

Section II assesses managerial, political, and economic theories and explanations for delegation. Managerial explanations involve legislative avoidance of the decisionmaking costs of tedium, as well as a regard for speed, expertise, and permanence. These explanations prove to be defective, however, because the members of Congress absorb the costs of detail and promote speed, expertise, and permanence in other areas (for example, constituency casework), and because they fail to explain why *all* legislative matters are not delegated. Political explanations, resting on the "depoliticizing" shift from the legislature to managerial bureaus, are similarly deficient because the removal of politics from administrative processes really occurs only in civics books. The economic theory underlying the delegation of legislative power rests on the notion that delegations serve the benign purposes that a positive interpretation of welfare economics would attribute to the state. Delegations of legislative power to agencies, for example, help legislators create public goods and suppress public bads. This view of delegation, however, also cannot be sustained. First, the judgments of welfare economics are often overstated and controversial. Second, even a political system with only those motives that welfare economics may contemplate would suffer under theoretical burdens, such as the absence of public-policy equilibria and the presence of intense minorities.

Section III offers a different perspective: that delegation facilitates the collective provision of private goods. We first review the public-choice theory that explains the collective production of private goods, especially in its regulatory aspects. This review includes a private-goods interpretation of interest-group, electoral, legislative, bureaucratic, and judicial decision making. Second, we analyze the managerial view of delegation in this private-interest interpretation, examining two models

of delegation that are consistent with the private-goods production hypotheses. The first is a responsibility-shifting model, in which legislators aid concentrated groups and fulfill their demands for private goods by creating a regulatory agency with legislative powers. This model even allows legislators to attack the agency for inefficiency. The second model views the delegation of legislative powers to an agency as equivalent to creating a public-policy "lottery," which a majority of legislators and their interest-group clients may prefer to any individual public-policy certainty.

Section IV argues for a renewed nondelegation doctrine. We thus propose to deprive the legislature of its ability to shift responsibility and to create lotteries in private benefits through regulation. We also review the likely efficiency properties of a renewed nondelegation doctrine and conclude that regulatory activities that survive the doctrine's rebirth would probably be decentralized, would command a consensus, and would act as a filter, allowing public-regarding regulatory arrangements to pass through unharmed.

I

THE DELEGATION DOCTRINE IN THE COURTS

The delegation doctrine¹⁶ is more precisely labeled the "nondelegation" doctrine, because it theoretically constrains congressional transfers of authority. In its application, however, the doctrine has seldom provided a strong constraint. We will speculate later about some of the reasons for the Supreme Court's reluctance to enforce it.¹⁷ Here we are concerned with reviewing its legal development.

A. Historical Development

The delegation doctrine developed slowly. The Supreme Court turned away early challenges to congressional delegations by narrowly construing the delegated powers. The Court upheld delegations on the somewhat strained rationale that the transferred authority was limited to factual determinations necessary to the application of the legislative will¹⁸ or to filling in certain "details" pertinent to the legislative purpose.¹⁹ Not until the late 1920s did the Court acknowledge the emerging reality by articulating the legal criteria for sustaining delegations of

¹⁶ Legal commentaries on the delegation doctrine are plentiful. General texts include 1 K. DAVIS, *supra* note 10, ch. 3; L. JAFFE, *supra* note 1, ch. 2. For a collection of cases and commentary, see G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* CH. 2 (2d ed. 1980).

¹⁷ See *infra* text accompanying notes 214-20.

¹⁸ See, e.g., *Cargo of The Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 386 (1813).

¹⁹ See, e.g., *United States v. Grimaud*, 220 U.S. 506, 517 (1911).

legislative powers. In *J. W. Hampton, Jr. & Co. v. United States*,²⁰ the Court considered congressional delegation to the President of the power to set tariff rates that would equalize production costs in the United States and competing countries. The Court ruled that it would sustain delegations of legislative power whenever Congress dictates an "intelligible principle"²¹ to which an agency must conform.

By modern legal standards, the delegation sustained in *Hampton* is not especially troublesome because the scope of the power and the discretion involved was fairly limited. But the Court's criterion for sustaining the delegation eventually transcended the original context and was soon providing the basis for sustaining far more sweeping regulatory delegations of broader legislative powers.²² Indeed, the Court's willingness to uphold congressional delegations must have made it difficult for legal observers of the 1930s to imagine any congressional delegation of lawmaking power that the Court would hold unconstitutional.²³ Then, without warning, the Court brought the "non-doctrine" to life, turning it against congressional efforts to implement the New Deal. As part of a massive and hasty legislative program, Congress had enacted the National Industrial Recovery Act in 1933,²⁴ giving the President almost total control of the economy. Although the program initially drew wide public support, within two years its reliance on government and industry self-regulation proved ineffective, and the delegation was attacked from all sides.

²⁰ 276 U.S. 394 (1928).

²¹ *Id.* at 409.

²² Following *Hampton*, the Court upheld regulatory schemes in which Congress had given agencies legislative powers broader than those of previous delegations. In 1932, the Court sustained a delegation of power to the Interstate Commerce Commission for the regulation of the ownership and control of railroad systems under a "public interest" criterion in *New York Cent. Sec. Co. v. United States*, 287 U.S. 12 (1932). In the same term the Court, in *Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266 (1933), ruled that a grant of power allowing the FCC to assign radio frequencies under an identical standard was not so "indefinite as to confer an unlimited power." *Id.* at 285. During the following term, in *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304 (1934), the Court approved an order the FTC had issued under its statutory power to eliminate "unfair methods of competition," despite the acknowledged lack of definition in either the statute or the antecedent common law. *See id.* at 309-12; *see also* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 552-53 (1935) (Cardozo, J., concurring).

²³ *See, e.g.*, Field, *The Constitutional Theory of the National Industrial Recovery Act*, 18 MINN. L. REV. 291-92 (1934):

With respect to the constitutional question presented by the delegation of legislative powers to the president, the National Industrial Recovery Act has been drafted with special care to abide by the requirements of past decisions on this subject. Guides are furnished, and events specified, and conditions described, upon which executive action is to be predicated . . . Previous Acts of congress going as far or further have been upheld.

²⁴ Ch. 90, 48 Stat. 195 (1935). For a summary of the surrounding events, *see* E. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* PT. 1 (1966); G. ROBINSON, E. GELLHORN & H. BRUFF, *supra* note 16, at 47, 52.

The first legal challenge to the Act was to a minor aspect of the recovery program. In *Panama Refining Co. v. Ryan*,²⁵ the Court considered section 9(c) of the NIRA, which authorized the President to prohibit the interstate transportation of petroleum products produced or withdrawn from storage contrary to state law. The provision, a response to an oil glut, was designed to raise prices by restricting the supply coming to market. Chief Justice Hughes, writing for the Court, overturned section 9(c) as an unlawful delegation because it did not provide legislative criteria to guide presidential discretion in deciding when to invoke the statutory power to prohibit shipment of "hot oil." Justice Cardozo, in dissent, found the President's discretion to be limited both by explicit statutory conditions and the Act's declared objectives.²⁶

Less than three months after *Panama*, the Court again used the delegation doctrine to overturn New Deal legislation. In *A.L.A. Schechter Poultry Corp. v. United States*,²⁷ the Court reviewed the Act's central provisions empowering trade associations to create codes of fair competition. Chief Justice Hughes again wrote for the Court and invalidated the delegation. In doing so, he rejected on both procedural and substantive grounds the government's reliance on a recent trio of cases that had upheld delegations to the ICC, the FTC, and FCC.²⁸ Chief Justice Hughes emphasized that in each of these earlier delegations Congress had created an expert administrative body "acting under statutory restrictions adapted to the particular activity";²⁹ no such claim could be made for the NIRA. Even Justice Cardozo, in a concurring opinion, acknowledged that this time the delegation went too far:

The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant. . . . Here . . . is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.³⁰

Finally, in *Carter v. Carter Coal Co.*,³¹ the Court struck down the Bituminous Coal Conservation Act of 1935.³² Under the 1935 Act, coal companies in twenty-three predefined districts elected district boards to set minimum prices for each district. The Act also provided for industry-wide wage rates and maximum hours of labor through contractual agreements among producers employing more than one-half of em-

²⁵ 293 U.S. 388 (1935).

²⁶ *Id.* at 433-44.

²⁷ 295 U.S. 495 (1935).

²⁸ *See supra* note 22.

²⁹ 295 U.S. at 540.

³⁰ *Id.* at 551 (Cardozo, J., concurring).

³¹ 298 U.S. 238 (1936).

³² Ch. 824, 49 Stat. 991 (1935).

ployed mine workers. Mine owners choosing not to participate in these arrangements had to pay a fifteen percent surcharge on their sales. The Court invalidated this delegation of power to private coal producers: "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."³³

The rapid succession of three major decisions invoking the delegation doctrine might have presaged a new life for a moribund constitutional rule. They proved, however, to be the Supreme Court's last and only applications of the doctrine to overturn congressional acts because they lacked sufficient standards. Although the Court has often repeated its message in *Schechter*, that "sweeping delegation[s] of legislative power" are unconstitutional,³⁴ in the past half century no Court majority has subsequently applied the delegation rule to invalidate legislation. Why the Court has since declined to apply the rule to equally broad delegations is a matter of debate. A review of the post-*Schechter* decisions declining to apply the rule suggests, among other answers, that the short-lived resuscitation reflected a temporary judicial hostility toward centralized national regulation, rather than concern over an allegedly unconstitutional transfer of legislative discretion.³⁵

Four years after *Schechter*, the Court, in *United States v. Rock Royal Co-op.*,³⁶ sustained delegations under the Agricultural Marketing Agree-

³³ 298 U.S. at 311. Delegations to private groups pose a distinct problem. Cf. Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973) (pecuniary interests of members of State Board of Optometry disqualify them from conducting hearings regarding revocation of optometry licenses). One should not overemphasize this distinction, however, because delegations ostensibly made to officials actually may be delegations to private groups. In *Schechter*, for example, the power given to the NRA to establish Codes of Fair Competition was ultimately delegated to private firms within the industries covered by the codes. See *Yakus v. United States*, 321 U.S. 414, 424 (1944); L. JAFFE, *supra* note 1, at 66.

³⁴ See, e.g., *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (quoting *Schechter*, 295 U.S. at 539).

³⁵ The Court's other decisions of that term probed the distinction between state and federal intervention. The Court sustained the right of state legislatures to declare a moratorium on mortgage foreclosures, see *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), and to set minimum milk prices, see *Nebbia v. New York*, 291 U.S. 502 (1934). But it held invalid a federal statute granting relief for farm mortgagors, see *Louisville Bank v. Radford*, 295 U.S. 555 (1935), the presidential removal of an FTC commissioner without cause, see *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), and, of course, the NIRA in *Schechter*. After Chief Justice Hughes read the *Schechter* opinion, Justice Brandeis reportedly advised Tom Corcoran, one of Roosevelt's top advisers:

This is the end of this business of centralization, and I want you to go back and tell the President that we are not going to let this government centralize everything. It's come to an end. As for your young men, you call them together and tell them to get out of Washington—tell them to go home, back to the States. That is where they must do their work.

Brandeis, J., *quoted in* A. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL* 280 (1960).

³⁶ 307 U.S. 533 (1939). Justice Roberts, dissenting in the companion case of *H.P. Hood*

ment Act (AMAA),³⁷ which permitted the Secretary of Agriculture to set prices for agricultural products in order to give producers a "parity in purchasing power" between current prices and those received in a base period. Sustaining the delegation, a majority of the Court found the statutory provisions sufficiently specific to distinguish the case from the more amorphous standards invalidated in *Schechter*.³⁸

Because the AMAA involved a far less ambitious delegation than did the NIRA, *Rock Royal* is more a retreat from *Schechter*'s implications than a repudiation of its holding. In *Yakus v. United States*,³⁹ however, the Court's retreat was more substantial. There the Court sustained a wartime measure that gave the Office of Price Administration extensive powers to fix commodity prices.⁴⁰ The specified purposes were as broad and general as those condemned as standardless in *Schechter*,⁴¹ but the Act also provided that the OPA consider the "prices prevailing between October 1 and October 15, 1941"⁴² and that the Administrator set forth a "statement of the considerations"⁴³ used in prescribing prices. The significance of *Yakus* results from the Court's reformulation of the criteria for evaluating legislative standards that guide an administrator's use of the delegated power: legislative standards must provide a reviewing court with the ability to ascertain whether an agency has followed the legislative will.⁴⁴

& Sons, Inc. v. United States, 307 U.S. 588, 603 (1939), argued that the statutory concept of parity was too broad because it involved not only simple accounting comparisons of pricing periods, but also a complex industry-wide regulatory scheme to assure producers "parity in purchasing power." *Id.* at 606-07.

³⁷ Ch. 296, 50 Stat. 246 (1937) (reenacting and amending the Agricultural Adjustment Act, ch. 641, 49 Stat. 75 (1935)) (current version codified in scattered sections of 7 U.S.C.).

³⁸ The Court also summarily sustained a delegation to private milk producers of the power to implement marketing orders fixing milk prices. 307 U.S. at 577-78.

³⁹ 321 U.S. 414 (1944).

⁴⁰ Emergency Price Control Act, ch. 26, 56 Stat. 23, 24 (1942).

⁴¹ The specified purposes included: "[S]tabiliz[ing] prices," preventing "speculative, unwarranted, and abnormal increases in prices and rents," eliminating and preventing "profiteering, hoarding, manipulation, speculation and other disruptive practices," assuring "that defense appropriations are not dissipated by excessive prices," and protecting persons with fixed incomes and preventing "hardships" to business and government. 56 Stat. at 23-24.

⁴² *Id.* at 24.

⁴³ *Id.* at 25.

⁴⁴ The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. . . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. . . . Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions . . . of its legislative command. . . . Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of the Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared pur-

One might treat *Yakus* as an exception since it involved a wartime emergency and because the delegated function was performed by public officials rather than by private persons engaged in the regulated industry. However, the history of judicial tolerance of broad delegations since *Yakus* cannot be so rationalized. Those opinions clearly support the conclusion of most observers that the nondelegation doctrine has become what it was before *Panama Refining*—a nondoctrine.⁴⁵

Despite the Court's reluctance to apply this "nondoctrine," it has refused to repudiate it completely. Periodically, the nondelegation principle receives favorable mention in opinions of the Court and in those of individual justices. The Court sometimes refers to the doctrine, for example, when interpreting broad statutes, using it in support of an otherwise tenuous effort to narrow statutory construction. The leading case in this area is *Kent v. Dulles*,⁴⁶ in which the Court interpreted a regulation permitting the Secretary of State to refuse to issue a passport, because of the applicant's membership in the Communist party, as not authorized by statute. Writing for the majority, Justice Douglas buttressed his interpretation by reasoning that a broader interpretation might render the statute an invalid delegation.⁴⁷ Some commentators have suggested that *Kent* stands for the proposition that if a statutory delegation abridges a protected constitutional right, such as the freedom to travel, the Court will not presume that Congress has granted the challenged power to the agency without a clear statement of congressional intent.⁴⁸

pose. . . . The standards prescribed by the present Act, with the aid of the "statement of considerations" required to be made by the Administrator, are sufficiently definite and precise . . . to ascertain whether the Administrator . . . has conformed to those standards.

321 U.S. at 424-26. In dissent, Justice Roberts did not quarrel with the general criteria but argued that the stated purposes of the Act were neither sufficient to constrain administrative discretion nor helpful in enabling a court to ascertain whether the administrator's actions complied with the congressional mandate. *Id.* at 448-52 (Roberts, J., dissenting).

⁴⁵ See, e.g., 1 K. DAVIS, *supra* note 10, at § 3.2; Frank, *The United States Supreme Court: 1947-1948*, 16 U. CHI. L. REV. 1 (1948). The delegation approved in *Arizona v. California*, 373 U.S. 546 (1963), giving almost unfettered discretion to the Secretary of Interior to apportion Colorado River water rights, is an especially good example of a grant of legislative authority that the Court has upheld in the face of substantiated charges that the delegation was no more specific than the delegations found wanting under the NIRA.

An even more dramatic example is *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), upholding FCC cable television regulations which had been promulgated under the Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.), even though the Court admitted that Congress could not have foreseen the development of cable television when it passed the Act.

⁴⁶ 357 U.S. 116 (1958).

⁴⁷ *Id.* at 129.

⁴⁸ S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 263 (1979).

The Court retreated from the *Kent* decision seven years later in *Zemel v. Rusk*, 381 U.S. 1 (1965). In *Zemel*, the Court, per Chief Justice Warren, interpreted the Passport Act to allow

The Court, however, has not limited this "clear statement" application of the delegation doctrine only to delegations that invade "fundamental" rights. In *National Cable Television Association v. United States*,⁴⁹ the Court applied the "clear statement" approach more broadly. In *National Cable*, the Court ruled on an appropriations statute⁵⁰ instructing federal agencies to charge for the benefits that their actions confer on private individuals or groups. The Court, again speaking through Justice Douglas, construed the statute as allowing agencies to set fees to recoup only the costs of specific benefits conferred, and not, as the FCC had attempted, to recoup the full costs of regulating.⁵¹ The Court thought that a broader interpretation, necessary to sustain the FCC's attempted full-cost recoupment, would be tantamount to conferring agencies with the power to tax and would raise grave constitutional problems of the sort encountered in *Schechter*.⁵²

the Secretary of State to forbid travel to Cuba by imposing general area restrictions on the issuance of passports. The Court found that the failure of Congress to amend the Passport Act to prohibit the prior administrative practice of imposing area restrictions implied congressional approval of the restrictions, particularly when Congress had enacted subsequent legislation relating to passports that left untouched the Passport Act's broad rulemaking authority. The Court distinguished *Kent* by noting that the passport restriction upheld in *Zemel* rested on general foreign-policy considerations affecting all citizens, and not on the particular political views of the person seeking a passport. *But see* *United States v. Laub*, 385 U.S. 475 (1967) (travel in violation of area restriction not a criminal offense under 1952 Act). More recently, the Court in *Haig v. Agee*, 453 U.S. 280 (1981), per Chief Justice Burger, relied heavily on *Zemel* in sustaining an interpretation of the Passport Act allowing the Secretary to revoke a passport if the holder's activities abroad "are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." *Id.* at 299-300. Justice Brennan argued in dissent that, under *Kent*, the Court should construe the statutory power narrowly:

The presumption is that Congress must expressly delegate authority to the Secretary to deny or revoke passports for foreign policy or national security reasons before he may exercise such authority. To overcome the presumption against an implied delegation, the Government must show "an administrative practice sufficiently substantial and consistent."

453 U.S. at 318 (Brennan, J., dissenting).

⁴⁹ 415 U.S. 336 (1974).

⁵⁰ 31 U.S.C. § 483a (1976).

⁵¹ The FCC may have been correct in supposing that regulation confers a special benefit on the regulated. *See* Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). The Court, however, was unwilling to indulge such a notion, and in this case realism commends the Court's perspective; the restrictive regulations imposed on the cable industry at that time were hardly a boon to that industry. To maintain evenhandedness an agency would also have to impose fees on users who benefited from regulation. For example, consumers who gain from unprofitable services compelled by regulation presumably should be required to pay for them under an evenhanded application of *National Cable*. *See* Posner, *Taxation By Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971).

⁵² 415 U.S. at 341-42; *see also* *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980). In *American Petroleum*, a plurality of the Court read the Occupational Health and Safety Act as requiring a threshold finding of significant risk of injury before OSHA could regulate the benzene industry. Otherwise, "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in [*Schechter* and *Panama Refining*]." *Id.* at 646.

In some of the delegation cases, the Court has also indicated that broad delegations of authority without either corresponding procedural protections or an opportunity for judicial review may violate the Constitution. Both *Schechter* and *Yakus* emphasized the importance of regular procedures, and the *Yakus* test reformulated the rule of the delegation doctrine by emphasizing the availability of review. Like substantive legislative standards, procedural restraints, which have long been recognized as the "essence of a scheme of ordered liberty,"⁵³ can operate to check potentially excessive uses of administrative authority.

The importance of procedural protections and judicial review was recognized in *Amalgamated Meat Cutters v. Connally*.⁵⁴ In *Meat Cutters*, a three-judge federal district court upheld the 1970 Economic Stabilization Act's broad grant of discretion to the President to limit wage and price increases.⁵⁵ The court, however, approved this delegation only after finding that the Administrative Procedure Act's requirement of notice-and-comment rulemaking and its provision for judicial review⁵⁶ controlled the actions of the President's agent, the Cost of Living Council.⁵⁷ With regard to procedural controls, the court recognized that an inquiry into whether the governmental function being exercised was "legislative" in nature, or whether the Congress had enacted an "intelligible" substantive standard, could not alone resolve the delegation problem. Rather, the opinion suggested that the policies underlying the delegation doctrine require a careful examination of the total system of substantive and procedural controls that limit the agent's power.⁵⁸ Although not a Supreme Court decision, *Meat Cutters* has been widely accepted as an authoritative modern statement of the procedural due process gloss on the delegation doctrine.⁵⁹

⁵³ See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁵⁴ 337 F. Supp. 737 (D.D.C. 1971) (Leventhal, J.).

⁵⁵ Pub. L. No. 91-379, 84 Stat. 799 (1970).

⁵⁶ 5 U.S.C. §§ 553, 701-06 (1976).

⁵⁷ 337 F. Supp. at 760-62.

⁵⁸ Confining an agency within well-defined and statutorily required procedures, however, does not alone "solve" the delegation problem. One can imagine an agency making decisions completely opposed to the "legislative will," while following intricate, legislatively mandated procedures. Nonetheless, the tension between substance and process is considerable, although not so strong as to justify Davis's procedurally based approach to the delegation problem. See generally Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

⁵⁹ The Supreme Court itself has provided somewhat oblique support for a due process approach to delegation in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). In *Mow*, the Court invalidated a Civil Service Commission rule banning resident aliens from government employment, 5 C.F.R. § 388.101 (1976). Although the rule appeared to be within the scope of the Commission's authority and had won the acquiescence of the political branches, the Court concluded that "due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve" a valid governmental interest. 426 U.S. at 103. The Court found that the rule had no clear relationship to the Commission's purpose of promoting the efficiency of the federal civil service, see *id.* at 114-15, and deprived aliens of due process, see *id.* at 116-17. The Commission had defended the rule on foreign policy

The concurring, and more often dissenting, opinions of individual justices have also contained recurring references to the delegation doctrine. Justice Rehnquist's concurrence in *Industrial Union Department v. American Petroleum Institute*⁶⁰ (the *Benzene* case) is a good example. The suit involved a challenge to OSHA's new health standard⁶¹ which further limited occupational exposure to airborne concentrations of benzene. The Court's decision upheld a lower court ruling that: (1) the standard was not supported by appropriate findings; (2) the Secretary of Labor had not determined a safe threshold level of exposure to benzene; (3) the Congress was not seeking absolute safety; and (4) the Secretary had exceeded his authority by placing the burden on industry to prove safety.⁶²

In his concurrence, Justice Rehnquist argued that section 6(b)(5) of the Occupational Safety and Health Act⁶³ constituted an invalid delegation to the Secretary. He viewed the confusing interpretations of the legislative history and the disparate views of his colleagues and the litigants as strongly implying that Congress had not done its job of settling fundamental questions but had impermissibly delegated its legislative authority to the executive.⁶⁴

Justice Rehnquist raised the same argument in his dissent in *American Textile Manufacturers Institute v. Donovan* (the *Cotton Dust* case).⁶⁵ At issue was whether the Occupational Safety and Health Act of 1970⁶⁶ required OSHA to conduct a cost-benefit analysis in promulgating

grounds, claiming inter alia that a general rule forbidding the employment of resident aliens would provide the President with the option of offering employment opportunities to foreign citizens in exchange for reciprocal concessions in treaty negotiations with foreign governments.

Mow is a puzzling decision, because admittedly no "process" was due. The decision has strong overtones not only of equal protection but also of the largely discredited doctrine of substantive due process. By emphasizing the Civil Service Commission's lack of institutional competence to issue such a rule, however, the decision remains consistent with the modern approach to delegation that *Meat Cutters* illustrates.

⁶⁰ 448 U.S. 607, 671 (1980) (4-4 decision).

⁶¹ 29 U.S.C. § 652(8) (1976).

⁶² *American Petroleum Inst. v. OSHA*, 581 F.2d 493 (5th Cir. 1978).

⁶³ 29 U.S.C. § 655(b)(5) (1976).

⁶⁴ [T]he relevant portion of § 6(b)(5) is completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot. In the case of a hazardous substance for which a "safe" level is either unknown or impractical, the language of § 6(b)(5) gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line. Especially in light of the importance of the issues at stake, I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power.

448 U.S. at 675.

⁶⁵ 452 U.S. 490 (1981).

⁶⁶ Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified in scattered sections of titles 5, 15, 18, 29, 42, and 49 of the United States Code).

workplace safety and health standards for limiting workers' exposure to cotton dust. The majority held that the Act did not impose such a requirement, prompting a dissent by Justice Rehnquist, joined by the Chief Justice, who thought that in the absence of such a requirement, the rulemaking power conferred on OSHA was unconstitutionally broad.⁶⁷

Although the Court's two most outspoken conservatives were alone in seeking to apply the delegation doctrine in *Cotton Dust*, they are not alone in believing that the doctrine could be revived if a particular occasion demanded. The Court's liberals, who normally would not countenance the doctrine's application to schemes such as that involved in *Cotton Dust*, have urged its application to statutory delegations involving personal liberties. In *United States v. Robel*,⁶⁸ for example, Justice Brennan's concurrence⁶⁹ urged the doctrine's application to invalidate a section of the Subversive Activities Control Act of 1950,⁷⁰ which prohibited employment in defense facilities of people designated as members of a "Communist-action organization." The Court's majority found this section unconstitutional on first amendment grounds, but Justice Brennan would have declared the section unconstitutional because it involved a vague delegation from Congress to the executive in an area in which "liberty and the exercise of fundamental rights are at stake."⁷¹

Several historical aspects of the delegation doctrine's use also require attention. In particular, the Court has employed the doctrine to invalidate legislation in circumstances suggesting that the doctrine itself was not the dominant consideration in the Court's decision. The timing of the delegation cases in 1935 and 1936, immediately following the abrupt termination of the substantive due process rule,⁷² suggests that the Court may have been searching for a substitute to control potentially excessive executive authority. This rationale may explain why the Court has emphasized administrative processes and the availability of judicial review in subsequent delegation cases.

Why was the Court's experimentation with the delegation doctrine so limited? One answer might be that the Court found other legal doctrines, such as procedural due process, equal protection, and the first amendment, better suited to control legislatively authorized executive excesses. Unlike the delegation doctrine, these doctrines did not have

⁶⁷ 452 U.S. at 547-48.

⁶⁸ 389 U.S. 258, 276 (1967).

⁶⁹ *Id.* at 269.

⁷⁰ Pub. L. No. 81-831, 64 Stat. 987 (1950) (codified in scattered sections of titles 8, 18, 22, and 50 of the United States Code).

⁷¹ 389 U.S. at 275. Justice Marshall joined Brennan's dissent. *See* *Haig v. Agee*, 453 U.S. 280, 310 (1981) (Brennan, J., dissenting) (arguing for application of the *Kent v. Dulles* "principle" to narrow the scope of delegated power).

⁷² *See, e.g.,* *Nebbia v. New York*, 291 U.S. 502 (1934).

the effect of voiding the entire regulatory scheme as well as the particular authority that was not sufficiently contained. This analysis is consistent with modern cases such as *FTC v. Hope Natural Gas Co.*,⁷³ in which the Supreme Court in 1944 abandoned its half-century-old policy of detailed constitutional review of agency rate decisions under the "taking clause."⁷⁴ In *Hope Natural Gas* and elsewhere,⁷⁵ the Supreme Court has retreated from engaging in constitutional review of administrative action if that action is authorized and does not impinge on a protected fundamental interest.

The Court, however, has never entirely abandoned the delegation doctrine. It continues to live a fugitive existence at the edge of constitutional jurisprudence. In this shadow land of constitutional doctrine, *Schechter* represents the persistent possibility that if Congress goes too far in transferring unguided power, the Court might intervene. But how far is too far? What kind of delegation would induce the Court to revive this hoary old doctrine? If one looks solely at the results of the post-*Schechter* cases, the only safe prediction is that such a revival is not foreseeable. In this respect, the doctrine's occasional invocation in different contexts by individual justices is a poor predictor of what a majority of the Court will do in the future.

B. Judicial and Legislative Preferences

A theory of judicial preferences can be constructed by identifying the respective costs and benefits of delegation as a representative justice sees them. Buchanan and Tullock's constitutional-decision rule,⁷⁶ when

⁷³ 320 U.S. 591 (1944).

⁷⁴ U.S. CONST. amend. V.

⁷⁵ Compare *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936) with *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940).

⁷⁶ See J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962). An elementary explanation of the Buchanan-Tullock model is available in P. ARANSON, *AMERICAN GOVERNMENT: STRATEGY AND CHOICE* 120-24 (1981). The Buchanan-Tullock model predicts that a "representative person's" preference for a *decision rule* (the number or percentage of people required to make a decision in a collective-choice situation) depends on the sum of two costs. The first cost is that person's "*decision cost*" (the cost of securing the agreement of others to a particular collective action). The second is a perception of "*external cost*" (the cost that a collective decision might impose on the representative person). As the decision rule requires more and more people to consent to a collective choice, decision costs increase but external costs decline. The representative person prefers the decision rule that for him minimizes the sum of decision costs and external costs for a particular class of decisions.

Our application of the Buchanan-Tullock model requires a slight reinterpretation of their terms. First, in our usage, the preferences of a representative person for a collective-choice decision rule are the preferences of a representative justice for varying degrees of substantive constraint in authorizing legislation. Second, the external costs of the Buchanan-Tullock model become the justice's estimates of the "agency costs" for the legislature, and indirectly for the citizenry. Following Jensen and Meckling, we interpret agency costs to be the sum of the principal's monitoring costs, the agent's bonding expenditures, and a residual loss arising from any remaining divergence between the principal's preferences and the

applied to judicial decisionmaking, provides a model to help explain *individual* preferences for delegations. Central to this analytical framework is the idea that as the members of Congress grow less specific and confining in authorizing legislation, delegating proportionately fewer managerial tasks and proportionately more legislative ones, congressional decision costs fall and agency costs (resulting from an agency's divergence from congressional policy) rise. An individual justice prefers a degree of delegation that minimizes the sum of these two costs.

Applied to the delegation doctrine, the model yields the following predictions. First, if agency costs remain constant, an increase in the cost of legislative decisionmaking (because of the need for speed, expertise, secrecy, or more detailed information) makes it more likely that the justice will sustain the delegation. Second, if decision costs remain constant, an increase in the agency costs of delegations renders it more likely that a representative justice will invalidate the delegation. Because both decision costs and agency costs vary with the degree of legislative delegation, the justice's attitude toward a particular delegation will depend upon the specific cost configuration involved. The model, however, is useful in explaining individual cases only as it refers to a hypothetical representative justice, not to the entire Court.

Concerning legislative decision costs, practical considerations will influence a justice's preference for delegation. For example, the Court in *J.W. Hampton, Jr. & Co. v. United States*⁷⁷ stated that "[i]n determining what [one branch] 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."⁷⁸ The model would predict that a representative justice would sustain delegations involving routine bureaucratic management and ought to be sustained, even in the absence of specific standards, because Congress in such matters faces decisional tedium and because agency costs affecting constitutionally protected rights are not involved.⁷⁹ Fur-

agent's decisions. See Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976). Understandably, the residual loss forms the central concern in the legislative-delegation problem, and it also implicitly undergirds the notion that uncanalized delegations are in some sense "lawless." Third, the decision cost represents the justice's estimate of the opportunity cost of the legislature's time and absence of expertise if it had to carry out by itself an otherwise delegated task. In a "public-interest" model, this cost would fall on the citizenry. This kind of consideration lies at the heart of the public administration view of delegation. See *infra* text accompanying notes 103-10.

⁷⁷ 276 U.S. 394 (1928).

⁷⁸ *Id.* at 406.

⁷⁹ Bureaucratic decisions regarding the allocation of impounded river water among different classes of users, as in *Arizona v. California*, 376 U.S. 546 (1963), or the rules that govern private uses of public forests, as in *United States v. Grimaud*, 220 U.S. 506 (1911), are viewed differently because it is said that they do not threaten personal interests entitled to independent legal protection. Thus, the Court does not view broad delegations in these circumstances

thermore, because the executive branch experiences relatively lower decision costs in international matters than does the Congress, including the implicit costs of disunity and delay, the representative justice ordinarily will accept⁸⁰ nonspecific delegations to the President's agents extending far beyond the constitutionally rooted duties to "receive Ambassadors and other Public Ministers"⁸¹ and to appoint "public Ministers and Consuls. . ."⁸² Similarly, emergency situations may trigger a concern to avoid legislative delay.⁸³

Agency cost considerations, on the other hand, run in the opposite direction. For example, in matters of taxation⁸⁴ and due process of law,⁸⁵ a representative justice might scrutinize the particular statute to ascertain whether the delegation restricts civil liberties. The potential agency costs of such a delegation may be unacceptably high, especially if agency decisionmakers can avoid the direct *political* responsibility and sanctions that might fall on Congress. Of course, if both civil liberties and international matters are involved,⁸⁶ a representative justice may experience difficulty in enunciating a rule based on the nondelegation doctrine.

Agency costs also increase as the subject matter to be regulated expands. For example, in terms of regulatory intrusions on the private sector,⁸⁷ one might identify the following sequence from most to least intrusive: (1) *Schechter*,⁸⁸ (2) *Yakus*,⁸⁹ (3) *Meat Cutters*,⁹⁰ (4) *Panama Refining*,⁹¹ (5) *Carter*,⁹² (6) *Arizona v. California*.⁹³ As we move from (1) to (6),

as transgressing vital interests, and accepts them in the name of practicality. But if government action trenches on freedom to travel or of association—for example, by the denial of a passport because of the failure to deny alleged Communist party membership, as in *Kent v. Dulles*, 357 U.S. 116 (1958)—special protections may be warranted and the Court is more likely to void broad delegations by special rules of construction. These views have been trenchantly criticized. See McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Rebuttal*, 1962 SUP. CT. REV. 34, 45-53.

⁸⁰ See, e.g., *Haig v. Agee*, 453 U.S. 280 (1981); *Zemel v. Rusk*, 381 U.S. 1 (1965). But see *Kent v. Dulles*, 357 U.S. 116 (1958).

⁸¹ U.S. CONST. art. II, § 3.

⁸² *Id.* art. II, § 2.

⁸³ See, e.g., *Yakus v. United States*, 321 U.S. 414 (1944). But see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁸⁴ See, e.g., *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974).

⁸⁵ See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

⁸⁶ See, e.g., *Haig v. Agee*, 453 U.S. 280 (1981); *Kent v. Dulles*, 357 U.S. 116 (1958).

⁸⁷ The concept of regulatory "intrusiveness" is difficult to quantify in the absence of a defined "unit of regulation." Fiorina defines intrusiveness as "the degree that government policy directly diminishes individual freedom of action." Fiorina, *Legislative Facilitation of Government Growth: Universalism and Reciprocity Practices in Majority Rule Institutions*, 1 RESEARCH IN PUBLIC POLICY ANALYSIS AND MANAGEMENT 497 (1981).

⁸⁸ 295 U.S. 495 (1935).

⁸⁹ 321 U.S. 414 (1944).

⁹⁰ 337 F. Supp. 737 (D.D.C. 1971).

⁹¹ 293 U.S. 388 (1935).

⁹² 298 U.S. 238 (1938).

⁹³ 373 U.S. 546 (1963).

a representative justice is more likely to uphold a delegation. On the other hand, decision costs are also high in cases such as *Schechter* and *Yakus*, suggesting the possibility that different representative justices might prefer opposite conclusions.⁹⁴

Although this line of inquiry may allow one to understand a particular justice's attitudes toward discrete categories of delegation cases, substantial difficulties arise in applying this formulation to predict the entire Court's decisions over a long time period. Individual opinions diverge widely from case to case, based on alternative solutions to legally similar problems. Justices also vary markedly in their recognition of certain agency costs as constitutionally suspect or impermissible. For example, Justice Douglas's invocation of the delegation doctrine in aid of his statutory construction in *National Cable Television Association*⁹⁵ brought a protest from fellow liberal Justices Marshall and Brennan, who thought *Schechter* had no application except, perhaps, when personal liberties were implicated.⁹⁶ Justice Harlan obtained the support of Justices Douglas and Stewart, a coalition that covered the full political spectrum of the Court, for his dissent in *Arizona v. California*,⁹⁷ and yet remained unable to form a majority. More recently, Justice Rehnquist, who increasingly reflects the mainstream of the present Court, could secure only the Chief Justice to support his dissent in the *Cotton Dust* case.⁹⁸

Changing Court membership has also affected the Court's aggregate decisions. The Court that in 1981 allowed the Secretary of State to revoke Phillip Agee's passport⁹⁹ is not the same Court that in 1958 forbade a similar action involving Rockwell Kent.¹⁰⁰ Although the results are reconcilable, the different tenor of the opinions suggests the difficulty of predicting whether a particular statutory construction will be broad or narrow.

Finally, members of the Court certainly understand that many present delegations could not survive a renewed application of the nondelegation doctrine, if the renewed doctrine required specificity con-

⁹⁴ Arguments against a strict application of the nondelegation doctrine very often become self-fulfilling prophecies. This is certainly true here. As the extent of a delegation increases, the associated costs of rulemaking and administration proportionately increase. Thus, one could not reasonably imagine Congress enacting quickly the necessary codes contemplated in *Schechter*. Indeed, even the NIRA failed at this task. See *supra* note 24. Thus, the ultimate effect of delegation may be an increase in both agency and decision costs, making it difficult to predict an individual justice's attitude toward a particular delegation. Plainly, prediction poses a measurement problem, but not one that materially affects the theory's robustness.

⁹⁵ 415 U.S. at 392.

⁹⁶ *Id.* at 352-54 (Marshall, J., dissenting).

⁹⁷ 373 U.S. 546, 603 (1963) (Harlan, J., dissenting).

⁹⁸ See *supra* notes 65-67 and accompanying text.

⁹⁹ See *Haig v. Agee*, 453 U.S. 280 (1981).

¹⁰⁰ See *Kent v. Dulles*, 357 U.S. 116 (1958).

cerning the congressional intent behind substantive policy. Both the judiciary and Congress prefer to preserve congressional enactments,¹⁰¹ which a greater judicial review of regulatory enactments would seriously impair.¹⁰² That possibility, however, does not deter members of the Court from using the doctrine in dissent or from relying on it to reinforce a precarious opinion decided on grounds unrelated or tangential to the delegation issue.

II

DELEGATION, WELFARE, AND PUBLIC ADMINISTRATION

Before analyzing delegations in light of contemporary theories of legislation or arguing for a reinvigorated nondelegation doctrine, we first examine the managerial and political justifications for broad delegations. Finding neither persuasive, we next consider the prevailing theory of legislation that implicitly supports current delegations.

A. Rationalizing Delegations: Management and Politics

1. *Managerial Explanations*

Conventional rationalizations for the delegation of legislative authority can be divided into two categories: managerial and political. The managerial explanation consists essentially of four arguments: (1) reducing congressional workloads; (2) eliminating the need for frequent statutory amendments as conditions change; (3) having specialists decide matters about which Congress is not knowledgeable; and (4) establishing relative permanence among the decisionmakers who control certain problems.¹⁰³ Despite their widespread acceptance, none of these explanations withstand close scrutiny.

The explanation that congressmen delegate legislative authority to reduce their workload has an attractive implicit justification: absent delegation, the quality and quantity of legislation, as well as congressional oversight and investigation, would suffer.¹⁰⁴ This explanation for

¹⁰¹ See *infra* notes 214-20 and accompanying text.

¹⁰² Such a prediction assumes that Congress would continue to make standardless delegations and that the Court would continue to invalidate them. Of course, this possibility could precipitate a constitutional crisis. A more likely outcome would anticipate that the legislature would adjust to its newly-confined status while the Court refined the consequences of its renewed doctrine.

¹⁰³ Another commonly advanced managerial explanation concerns the desire for speedy resolutions of conflicts and other problems. To some extent, the goal of speed invokes the agencies' judicial functions, which do not concern us here. To the extent that this explanation refers to legislative activity, it does not seem to be a serious point; whatever the intent of those who promote bureaucratic solutions, timeliness has not been one of the bureaucracy's principal achievements. See 4 SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION 132-52 (Comm. Print 1977).

¹⁰⁴ See, e.g., Davis, *supra* note 58; see also B. ACKERMAN & W. HASSLER, CLEAN COAL, DIRTY AIR 116-28 (1981).

broad delegations, however, has several problems. First, members of Congress willingly impose severe burdens on themselves and their staffs in matters having little direct relation to legislation, oversight, and investigation. Witness the attention that they give to matters affecting their districts, especially to casework for constituents.¹⁰⁵ The increasing number of caseworkers on congressional staffs also suggests that Representatives and Senators have not only the capacity to understand how the bureaus, agencies, and commissions operate, but also the ability to alter their decisions in a constituent's favor (or against the interests of a political enemy).

The legislative-workload argument also does not explain why the members of Congress should be the ones to make the threshold decision about the amount of legislation that they will write, the amount that they will delegate, and the terms and conditions upon which they will delegate. This decision should be made on constitutional grounds, which often may conflict with congressional preferences. Surely constitutional constraints on the decision to delegate should apply; otherwise members of Congress will tend toward maintaining their positions, which leads them to shift away from legislating, and emphasize casework instead. Indeed, the legislative-workload argument is a self-fulfilling prophecy. If the Constitution permits Congress to delegate whatever amount of legislative powers that it prefers, then we should expect it to make such delegations. Constitutionally unconstrained, Congress will fail to develop those specialized resources for detailed legislating that a robust nondelegation doctrine would require.

The second set of managerial explanations for delegations supplements the first set: in the absence of delegations, Congress often would need to amend statutes to react to economic, social, or technological change. The FCC's extension of regulatory authority over cable television service, which the Supreme Court approved in *United States v. South-*

¹⁰⁵ See W. GELLHORN, *WHEN AMERICANS COMPLAIN* (1966); D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 54-59 (1974). One measure of the emphasis on casework is the allocation of House and Senate members' personal staffs to this function. Most of the extraordinary growth in personal staffs in the past 20 years can be attributed to casework. See Malbin, *Delegation, Deliberation, and the New Role of Congressional Staff*, in *THE NEW CONGRESS* 134 (T. Mann & N. Ornstein eds. 1981). On congressmen's district activities, see generally R. FENNO, *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* (1978). Fiorina implies that if legislation were improved, especially legislation concerning bureaus and agencies, the demand for casework would be far less. See M. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 59-60 (1977). Insofar as casework arises from the desire to make individual accommodations with the bureaucracy, one must be skeptical of the likelihood of any significant reduction in such work, regardless of the quality of the legislative product. If failure to apply the delegation doctrine creates a greater than "optimal" amount of regulation, however, then congressional adherence to the doctrine might diminish the opportunities for casework. Of course, greater legislative specificity may also reduce agency discretion, thus reducing the likelihood that casework could be politically productive.

western Cable Co.,¹⁰⁶ provides an apt example. The Court there suggested that the FCC needed a broad delegation to prevent Congress from continually being bogged down with reconsiderations whenever new conditions, innovations, inventions, or legal decisions emerged.¹⁰⁷

This explanation is not only subject to all of the criticisms leveled at the workload explanation, but is also subject to an additional criticism: Congress often cannot foresee the consequences of its delegations. When Congress delegated to the FCC the right to allocate the radio frequency spectrum among competing claimants, for example, it might well have anticipated that supply and demand characteristics of the communications industry would vary over time, that new ownership and control configurations would emerge, and that a narrow line of technical innovations would occur affecting such matters as transmission quality, bandwidth (interference), and power. Congress, however, was unlikely to anticipate the advent of a major structural innovation such as cable television. When such an unforeseen innovation occurs, it may change the entire economic, social, or technological matrix for which Congress designed the legislated regulatory regime. In fact, that is precisely what cable television did insofar as it made obsolete the fundamental problem of radiospectrum scarcity that provided the legislatively claimed basis for the Communications Act. Unanticipated change, therefore, argues not for a congressional (or judicial) authorization of enlarged regulatory purview based on the original statute, but for a legislative reconsideration of the original regulatory purview.¹⁰⁸

The third managerial explanation for delegation rests on an asserted need for expertise. This explanation is misplaced, because agency heads do not necessarily have more expertise than do members of Congress, particularly committee and subcommittee chairmen and ranking minority members. The argument for technocratic delegations only addresses whether the agency heads or the members of Congress should supply the basic policy direction to the technical staffs of particular agencies. Technical questions of risk and benefit invariably involve determining normative standards, and the Constitution assigns such deter-

¹⁰⁶ 392 U.S. 157 (1968).

¹⁰⁷ *Id.* at 172-73.

¹⁰⁸ The Supreme Court's decision in *Lichter v. United States*, 334 U.S. 742 (1948), suggests some rough limits on the changing-conditions justification. The *Lichter* Court rejected a delegation challenge to a section of the Renegotiation Act of 1942 which required the renegotiation of war contracts that resulted in "excessive profits," even though the statute did not define what constituted "excessiveness." In upholding the delegation, the Court observed that Congress had not only closely reviewed the administrator's standards, but had adopted the standards by statutory amendment within six months of reviewing them. The delegated legislative authority remained unconstrained for only a brief time, when the agency responded to a new problem during the wartime emergency. In other words, the changing-conditions explanation supports a broad delegation for only a limited time and only under limited circumstances, such as an emergency.

minations to Congress. The technology argument also fails to establish the optimum level of specificity in congressional instructions to the agency on matters of policy that transcend technical expertise. No one who argues for requiring greater specificity in legislative delegations supposes that the members of Congress could or should specify within narrow limits, for example, the transmitter power levels for particular television broadcast stations licensed by the FCC. But one might imagine that legislators would at least address the basic framework of broadcast frequency allocations within which power levels would be set.¹⁰⁹

A fourth managerial explanation for delegation concerns a desire for permanence in regulatory areas, a desire manifested in having the same people regulate, year in and year out. Although a concern with permanence may have been understandable in an age of high congressional turnover, such high turnover levels in the House and Senate no longer prevail.¹¹⁰ Moreover, congressional staffs commonly have a stability unmatched in government outside of the military services. Considering the quadrennial turnover in many agencies, the stability of congressional-staff tenure seems comparable to that of agency staff. Thus, as congressional stability increases, delegations of broad legislative authority should diminish. But no persuasive evidence exists that such a decline in broad delegations is occurring.

An even more fundamental objection may be leveled at the permanence argument. Permanence is inconsistent with a political system designed to respond to changing political and social circumstances. The argument for permanence of regulatory decisionmakers thus conflicts with the second managerial argument, which calls for broad administrative discretion to facilitate adaptation to changed conditions. "Changed conditions" may include not merely changes in the economic or technical environment, but also changes in the political perspectives or preferences of the electorate. Hence, the argument for "stability" raises questions about the democratic imperative for changes in officeholders.

2. *Political Explanations*

While managerial explanations invoke considerations of adminis-

¹⁰⁹ Congress's only guideline on allocation of frequencies used for broadcast stations is a direction to distribute them "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b) (1976). On the strength of this vague instruction, the FCC has proceeded to construct a complex allocation system that has produced recurrent economic and political problems. See 1 NETWORK INQUIRY SPECIAL STAFF, FED. COMMUN. COMM'N, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION 41-142 (1980); R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 97-120 (1973).

¹¹⁰ See Fiorina, Rohde & Wissel, *Historical Change in House Turnover*, in CONGRESS IN CHANGE: EVOLUTION & REFORM 24-49 (N. Ornstein ed. 1975); Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982); Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 AM. POL. SCI. REV. 144 (1968).

trative efficiency, political explanations involve normative questions of public policy. The foremost political explanation is that delegation helps to "depoliticize" the problem under review, because delegation removes the problem from a political (and putatively "irrational") forum and places it in a nonpolitical (and allegedly "rational") one.

This distinction between the political processes of Congress and the administrative processes of the executive became most prominent during the age of reform, with Woodrow Wilson as its most uncompromising advocate.¹¹¹ Wilson believed so strongly in the division between politics and administration that he viewed the methods of governing (administration) as divorced from the substance and ideology of public policy (politics).¹¹² Indeed, Wilson went beyond this distinction, asserting that if a little administrative expertise is beneficial, then greater administrative expertise must be better. More administrative and less political decisionmaking, however, could occur only if the legislature delegated more authority to administrators. Wilson embraced just such a view, implicitly abandoning the separation-of-powers principle as applied to administration.¹¹³

Wilson's analysis clearly demonstrates an antidemocratic distrust of popular political government. Although he emphasized trust in democratic government as a justification for scientific administration, Wilson was less than enthusiastic about elections and legislatures.¹¹⁴ This distrust of democratic government, indeed a belief in its fundamental cor-

¹¹¹ The field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study. It is a part of political life only as the methods of the counting-house are a part of the life of society; only as machinery is part of the manufactured product.

Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 209-10 (1887), reprinted in 5 W. WILSON, THE PAPERS OF WOODROW WILSON 370 (A. Link ed. 1968); see also B. ACKERMAN & W. HASSLER, *supra* note 104; 1 K. DAVIS, *supra* note 10, at § 2.8.

¹¹² Wilson, *supra* note 111, at 210. More modern exponents of public administration, most notably Herbert Simon, have also expressed this view of administration versus politics in the distinction between "facts" (administration) and "values" (politics). See, e.g., H. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION 46-60 (3d ed. 1976). But see 1 K. DAVIS, *supra* note 10, § 2.14, at 122-24.

¹¹³ [L]arge powers and unhampered discretion seem to me the indispensable conditions of responsibility. Public attention must be easily directed, in each case of good or bad administration, to just the man deserving of praise or blame. There is no danger in power, if only it be not irresponsible. If it be divided, dealt out in shares to many, it is obscured; and if it be obscured, it is made irresponsible. But if it be centered in heads of the service and in heads of the branches of the service, it is easily watched and brought to book. If to keep his office a man must achieve open and honest success, and if at the same time he feels himself intrusted with large freedom of discretion, the greater his power the less likely is he to abuse it, the more is he nerved and sobered and elevated by it. The less his power, the more safely obscure and unnoticed does he feel his position to be, and the more readily does he relapse into remissness.

Wilson, *supra* note 111, at 213-14.

¹¹⁴ "Self-government does not consist in having a hand in everything, any more than

ruption, has provided the intellectual animus for the nonpartisan administrative state from Wilson's time to the present. Nonpartisan city councils have replaced mayors, and city manager forms of government have replaced nonpartisan city councils. The civil service has replaced the spoils system to some degree, and the proportion of elected to nonelected employees of the public sector has shrunk to a pittance.¹¹⁵

The most vigorous contemporary supporter of delegated powers, Kenneth Davis, adheres to a Wilsonian view of administrative government. For Davis, the purpose of the nondelegation doctrine is to protect against "unnecessary and uncontrolled discretionary power," and he argues that this purpose is best served by focusing on the "totality of protections against arbitrariness, including both [procedural] safeguards and standards."¹¹⁶ Davis wants to focus judicial review of legislative delegations almost wholly on the standards that the administrators themselves create, in order to confine, guide, and determine their policy judgments. If an administrator should fail to establish safeguards against arbitrary decisions, then the agency action would be invalidated. Apparently, the courts would merely ascertain whether the safeguards were sufficient and had been observed.

But simply declaring politics to be irrelevant does not make it so. The early Progressives and their intellectual progeny merely succeeded in transferring political bargaining from the legislative arena, in which the founding fathers had placed it, to the administrative arena, in which the Progressives themselves would view political bargaining as an abomination. Today, federal agencies, bureaus, and commissions are as politicized as any other branch of the federal government, at least if the term "politics" includes a consideration of the preferences of particular interest groups. In sum, if the only transfer that has occurred is that of managerial functions from the Congress to the agencies, then, apart from the continued possibility of graft and corruption, one might expect a reduction in political considerations. But if these transfers involve political questions about public policy then there is no reason to expect that politics will disappear. Politics, instead, will merely reappear in the agencies.¹¹⁷

housekeeping consists necessarily in cooking dinner with one's own hands. The cook must be trusted with a large discretion as to the management of the fires and the ovens." *Id.* at 214.

¹¹⁵ Cf. *Branti v. Finkel*, 445 U.S. 507, 515 (1980) (first and fourteenth amendments bar dismissal of assistant public defenders on political grounds); *but cf. id.* at 527 (Powell, J., dissenting) (patronage serves substantial governmental interests; thus no constitutional violation when such interests outweigh "tangential burdening of First Amendment rights").

¹¹⁶ 1 K. DAVIS, *supra* note 10, § 3.15, at 206-07.

¹¹⁷ See Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 175 (1978).

B. Welfare, Legislation, and Delegation

The delegation problem is generally limited to the public sector. In the private sector, market forces will discipline the exercise of delegations to achieve efficient results, but no similar competitive constraints appear to exist on the uses of delegation in the public sector. Government often has a monopoly of production, particularly in those public-policy areas in which delegations of legislative authority most commonly occur.¹¹⁸ Competition, therefore, does not ensure an efficient level of public-sector delegation. Additionally, although consumers can contract for efficient delegations in the private sector, few opportunities are available for citizens to strike comparable bargains over public-sector delegations. Thus, to the extent that private- and public-sector delegations serve similar purposes, a clear need remains for legal rules governing public-sector delegations. Under current interpretations of the delegation doctrine, such rules do not exist. Some self-imposed legislative restraints do exist,¹¹⁹ but these are at best amorphous practical constraints with no coherent theory of legislation to guide them.

No adequate normative theory of delegation has developed, and the existing literatures of law, economics, and political science provide little explanation of when legislators should, should not, or actually will delegate legislative authority. Here we articulate some basic elements of a normative theory of delegation. Our approach first examines some traditional normative welfare theories concerning the bases of public action, both to provide a foundation for an analysis of the delegation problem and to see if a satisfactory "public-interest" rationale for delegation exists. From these theories we derive a set of inferences about the effect that legislative delegation might have on citizens' welfare. Our conclusion, not surprisingly, is that welfare (public-interest) rationales resemble managerial justifications, and that both explanations are similarly deficient. At this point, however, we refrain from assaulting the basic premises of welfare theory itself.

1. *Traditional Welfare Theories of the Public Sector*

The usual concerns of welfare economics involve utility interdependencies, information costs, and market structure.¹²⁰ From these concerns emerge a variety of problems and corresponding rationales for collective action, which we can encompass under five headings: (a) pub-

¹¹⁸ Government is only a local monopoly at the state and local level. Therefore, interpolity competition may create rules and market-like conditions for the efficient delegations of local legislative authority. See Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416-24 (1956).

¹¹⁹ See *infra* text accompanying notes 171-80.

¹²⁰ For surveys of economic theories of collective action, see generally P. ARANSON, *supra* note 76, ch. 3; W. BAUMOL, *WELFARE ECONOMICS AND THE THEORY OF THE STATE* (2d ed. 1965).

lic goods; (b) public "bads"; (c) property rights; (d) monopoly; and (e) wealth redistribution.

a. *Public Goods.* The concept of public goods is an extremely elastic one, and commentators have attached the label to virtually every public-sector activity.¹²¹ Our usage, however, is more limited. Following Samuelson,¹²² we define a public good as a product or service that is not diminished by consumption (the marginal cost of additional consumption is zero) and that cannot be withheld from those who will not pay for its production. Standard examples include national defense and domestic law enforcement. Because private-sector decisionmakers will not necessarily supply public goods at efficient levels, such goods may be logical candidates for public-sector production.¹²³ The mere possibility of some good's public nature, however, does not necessarily call for public-sector production, because the costs of certain public goods may exceed their benefits. Moreover, the manifest economic desirability of producing a particular public good does not automatically compel any particular form of public-sector response. The government, for example, can build and operate a lighthouse with public revenues or user fees, or it can allow private-sector producers to build and operate lighthouses under private ownership, franchise arrangements, or regulations.¹²⁴ Additionally, the desirability of public-sector production, or encouragement of production, does not identify the level of government that should take action—whether it should be undertaken at the national, state, or local level.

b. *Public Bads.* Public-goods problems may emerge when people do not have incentives to produce optimal levels of goods that display positive externalities. For example, *A* cannot charge *B* for consuming the benefits of *A*'s production and *A* cannot withhold those benefits from *B*. Suboptimal production may result. Public-bads problems emerge because people may not face incentives optimally to reduce production of goods that display negative externalities. That is, *A* cannot charge *B* for the costs that *B*'s production (or consumption) imposes on *A*.

Both problems result from utility interdependencies, and if positive and negative actions are not distinguished, then the problems merge: if *A* fails to produce a public good (or to contribute to its production), he

¹²¹ See, e.g., Steiner, *Public Expenditure Budgeting*, in THE ECONOMICS OF PUBLIC FINANCE 241 (A. Blinder & R. Solow eds. 1974).

¹²² See Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954).

¹²³ An analog of the public-goods problem is the "prisoner's dilemma" in game theory. As this game shows, it is not merely the jointness in production and consumption that produce suboptimal supply; the benefit from the good for each person must also be less than the total supply cost. If this inequality is reversed for at least one person, then the good may be produced without public-sector intervention. See Aranson, *Pollution Control: The Case for Competition*, in INSTEAD OF REGULATION 339, 357 (R. Poole ed. 1981).

¹²⁴ See Coase, *The Lighthouse in Economics*, 17 J. LAW & ECON. 357 (1974).

thereby produces a public bad, and if *A* fails to produce a public bad (when it would have been individually rational for him to do so), he thereby produces a public good. The problems of public goods and public bads are thus symmetrical, and all of the qualifications placed on the public-sector production of public goods apply equally to the public-sector suppression of public bads. Just as the absence of a theoretical public good does not necessarily compel a public-sector response, a public bad may also best be left ignored. People may voluntarily suppress public bads, the costs of suppression may well exceed the benefits, and the identification of bads does not specify the appropriate form or locus of public intervention.

c. *Property Rights*. A property right is a right to compensation for the benefits that one's actions confer on others or for the loss that one experiences as the result of others' actions. If an institutional arrangement could be designed to guarantee such a right, then that arrangement would solve public-goods problems. For example, if the lighthouse owner enjoyed a right to collect fees from those whom his lighthouse protected, then suboptimal production of lighthouse services would not necessarily result. Similarly, if optimal property-rights arrangements could be constructed for information, then certain problems involving discovery, innovation, invention, and consumer decisionmaking would seem less troublesome.¹²⁵ A property right also may be a right to receive compensation for the damages that the actions of others impose on us, a right to avoid such damages altogether, or a right to contract to accept such damages. Of course, damages are equivalent to a negative externality, and the previously-noted qualifications about public-sector action apply with equal force to the definition and enforcement of property rights.

d. *Monopolies*. Control of monopolies is a widely disputed area of economics.¹²⁶ In the past, economists and legal scholars generally agreed upon the criteria for identifying monopolies and restrictive trade practices, theoretical measures of the losses associated with monopoly, and desirable statutory and regulatory correctives. Today, economists and legal scholars have seriously challenged many aspects of traditional monopoly and restrictive trade-practice theory.¹²⁷ Nevertheless, given the caveats concerning other rationales for public intervention, the elimination or control of alleged structural market imperfections or anticompetitive practices remains an arguable basis for collective action.

¹²⁵ See Hirshleifer & Riley, *The Analytics of Uncertainty and Information—An Expository Survey*, 17 J. ECON. LIT. 1375 (1979).

¹²⁶ See Stigler, *The Economists and the Problem of Monopoly*, 72 AM. ECON. REV., PAPERS & PROC. 1 (1982).

¹²⁷ See, e.g., R. BORK, *THE ANTITRUST PARADOX* (1978); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 AM. ECON. REV. 1 (1982).

e. *Wealth Redistribution.* Economists disagree even more strongly over collectively imposed wealth-redistribution policies. The various rationales for nonmarket redistributions derive from theories of altruism,¹²⁸ insurance,¹²⁹ social stability,¹³⁰ and the social contract itself.¹³¹ All of these aspects of redistribution share characteristics of public goods, because a person who contributes resources to be redistributed for any of these reasons thereby confers a benefit on anyone else who shares a similar redistributive preference. The benefits of a redistribution, therefore, are indivisible among contributors and potential contributors.

However, as with public goods generally, the case for collective redistribution is subject to several limitations. First, if few people are involved in the redistribution, collective action may be unnecessary. In small communities or among small or closely-knit groups, for example, informal social pressure may suffice to support desirable charitable activities. Even when coercive collective action seems more efficient, common law or statutory law may be more appropriate in enforcing redistributions. The legal obligation to support dependent children is illustrative. Second, the mere possibility of a potentially desirable redistribution does not compel one to embrace every means to achieve it, for the costs of redistribution may exceed the benefits. Third, methods of redistribution vary greatly, as the debate concerning the provision of in-kind transfers (for example, food stamps, housing, and school lunches) versus a negative income tax (money) demonstrates.¹³² Fourth, there is the problem of choosing the correct jurisdictional level for making resource distributions.

2. *Implications for the Delegation of Legislative Power*

Using this outline of welfare rationales for collective action, one can identify the demand for the delegation of legislative authority by tracing public-policy development through several political relations or "connections": (a) between citizens' welfare and their electoral preferences; (b) between citizens' electoral preferences and candidates' promises; (c) between candidates' promises and officeholders' legislative output; (d) between legislative output and agency decisions; and (e) between agency decisions and citizen-legislative preferences.

a. *Citizen Welfare and Electoral Preferences.* The first connection that

¹²⁸ See, e.g., J. RAWLS, *A THEORY OF JUSTICE* (1971).

¹²⁹ See, e.g., Hochman & Rogers, *Pareto Optimal Redistribution*, 59 AM. ECON. REV. 542 (1969).

¹³⁰ Brennan, *Pareto Desirable Redistribution: The Non-Altruistic Dimension*, 14 PUB. CHOICE 43, 55-66 (1973).

¹³¹ J. RAWLS, *supra* note 128, at 266-70; see also J. BUCHANAN & G. TULLOCK, *supra* note 76.

¹³² See, e.g., M. FRIEDMAN, *CAPITALISM AND FREEDOM* ch. 12 (1962); R. MUSGRAVE & P. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 84-86 (3d ed. 1980).

influences the demand for legislative delegations is the process by which citizens translate the problems that affect their welfare into expressed political preferences. Economists assume that consumer wants automatically become consumer preferences, which then determine consumer demand. But market "imperfections" may impede this process. For example, free-rider problems,¹³³ and the unlikelihood that citizens will draw the connection between their diminished welfare and potential collective actions that might improve it, may cause a less-than-optimal supply (or suppression) of public goods (and bads). Although those with an incentive to do so may point out these connections to the citizen, no one has yet proposed an arrangement that would compensate them for providing this service. Because the desired public policy would create a public good, identifying the connections between welfare and political preferences is itself tantamount to supplying a public good.¹³⁴

Because a welfare-reducing problem, such as pollution or monopoly pricing, may be just one of several issues that will emerge in a particular election, other issues of immediate impact, such as sudden increases in the rate of inflation or unemployment, or an unanticipated foreign policy crisis, are likely to predominate. If the particular welfare-reducing problem carries a long-term impact that is not immediately critical, it may also fail to become a campaign issue. Finally, citizens in various constituencies may express concern for the same problems but prefer different degrees of collective action. For example, people differ in their susceptibility to externalities such as air pollution. Such variations across constituencies may lead to differences in the demand for collective action.

These difficulties in linking citizens' welfare to electoral preferences present uncertain implications for the delegation of legislative authority. Because of these various difficulties, candidates will receive confusing signals about the kind of public action desired—if, indeed, the electorate sends any signals at all. This confusion may lead candidates to respond only in a very general way to public demand for collective action, as by

¹³³ Some writers have suggested that the public sector has failed to expand to its optimal size because of inadequate advertising and inadequate recognition of the benefits of public goods. See J. GALBRAITH, *THE AFFLUENT SOCIETY* ch. 17 (2d ed. 1969); Downs, *Why the Government Budget Is Too Small in A Democracy*, 12 *WORLD POLITICS* 541 (1960). This conclusion reflects a naive view of the political dynamics of collective action. As we argue below in section II, the political process may tend to underinvest in the true public goods, but it tends to overinvest in the collective provision of private goods.

¹³⁴ This problem is suggested by M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (rev. ed. 1971), and explicitly identified in Aranson & Ordeshook, *A Prolegomenon to a Theory of the Failure of Representative Democracy*, in *AMERICAN REEVOLUTION: PAPERS AND PROCEEDINGS* 23 (R. Auster & B. Sears eds. 1977) [hereinafter cited as Aranson & Ordeshook, *A Prolegomenon*], and in Aranson & Ordeshook, *Public Interest, Private Interest, and the Democratic Polity*, in *THE ROLE OF THE STATE IN CAPITALIST SOCIETIES* (R. Benjamin ed. forthcoming).

promises to create an agency to "deal with the problem," leaving both the "problem" and the "solution" undefined.

b. *Electoral Preferences and Candidate Promises.* The publication of Downs's *An Economic Theory of Democracy*¹³⁵ inspired the study of the connection between citizens' preferences and candidates' electoral decisions. Downs popularized the concept of the median-voter hypothesis, which predicts that, given certain assumptions about the distributions of voters' preferences, at equilibrium candidates will converge to the median voter's most preferred position on each issue. Subsequent studies invalidated Downs's simple conclusion.¹³⁶ The actual existence and location of electoral equilibria depend on such variables as the distribution of voter preferences and the causes of voter abstention. The most profound and persistent finding is that pure strategy equilibria—that is, unique strategies that can defeat or tie all other strategies—usually fail to exist in elections.¹³⁷ This absence follows from several prior conditions, including the absence of symmetry among preferences,¹³⁸ the presence of cyclical majorities (for example, policy *A* defeats *B*, *B* defeats *C*, and *C* defeats *A*),¹³⁹ and the presence of intense minorities in opposition to or in support of particular public policies.¹⁴⁰ In sum, electoral equilibria are hard to find, and if they do exist, candidates seldom converge to the same public-policy positions.

Several scholars, most notably Shepsle,¹⁴¹ have sought to discover how candidates respond in the absence of pure strategy equilibria. While specific candidate responses depend upon the reasons that such equilibria are absent, candidates generally react by adopting a strategy of ambiguity. When distinct "bodies of opinion," or "intense minorities" are present in the electorate, for example, a strategy of ambiguity

¹³⁵ A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

¹³⁶ For a review of spatial election theory, see generally W. RIKER & P. ORDESHOOK, *AN INTRODUCTION TO POSITIVE POLITICAL THEORY* chs. 11-12 (1973). On the theoretical and empirical weaknesses or inapplicability of the median-voter result, see generally Aranson & Ordeshook, *Regulation, Redistribution, and Public Choice*, 37 *PUB. CHOICE* 69 (1981); Aranson, Hinich & Ordeshook, *Election Goals and Strategies: Equivalent and Nonequivalent Candidate Objectives*, 68 *AM. POL. SCI. REV.* 135 (1974); Aranson & Ordeshook, *Spatial Strategies for Sequential Elections*, in *PROBABILITY MODELS OF COLLECTIVE DECISION MAKING* (R. Niemi & H. Weisberg eds. 1972).

¹³⁷ See generally *POLITICAL EQUILIBRIUM* (P. Ordeshook & K. Shepsle eds. 1982); McKelvey, *General Conditions for Global Intransitivities in Formal Voting Models*, 47 *ECONOMETRICA* 1085 (1979); Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 *AM. POL. SCI. REV.* 432 (1980).

¹³⁸ Plott, *A Notion of Equilibrium and Its Possibility Under Majority Rule*, 57 *AM. ECON. REV.* 787 (1967).

¹³⁹ See, e.g., D. BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958).

¹⁴⁰ J. Oppenheimer, *Relating Coalitions of Minorities to the Voters' Paradox or Putting the Fly in the Democratic Pie* (paper prepared for the Annual Meeting of the Southwestern Political Science Association, San Antonio, Texas) (1972).

¹⁴¹ See, e.g., Shepsle, *The Strategy of Ambiguity: Uncertainty and Electoral Competition*, 66 *AM. POL. SCI. REV.* 555 (1972).

sometimes avoids defeat. Such a strategy embraces such maneuvers as claiming to have "a secret plan to end the war in Vietnam," or advocating the creation of an "expert" agency to study a problem and make and enforce rules to resolve it.¹⁴² Establishing an "expert" agency alleviates the candidate's need to take a stand on an issue prior to the commission's or agency's study. This strategy, therefore, entails a broad delegation of discretion to the particular agency.

c. *Candidate Promises and Legislative Output.* A simple view of the connection between candidates' campaign promises and their performance as officeholders assumes that candidates enter office and vote as citizens instructed them during the election. This assumption may hold true for those legislators and elected executives who meet sporadically to vote on a single issue. In most instances, however, each officeholder has far more options than merely voting for or against a proposal. In complex legislative situations, agenda control, strategic manipulation,¹⁴³ and other forms of parliamentary maneuvering¹⁴⁴ become available as techniques to direct the legislative outcome in the manner desired. These manipulative practices, which become possible in the absence of pure strategy legislative equilibria, may occur even if legislators agree on producing some public good through a regulatory process but disagree about production methods or levels.

The nature of constituents' revealed preferences may also depend on how policy choices are set against each other. And issues may arise about which constituents may not have instructed the legislator, perhaps because those issues were not brought to the constituents' attention. The legislator, therefore, must infer the effects that various policies would have on his constituents' welfare and discern what their political preferences might have been had they been knowledgeable. The inherent uncertainty over how to exercise legislative choice may result in the transfer of responsibility to a delegate. The delegate with broad discretion offers the legislator a substitute for taking direct action that different constituents might find objectionable.

d. *Legislative Output and Agency Decisions.* To accomplish welfare-related goals, legislative output (statutes) may describe in greater or lesser detail the actions that an agency should take. Legislators may prescribe agency structure and procedure, or they may set goals and

¹⁴² Fiorina, *supra* note 110, draws this connection between ambiguity and agency formation.

¹⁴³ See Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 *ECONOMETRICA* 587 (1973); Levine & Plott, *Agenda Influence and Its Implications: Existence and Correspondence Theorems for Voting Procedures and Social Welfare Functions*, 63 *VA. L. REV.* 561 (1977); Riker, *The Paradox of Voting and Congressional Rules for Voting on Amendments*, 52 *AM. POL. SCI. REV.* 349 (1958); Satterthwaite, *Strategy Proofness and Arrow's Conditions*, 10 *J. ECON. THEORY* 187 (1975).

¹⁴⁴ See J. BUCHANAN & G. TULLOCK, *supra* note 76, at chs. 11-12; Ricker & Brams, *The Paradox of Vote Trading*, 67 *AM. POL. SCI. REV.* 1235 (1973).

criteria for agency actions, such as requiring economic benefits to exceed costs. Legislators may also specify particular regulatory methods—choosing, for example, between design standards or performance standards in regulating the safety of private production. Finally, a legislature's directions to an agency may entail very specific details, such as airbag installation in new automobiles. Presumably, the degree of delegated discretion that individual legislators prefer and that the legislature as a whole will embrace reflects various characteristics of the legislative environment, including the electoral connection. In periods of heavy demand for welfare-improving measures, for example, the opportunity costs of not delegating, and therefore of not legislating, may exceed the opportunity costs of actually legislating and delegating. Under the welfare-maximizing model, therefore, it is precisely during such periods that one should expect the greatest amount of delegation with the least amount of specificity.¹⁴⁵

e. Agency Decisions and Citizen-Legislative Preferences. The strongest welfare justification for the delegation of legislative authority lies in the ability of administrative agencies to facilitate the connections just described. If agency decisions are indeed designed to increase citizens' welfare, then various aspects of agency output will intervene and favorably affect each link in the public-policy chain. In this manner delegation becomes a recursive mechanism by which the agency recreates its powers and purposes. This process can occur in a number of different ways.

First, if Congress asks agency leaders to concern themselves with possible changes in citizens' welfare associated with a particular problem, then the agency might begin by examining the connection between the problem and the welfare degradation. The EPA, for example, might try to identify new varieties of pollution and find causal links between these new varieties and adverse health effects. The agency might explain to the citizenry the full nature of the present danger. Citizens' political preferences might then be engaged and, as a consequence,

¹⁴⁵ Ehrlich and Posner argue that increases in the size of a legislature create marginally increasing increments to the costs of output because, among other things, negotiations become more costly. Legislators, therefore, respond to an increased demand for output by delegating legislative authority. See Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEG. STUD. 257 (1974); see also Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 339-40 (1974). This explanation of delegation overlooks certain aspects of the legislative process. First, negotiations usually take place in the demand-revealing process among interest groups and legislators, not in the legislature sitting as a committee-of-the-whole. Second, the entire legislature need not become involved in every aspect of the production of legislative output. Increased transaction costs, therefore, may explain the delegation of authority to congressional committees, but not necessarily to independent or executive-branch commissions. Third, demands in new public-policy areas create enriched opportunities for log rolling that theretofore had been too costly. Thus, increased public-policy demands may actually reduce transactions costs.

elected officeholders would face what was once a "latent" demand. By some accounts this is exactly how the political demand-generating process should work.¹⁴⁶ Because public goods are involved, individual citizens may not have the incentive to do the necessary research to reveal environmental dangers or similar problems. By establishing and maintaining an agency, Congress is delegating not merely legislative tasks but also the election-related task of searching out new opportunities to improve citizens' welfare. The agency receives an open-ended mandate similar to that claimed by a large conglomerate firm in its television commercials several years ago: "find a need and fill it."¹⁴⁷ Reelection follows if the delegates' choices are correct in gauging what the citizenry "needs" and if officeholders attend closely to their public-policy recommendations.

Second, agencies intervene in the connection between citizens' preferences and candidates' promises. Although the law proscribes direct intervention by professional civil-service personnel,¹⁴⁸ appointed agency leaders can be active in electoral campaigns. More importantly, agency leaders can influence the character of public-policy electoral debates. Accordingly, candidates can formulate their campaign platforms with reference to the nature of the tasks that they will delegate or refuse to delegate.

Third, agencies similarly intervene in the connection between candidates' promises and officeholders' legislative output. Agency personnel constantly and strategically feed information to legislators to aid them in their investigation, lawmaking, and oversight work. Such actions fall within the agency's responsibilities, because supplying information is equivalent to providing a public good, which citizens themselves would not undertake. Presumably, this information details the welfare consequences of changes in legislators' decisions. The agency, therefore, serves as a very sensitive "little electorate" on those matters about which, inter alia, the members of Congress are currently uninstructed.

Finally, information control and agenda control are closely related phenomena. Agencies often affect the officeholders' legislative output

¹⁴⁶ For a review of the argument and an alternative view, see MCBRIDE & WEINGAST, *PRODUCT SAFETY AND CONSUMER LIABILITY: IMPLICATIONS FOR THE ASSIGNMENT OF LIABILITY AND STANDARDS REGULATION* (1979) (St. Louis, Washington University Center for the Study of American Business). An example of this agency function is provided in Costle, *Pollution's "Invisible" Victims*, 6 EPA J. 4 (1980).

¹⁴⁷ Or, more realistically, "declare a need and fill it." This is, roughly, what Galbraith labels the "revised sequence." J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 211-18 (1967). Although Galbraith associates this phenomenon of demand creation with the private sector, the same phenomenon patently extends to the public sector as well. See, e.g., Stigler, *Private Vice and Public Virtue*, 4 J. LAW & ECON. 1 (1961).

¹⁴⁸ 5 U.S.C. § 7324 (1976); see *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

by controlling the congressional agenda. Agenda control of this nature is difficult to sustain, but the agencies often succeed by bundling various packages that are of interest to a sufficient number of congressmen.¹⁴⁹ Of course, the associated legislation affects the agency's mission and resources, and one would expect the agency to act in such a manner as to advance its own institutional interests as well as that of the legislator.

3. *Critique of Welfare Rationales for Delegation*

The analysis thus far contemplates the benign use of delegation to improve citizens' welfare. It assumes that all participants—citizens, election candidates, officeholders, and agency personnel—wish to serve the "public interest." We continue this assumption long enough to offer two criticisms of it.

First, the explanation is simplistic. Because it does not address the costs and uncertainties of delegation or the possible decisionmaking failures that might arise in the agency but not in the legislature, this favorable view of delegation would lead to a prediction that legislators will broadly delegate legislative authority concerning nearly every public-policy subject matter.¹⁵⁰ Congress, however, has not attempted such wholesale transfers of power. Witness, for example, the relative specificity of such statutes as the Clean Air Act¹⁵¹ or the tax code.¹⁵² An expansive theory of delegation based on a welfare-maximizing (or public-administration) view, therefore, is defective. Either the legislature has failed to adopt the "efficient" solution of total delegation, or its members have incentives not to transfer legislative power completely— incentives that a coherent theory of delegation must explain.

Second, the decision to delegate legislative authority grows out of a complex procedure of democratic choice. The decision, therefore, is subject to all of the limitations inherent in such procedures. These limitations include the victory of apathetic majorities over intense minorities, the victory of intense minorities over not-so-apatetic majorities, the lack of pure strategy electoral and legislative equilibria, logrolling, and agenda manipulation by delegates and others. All of these limitations render the delegation decision un compelling on welfare grounds.

This enumeration does not suggest that decisions to delegate legislative authority should be made by means other than democratic processes. Nor do we argue that delegation of legislative authority never serves public welfare-regarding objectives. What we do suggest is that

¹⁴⁹ See, e.g., Mackay & Weaver, *Monopoly Bureaus and Fiscal Outcomes: Deductive Models and Implications for Reform*, in POLICY ANALYSIS AND DEDUCTIVE REASONING ch. 10 (G. Tullock & R. Wagner eds. 1978).

¹⁵⁰ "[T]he good government model . . . does not explain why Congress ever passes a specific law rather than hand off the specifics to an agency." Fiorina, *supra* note 110, at 45.

¹⁵¹ 42 U.S.C. §§ 7401-7642 (Supp. IV 1980).

¹⁵² Internal Revenue Code of 1954, 26 U.S.C. §§ 1-9602 (1976 & Supp. V 1981).

the eventual public-policy outcomes from broad delegations can reduce citizens' welfare to levels below those that might prevail in the presence of a renewed delegation doctrine. Without trying to attribute all of the problems of democratic political processes to delegation, we think it evident that the delegation decision compounds the problems inherent in democratic processes.

III COLLECTIVE ACTION, PRIVATE WELFARE, AND DELEGATION

It is dismally true that the reality of collective action has little to do with welfare theory. The theoretical principles of welfare theory just reviewed bear little resemblance to the kinds of collective action actually taken. To review examples of the divergence between the normative theories of collective action and the political reality would be a tedious exercise. Suffice it simply to assert what ordinary observation will show: the "public goods" that Congress actually supplies seldom conform to those that classical welfare justifications define; externalities and market imperfections are as often the consequences as they are the causes of government intervention; redistribution programs all too often shift wealth from the poor to the (relatively) affluent.

Nor do we need to make a global judgment about how much of the public sector is devoted to the collective provision of private benefits to particular interest groups, broadly defined, and how much is devoted to "genuine" public welfare. It is enough to call attention to the general divergence of theory and reality as a preface for an exploration of the political dynamics of collective action and to how these dynamics affect the delegation of legislative powers.

A. Public Goods, Private Goods, and Public Policy

There are five principal sets of participants in the public policymaking process: interest groups, legislators, the chief executive, bureaus (including regulatory agencies), and the courts. The dominant incentive of each is the public production of private goods, often through legislative delegation to a centralized regulatory system.

1. *The Electorate and Interest Groups*

Our earlier discussion of public-policy formation implicitly assumes that electoral competition solely concerns public goods. Each member of an otherwise undifferentiated electorate individually forms preferences concerning the optimal level of production for public goods. Each voter then either chooses the candidate who takes a position closest to that level or abstains from voting. This model of elections, which provides a post-hoc explanation for electoral outcomes, flows from norma-

tive welfare judgments,¹⁵³ but it rests on an atomistic conception of the political process that disregards such matters as information costs, disparate constituencies, organization, political parties, and sophisticated voting and agenda control. In this sense, it resembles the real world of politics even less than the economic theory of perfect competition resembles private-sector decisionmaking.

Downs's premise, which modern political analysts have widely accepted, provides a more realistic view of the political process. Downs suggests that candidates and legislators seek primarily to be elected or to receive other private benefits.¹⁵⁴ This view does not imply that the legislator's own policy preferences or his view of the "public interest" fails to affect his choices. Indeed, the desire to promote such personal views about public welfare may be a strong motive underlying a candidate's desire for office. Nevertheless, the legislator's personal views are of little import unless he is elected, and he will be elected only if he responds or is perceived to respond to electoral preferences.

How do candidates discern and weigh such preferences? A candidate's constituency may be divided into nonoverlapping groups, whose preferences on certain public policy questions differ significantly.¹⁵⁵ Candidates must decide how to allocate their scarce campaign resources, which may include mutually exclusive public-policy positions; how to appeal to the undifferentiated electorate on the issues about which no group has taken a position; and how to focus on the positions that the groups or some subset of the groups have individually adopted.

Two possibilities emerge. First, a group may differ from all other groups by preferring a distinct level of public production of some good. The particular good, for example, might be a public good such as clean air, and the distinguishable group might consist of "high demanders," such as persons unusually concerned with, or affected by, air pollution. On the other hand, the particular good might be a private good in consumption but not in production, such as protection against competitive entry, and the distinguishable group might consist of individual busi-

¹⁵³ See Bowen, *The Interpretation of Voting in the Allocation of Economic Resources*, 58 Q.J. ECON. 27 (1943).

¹⁵⁴ Traditionally, economic theory assumes that the social function and private motive of government both consist of maximization of social utility or social welfare. Our hypothesis differs from this view in three ways: (1) in our model, government's social function is not identical with its private motive; (2) we specify only the private motive, which is the maximization of plurality instead of utility or welfare; and (3) the government is a party competing with other parties for control of the government apparatus. See A. DOWNS, *supra* note 135, at 51. In short, candidates propose policies to get elected; they are not elected to enact welfare-maximizing legislation.

¹⁵⁵ The condition that groups not overlap in membership is a technical one that greatly simplifies analysis without great injury to reality. See Aranson & Ordeshook, *Incrementalism, The Fiscal Illusion, and the Growth of Government in Representative Democracies*, in *THE GROWTH OF GOVERNMENT* (W. Meckling ed. forthcoming).

nesses, such as truckers, banks, or airlines. The candidate might espouse a level of public production for the differing goods that each group's median member prefers. Alternatively, he might try to discern the median voter's preference for the public production of each good, which may be zero, while paying no attention to each distinguishable group's median preference.

Under most reasonable conditions, the candidate will choose the first strategy by attempting to satisfy the distinct preferences that characterize each group. The very existence of the group reflects the importance of the issue and indicates that group members will receive information on the connection between their welfare and the facilitating public-policy preferences, as well as communications concerning the candidate's position. The choice similarly implies that monitoring and incentive arrangements are available to establish a public-policy "market," in which group members will reward the candidate for his position. These politically efficient characteristics of groups are absent for the undifferentiated electorate. The candidate, therefore, will prefer to bargain with individual groups about their preferred public policies rather than with the general electorate, which has few means of indicating its median preference on each issue.

A second possibility is that the distinctive preferences of two or more groups will clash on a single public-policy issue. In response, the candidate might adopt a median position between or among the groups or in the general electorate; he might take a median position among some subset of groups that have formed a coalition; or he might try to satisfy the largest group's demands. Alternatively, he might adopt a strategy of ambiguity on the issue. The outcome of such group conflicts depends on the groups' relative strengths and the candidate's ability to satisfy opposing groups simultaneously. These situations often result in the delegation of legislative authority through the formation of regulatory agencies.¹⁵⁶

Because candidates form their public policy programs around identifiable group preferences, we must identify the characteristics of the demanded public policies. In short, we must ask if groups demand the production of public goods or private goods. Two models have been developed to answer this question.¹⁵⁷ The first constructs a two-person game in which each group must choose to demand either a private good or a public good. If a demand for either good is tantamount to its public-sector supply, and if the costs and benefits of both goods are indistin-

¹⁵⁶ See *infra* text accompanying notes 230-41.

¹⁵⁷ See Aranson & Ordeshook, *A Prolegomenon*, *supra* note 134; Aranson & Ordeshook, *supra* note 155; Aranson & Ordeshook, *The Political Bases of Public Sector Growth in a Representative Democracy* (paper prepared for the Annual Meeting of the American Political Science Association, Washington, D.C.) (1978).

guishable, then the game is a prisoner's dilemma. Each group will demand its private-benefits legislation, which in turn yields a net welfare loss to the members of each group.¹⁵⁸ A second model constructs a set of n-person games, which assume that there is some probability (greater than or equal to zero and less than or equal to one) that group demand will produce public supply, and that the demand contributes marginally to the probability that officeholders will adopt the demanded program.¹⁵⁹ If the returns from political demand are marginally diminishing (that is, as each additional group demands that good, the resulting positive increments to the probability that the good is produced grow smaller), then each interest group will demand its private benefit rather than the public good.

These findings also reveal that groups principally seek the collective supply of goods whose benefits to the group exceed their tax-share cost, or exceed some constant proportion (less than one) of their total cost. In other words, in a welfare sense the programs associated with these private demands may be inefficient. A search for the exact relationship between costs and benefits has not produced general solutions. But by stepping outside of these models, we can make a convincing argument that inefficiency will prevail. If capital markets are perfect, then groups will purchase efficient programs or benefits in the private sector, because the benefits of these programs by definition exceed their costs. Such groups would use scarce political resources to lobby for the public supply of inefficient programs. Of course, the cost of these programs, including inefficiency, is spread throughout the rest of the population in the form of taxes or the untoward consequences of inefficient regulations.¹⁶⁰

Is opposition to the public supply of private goods possible? Recall that the collective supply of one group's private good is a public bad for all other groups. Accordingly, a group that opposes such a supply would be supplying a public good to all other groups. By the preceding analysis, however, groups should not oppose each other's demands for private

¹⁵⁸ This model assumes that the groups would demand the same public good if they demanded any public good at all. If they demanded different public goods, then the game would become a "battle of the sexes," which has no Nash equilibrium strategy. See R. LUCE & H. RAIFFA, *GAMES AND DECISIONS: INTRODUCTION AND CRITICAL SURVEY* 90-94 (1957).

¹⁵⁹ Aranson & Ordeshook, *A Prolegomenon*, *supra* note 134; Aranson & Ordeshook, *supra* note 155; Aranson & Ordeshook, *supra* note 157.

¹⁶⁰ Using standard microeconomic assumptions we can also show that political action in pursuit of these programs is an inferior good. As income declines, spending to secure such goods represents a relatively greater proportion of group members' incomes. One way for this income to decline is for other groups to succeed in securing their private goods at collective cost. See Aranson & Ordeshook, *Alternative Theories of the Growth of the Government and Their Implications for Constitutional Tax and Spending Limits*, in *TAX AND EXPENDITURE LIMITATIONS* 143 (H. Ladd & T. Tideman eds. 1981).

benefits, as long as the costs do not fall disproportionately on a particular group.

2. *The President*

The President is often regarded as uniquely positioned to resist the demands of private interests and to ensure that collective action serves only the general welfare.¹⁶¹ As a nationally-elected official, he is theoretically informed about the public-policy demands of all groups in the electorate and he is tied to no single one of them. In formulating his legislative program, he might conclude that satisfying all groups' demands would be Pareto inferior to satisfying no group's demands (provided that all demanded programs are welfare-inefficient). He might then veto bills that satisfy such demands but act favorably on those public policies that share impeccable welfare-related credentials. Indeed, by one account, Congress, through the administrative agencies, has both the capability to pass bad legislation and the incentive to do so, whereas the President has an incentive to suppress bad legislation but lacks the capability to do so.¹⁶² Welfare-diminishing legislation, therefore, will develop only if Congress prevails.

This view is naive in its interpretation of presidential incentives. A presidential candidate or incumbent, designing a strategy for the public supply of private goods, has several options if he wishes to maximize his expected plurality. He can add a program, refuse to add a program, or delete an existing program. He may consider all existing and proposed programs simultaneously and render a global decision, or he may consider programs individually and make sequential, incremental decisions. Voters will perceive the effects of these decisions in different ways. Some voters may perceive very small public-policy-related changes in their welfare. Others may have high perceptual thresholds and will be insensitive to all but the largest public-policy effects. Of course, electorates can also reflect a mix or distribution of thresholds, reflecting differences in the opportunity costs of gaining political and economic information.

This model of an electoral process in private goods is general, and it applies equally well to the President or presidential candidate as to members of Congress and congressional candidates. The model yields four results.¹⁶³ First, if politicians use global decision processes and if citizens' perceptual thresholds are low and, therefore, highly sensitive to

¹⁶¹ See THE FEDERALIST Nos. 67-77 (A. Hamilton). Commentators rely on this view of the Presidency, in part, to support proposals for greater presidential control of agencies. See Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979); Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975).

¹⁶² Commentators also apply this argument to the bureaucracy as a source of private goods. See, e.g., Fiorina, *Control of the Bureaucracy: A Mismatch of Incentives and Capabilities*, in THE PRESIDENCY AND THE CONGRESS 124 (W. Livingston, L. Dodd & R. Schotts eds. 1979).

¹⁶³ See Aranson & Ordeshook, *supra* note 155.

small changes in welfare, then the number of public-sector programs yielding private benefits will grow.¹⁶⁴ That is, the President, candidate, or other elected official will decide to add more programs than he deletes. Second, again using global decision procedures, but assuming that citizens have high perceptual thresholds and, therefore, are insensitive to small changes in welfare, the President will reduce the number of private programs collectively supplied.¹⁶⁵ Third, if the President uses incremental decision procedures considering one or a few programs at a time, and if citizens are sensitive to small changes in their welfare, then he will choose a net reduction in the number of private-goods programs collectively supplied. Finally, if the President again uses incremental decision procedures, but citizens' perceptions are insensitive to small changes in welfare, then he will choose to expand the number of collectively-supplied private-benefits programs.

Most citizens appear to be relatively insensitive to the welfare consequences of most public decisions, especially those decisions that allocate private, divisible benefits to others.¹⁶⁶ Additionally, most officeholders and candidates normally do not adopt a comprehensive view of public policy, but consider programs incrementally, such as those that distribute private benefits through direct and indirect subsidies and regulations.¹⁶⁷ These two common conditions combine to promote net increases in the number of collectively-supplied private benefits. Therefore, until the voter's information and decisionmaking costs decline or the marginal productivity of public-sector regulations and expenditures falls precipitously (relative to their costs), we expect a net growth in collectively-supplied private benefits.¹⁶⁸

For reasons that we explore later,¹⁶⁹ this growth in collectively-supplied private benefits implies a net increase in the delegation of power to

¹⁶⁴ The model states changes in the number of programs granted or deleted as a net outcome, because some programs may be deleted, even though a larger number are added. Conversely, some new programs may be added, even though more are deleted. Hence, the model predicts neither that government programs, including regulatory regimes, are immortal, nor that all demands are granted. *But see* H. KAUFMAN, *ARE GOVERNMENT ORGANIZATIONS IMMORTAL?* (1976).

¹⁶⁵ This result partially depends on the shape of the distribution of thresholds. In particular, in the relevant range of the candidate's decisions, the threshold function must be marginally increasing as a function of positive changes in net welfare.

¹⁶⁶ *See* M. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* (1981).

¹⁶⁷ *See* A. WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* 135-36 (2d ed. 1974) ("Federal budgeting today is incremental rather than comprehensive, calculated in bits and pieces rather than as a whole, and veils policy implications rather than emphasizing them.").

¹⁶⁸ The model also explains an occasional attack on the process, such as has occurred partially in the Reagan administration. The Reagan budget-makers appeared to proceed incrementally in the presence of low thresholds, doing so in all public-policy areas except national defense. Hence, the process of supplying private benefits in the public sector is not without theoretical limits.

¹⁶⁹ *See infra* text accompanying notes 180-213.

agencies as a means to attain the collective provision of private goods. If a President has little incentive to stop the collective provision of private goods, he has even less incentive to curb the legislative delegation of authority, inasmuch as executive agencies are the repositories of much of the delegated authority. Certainly, it is altogether unusual in the annals of politics to find a chief executive rejecting powers that others have granted to him or his agents.¹⁷⁰

3. Congress

It is now a commonplace among modern political analysts that members of Congress are the primary agents responsible for generating and perpetuating the collective production of private benefits.¹⁷¹ Three entirely independent but theoretically related lines of research reveal Congress's central role in sustaining this process.

The first line of research focuses on the legislator as the representative of specific clientele or constituency interests, a role that is distinct from that of the representative for the "public good." A modern interpretation¹⁷² of Edmund Burke's view¹⁷³ posits a fundamental tension between a legislator's role as a delegate of narrow interests and his role as a trustee for his district and for the nation. This interpretation, however, fails to draw the obvious parallel to the currently-understood tension between legislative "delegates" as private-benefits producers and legislative "trustees" as public-goods producers. More recent studies of Congress highlight this tension by focusing on the representative's goal of reelection. According to these studies, the goal of reelection decreases the legislator's incentives to investigate, legislate, and oversee, and increases his incentives to engage in a different set of activities designed to secure his reelection.

Mayhew identifies three such activities: "advertising," "position-

¹⁷⁰ A remarkable and politically paradoxical example of this phenomenon is the Nixon administration's imposition of wage, rent, and price controls, which led to the delegation challenge in *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971). The situation in which the chief executive reluctantly accepts powers granted to him structurally resembles many congressional delegations of legislative authority to agencies. The members of Congress want to avoid blame for a problem such as inflation as well as blame for directly imposing a policy of wage controls. This strategy is especially attractive when different parties are in control of the Congress and the White House.

¹⁷¹ See J. FERREJOHN, *PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947-1968* (1974); M. FIORINA, *supra* note 105; D. MAYHEW, *supra* note 105; Fiorina & Noll, *Voters, Bureaucrats, and Legislators: A Rational Choice Perspective on the Growth of Bureaucracy*, 9 J. PUB. ECON. 239 (1978); Shepsle & Weingast, *Political Preferences for the Pork Barrel: A Generalization*, 25 AM. J. POL. SCI. 96 (1981); Weingast, Shepsle & Johnsen, *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 642 (1981).

¹⁷² Eulau, Wahlke, Buchanan & Ferguson, *The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke*, 53 AM. POL. SCI. REV. 742 (1959).

¹⁷³ See 1 THE WORKS OF EDMUND BURKE, WITH A MEMOIR 219 (1837) (speech to the electors at Bristol).

taking," and "credit-claiming."¹⁷⁴ Through advertising, the legislator seeks to gain public-name recognition, similar to brand-name identification. Through position-taking, the legislator delivers speeches, votes on motions, and exerts other efforts to convey his views on broad public-policy issues to his constituents. Through credit-claiming, by far the most complex of the three election-related activities, the legislator tells his constituents exactly what he has done to improve their welfare. In general, the ability to claim credit for the legislative creation of public goods is severely limited. A representative or senator seldom can argue convincingly that he alone is responsible for the legislative production of a public good, such as reducing the unemployment or inflation rate. Usually, a representative can claim credit only for the successful passage of private benefits for his constituents or a group within his constituency. Indeed, the literature on the Congress is replete with references to "particularized" programs and benefits, the "pork barrel," and "distributive" benefits, all of which are synonymous with what economists call "private goods." Production of private goods is a central motive of legislative action. In some cases, these private goods are by-products of supplying public goods. For example, expenditures on national defense, the paradigmatic public good, usually create private benefits for particular constituencies. Even when this congruence of private and public goods exists, however, the private benefit to the representative's constituents dominates the representative's preferences. For example, we expect the representative from the "State of Boeing" to be not only a strong supporter of national defense but also an advocate for air power.

The second line of research into the ways and means of legislators focuses on logrolling. Some scholars argue that logrolling creates preferred departures from pure majority sentiments, so that appropriate, efficiency-producing exchanges can overcome the problem of an apathetic majority voting down an intense minority.¹⁷⁵ This view has an intuitive appeal, because it posits that logrolling makes the legislative process more nearly market-like. Logrolling, however, really contemplates the implicit exchange of private benefits that are to be supplied collectively. Group *A*'s representative trades his vote to the representative of group *B* in exchange for legislative support on the private-benefit program that group *A* wants enacted. If each program alone is inefficient, then the entire logrolling process, by aggregating these programs, creates a total public-sector expenditure that is even more inefficient.¹⁷⁶

Scholars have studied logrolling for its role as midwife to pork-barrel legislation such as rivers and harbors bills, national-park legislation,

¹⁷⁴ D. MAYHEW, *supra* note 105, at 49.

¹⁷⁵ See, e.g., J. BUCHANAN & G. TULLOCK, *supra* note 76, at chs. 10-13.

¹⁷⁶ See Riker & Brams, *The Paradox of Vote Trading*, 67 AM. POL. SCI. REV. 1235 (1973).

and other omnibus legislative packages.¹⁷⁷ Logrolling, however, is more than a midwife; it also shapes the character of regulatory legislation. An examination of the manner in which legislators create and renew many regulatory agencies and their delegated tasks shows that the original problem, such as an externality whose untoward consequences have suddenly been discovered, triggers congressional hearings and investigations.¹⁷⁸ At this legislative stage, not only have the private-interest groups voiced their particular views, but even undifferentiated public attention may be great. By the time a bill has been marked up, every imaginable private interest has affected its terms. The motivation to produce private goods through public policy, shared by representatives and senators alike, implies such a result. Through this process, even a narrow regulatory statute eventually begins to resemble a logrolled omnibus bill with something for everyone, including payoffs that the bill's ambiguity disguises.

A third line of research on legislative decisionmaking returns us to the previously discussed interest-group models.¹⁷⁹ These models assume that each legislator is an agent for a distinguishable interest within his constituency or for the entire constituency if it is homogeneous. In a generalized n-person (legislator) model without coalitions, the cost-benefit ratio for an omnibus bill's passage requires only that the benefits of each bill exceed one-half of the cost. More generally, in n-legislator situations with coalitions, those legislative alliances that might form to block the passage of inefficient programs commonly do not form.¹⁸⁰ While these models assume the existence of pure pork-barrel relationships between legislators and constituencies, constituents may be internally divided in their opinions about various programs. When these preference differences do exist, the election model that describes presidential decisionmaking predicts nearly all of the legislator's decisions. In particular, if legislators proceed incrementally in the face of high voter perceptual thresholds, they should try to enact more private-benefits legislation than they oppose.

4. *Bureaus*

Three aspects of agencies deserve attention: congressional intent in delegating *regulatory* authority to the agency, the agency's "objective function" as an interest group, and the strategic premises underlying the agency's political actions. These three aspects, considered along with the relationships among the members of Congress, interest groups, and

¹⁷⁷ See *supra* note 171.

¹⁷⁸ M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 74-77 (1955).

¹⁷⁹ See *supra* text accompanying notes 157-70.

¹⁸⁰ Aranson & Ordeshook, *supra* note 157.

agency personnel, ultimately condition our view of the delegation of *legislative* authority.

When collectively supplied, private benefits can assume several forms. The benefits may be direct cash payments, such as cash subsidies and unrestricted grants-in-aid. These payments are completely fungible, but it is difficult to restrict access to them or to target subsidies to particular recipients. If the legislator fails to target and restrict entry to the benefited group, the payments may come to resemble public goods, thereby preventing the legislator from claiming payment in return. Similarly, the coalitions that support such payments are necessarily weak, because the support of "factor suppliers,"¹⁸¹ in this case taxpayers, is absent. Private benefits may also be in-kind. In-kind benefits are seemingly easier to target than direct cash payments, and the factor suppliers join the program's supporting coalition. For example, symphony orchestra managers, university presidents, and supermarket owners support the subsidized allocation of concert tickets, tuition credits, and food stamps, respectively. Regulation by agency is a third way to distribute private benefits. The President and the members of Congress supply private benefits by promulgating regulations and creating regulatory agencies. One political advantage of this form of private benefit is that its full costs are carried "off the books." But the returns from regulation are limited by demand, the extent of the market for the regulated product or service, and the availability of substitutes.

The private-goods nature of regulation has been extensively documented,¹⁸² and we need not rehearse that documentation in detail. The active and sometimes highly competitive political market for private regulatory benefits is similar in superficial ways to the economic market for other private goods. The political market, however, remains different in many critical respects.¹⁸³ We cannot yet predict who the next purchaser of a regulatory public policy might be—perhaps firms in a particular industry or perhaps a group of consumers of their product.¹⁸⁴

¹⁸¹ A factor is a good or service used in the production of a final good.

¹⁸² See, e.g., R. NOLL, *REFORMING REGULATION* 15-47 (1971); Aranson & Ordeshook, *supra* note 136, 37 *PUB. CHOICE* at 69; Posner, *supra* note 145, at 335; Stigler, *supra* note 51. The observation is not a new one:

Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens. This is a state of things in which it may be said with some truth, that laws are made for the *few*, not for the *many*.

THE FEDERALIST No. 62 (J. Madison).

¹⁸³ See Stigler, *supra* note 51. For comparisons and contrasts of the two markets, see generally Buchanan, *Social Choice, Democracy, and Free Markets*, 62 *J. POL. ECON.* 114 (1954); Stigler, *Economic Competition and Political Competition*, 13 *PUB. CHOICE* 91 (1972).

¹⁸⁴ This limitation is no more acute than the inability of economic theory to predict the next attempt to take over a publicly traded firm. Furthermore, a degree of unpredictability is

Nevertheless, economic theory can characterize the private-goods aspects and adverse welfare consequences of the regulatory process. Economic reasoning can also explain regulatory purchases that do occur, and as we show later,¹⁸⁵ it can also suggest methods for changing the observed pattern.

Thus far, we have discussed the interactions of voters, interest groups, election candidates, legislators, and presidents in the decision-making process. However, the delegation of legislative authority also includes substantial bureaucratic discretion for the administrative agency. Thus, our analysis must also account for the incentives, preferences, and strategic choices of bureaucrats and bureaus. We set aside the possibility that bureaucrats seek merely to promote the "public interest," as defined by our conventional welfare criteria. Imputing such an incentive to bureaucrats may be reasonable in particular cases, but it is not useful for predicting bureaucratic decisions. We do not insist that bureaucrats may be interested in promoting public welfare, any more than we would deny that other persons may be public-regarding in their decisions. Nonetheless, it would be naive to suppose that the self interest motives of ordinary human action are transformed merely by becoming a bureaucrat.

Yet because environmental constraints surrounding human action may vary, we must consider how the institutional environment affects bureaucrats. In effect, we are searching for an *institutional* objective—or in the current argot of modern political analysis, "maximand." Discerning such a maximand is extraordinarily difficult, because of the diverse preferences of those persons who comprise the institution. Sometimes the external environment "dictates" such a maximand. Economic competition, for example, may require private-sector firms to pursue a profit-maximizing objective.¹⁸⁶ But environmental constraints on bureaucratic institutions seem more complex than those on private firms, and we do not know if the constraints on institutions "enforce" any single maximand comparable to simple profit maximizing. Bureaus differ greatly in their functions, their histories, and the social and political environment in which they operate. Nevertheless, we can identify some general agency maximands that are useful in understanding bureaucratic decisionmaking.

Agency maximands may be characterized by size,¹⁸⁷ jurisdiction,¹⁸⁸

inherent in any theoretical view of the public sector that contemplates the possible absence of pure-strategy electoral or legislative equilibria. For an attempt to connect the resulting public-policy instability to regulatory problems, see generally Barke & Riker, *A Political Theory of Regulation With Some Observations on Railway Abandonments*, 39 PUB. CHOICE 73, 97-103 (1982).

¹⁸⁵ See *infra* text accompanying notes 242-47.

¹⁸⁶ See Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 21 (1950).

¹⁸⁷ See, e.g., W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

¹⁸⁸ G. TULLOCK, THE POLITICS OF BUREAUCRACY 134-36, 167-70 (1965).

and output.¹⁸⁹ Size maximizing, usually interpreted as budget maximizing, would be a curious objective for a private-sector firm, because it can always maximize the size of its budget by driving up its costs eventually resulting in bankruptcy. Government bureaus are different because as long as Congress and, ultimately, the taxpayers, underwrite their direct costs, the bureaus remain solvent.

Agency budget maximizing yields certain consequences. First, the agency usually prefers an unconstrained to a constrained delegation of regulatory and legislative authority. Delegations without standards allow agencies to work out budget-maximizing techniques, as well as policies consistent with other objectives. Second, the agency typically has an incentive to overstate the dangers of the activities that it regulates or proposes to regulate. This strategy distorts congressional estimates of the potential marginal productivity of resources allocated to particular regulatory activities. The EPA and FDA are examples of agencies that have traditionally used this strategy.¹⁹⁰ Third, agencies will sometimes enlarge their budgets by acting as conduits for direct subsidies to the industries that they regulate. For many years, the CAB provided such subsidies to the airlines,¹⁹¹ and the EPA's sewer and water projects made up more than 77% of its \$5.1 billion 1981 budget.¹⁹²

Jurisdictional expansion historically has been an important objective of most regulatory agencies, despite some recent evidence of agencies accepting and even initiating contraction of their jurisdictions. An agency may try to expand its jurisdiction by seeking control over additional regulatory matters within a single industry or by extending its

¹⁸⁹ See Lindsay, *A Theory of Government Enterprise*, 84 J. POL. ECON. 1061 (1976). In Lindsay's model the bureau maximizes only output capable of being monitored by Congress, on the premise that congressional rewards to bureaucrats are forthcoming only for measurable benefits.

¹⁹⁰ See, e.g., PRESIDENT'S COUNCIL ON ENVIRONMENTAL QUALITY, DRINKING WATER AND CANCER: REVIEW OF RECENT FINDINGS AND ASSESSMENTS OF RISKS (1980); Costle, *supra* note 146, at 24.

¹⁹¹ See G. DOUGLAS & J. MILLER, ECONOMIC REGULATION OF DOMESTIC AIR TRANSPORT: THEORY AND POLICY 110-11, 117 n.22 (1974); D. LOCKLIN, ECONOMICS OF TRANSPORTATION 764-70, 817-23 (6th ed. 1966) (description of various subsidies provided airlines industry); see also Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 33, 92 Stat. 1705, 1732, codified at 49 U.S.C. § 1389 (Supp. IV 1980) (subsidy for local airline service during deregulation); Gaskins & Voytko, *Managing the Transition to Deregulation*, 44 LAW & CONTEMP. PROBS. 9, 18-19 (1981).

¹⁹² See Budget of the United States Government, FY 1981, H.R. DOC. NO. 246, 96th Cong., 2d Sess. 157 (1980) (\$3.95 billion of the EPA's \$5.1 billion budget for pollution control and abatement allocated for sewage treatment plant construction grants); see also Budget of the United States Government, Appendix, H.R. DOC. NO. 96-247, 96th Cong., 2d Sess. 777-86 (1980).

Direct subsidies are more efficient for achieving regulatory objectives than is direct regulation itself. Such subsidies are hardly as subtle as regulation, however, and their direct costs cannot be carried "off the books." This difference explains in part why they are not used more frequently.

traditional regulatory activity to confront a perceived economy-wide problem. For example, the EEOC's recent foray into the "equal pay for comparable work" area is consistent with a jurisdiction-maximizing objective;¹⁹³ implementing such an objective would require a vast expansion both in personnel and budget. Similarly, the FCC's assumption of regulatory authority over cable television, which the Court affirmed in *United States v. Southwestern Cable Co.*,¹⁹⁴ enabled the agency to expand its jurisdiction. Though the FCC has since abandoned most of its cable regulations,¹⁹⁵ the jurisdiction itself remains largely unchanged and could presumably be reactivated if the "public interest" seemed to require it. The FTC has also frequently expanded the scope of its regulatory concerns to police "unfair" practices.¹⁹⁶ Again, recent deregulation measures¹⁹⁷ have reversed this expansion, but the FTC has already replaced it with new regulations for professional associations.¹⁹⁸ The SEC's regulation of cash tender offers further illustrates the entrepreneurial possibilities in jurisdictional expansion.¹⁹⁹

Varying political constraints complicate a simple maximand of jurisdictional expansion. Witness, for example, the recent deregulation movement in airlines and communications. A single agency may regulate different firms and industries with competing demands for regulatory action. In such cases it is not always clear which competing firm, industry, or interest group will prevail. Alternatively, a particular firm in a regulated industry may decide that it would do better without regulation. An agency may refuse an implied jurisdictional expansion or might actually remove some regulation, depending on the result of bidding by those advantaged or disadvantaged by the status quo. The ICC's quarter-century refusal to require that railroads offer piggyback services to truckers reflected such considerations.²⁰⁰ The *Permian Basin Area Rate Cases*,²⁰¹ in which the Supreme Court upheld the FPC's area-rate regulatory system even though it clearly exceeded the original con-

¹⁹³ See *County of Washington v. Gunther*, 452 U.S. 161 (1981); Lindsay & Shanor, *County of Washington v. Gunther: Legal and Economic Considerations for Resolving Sex-Based Wage Discrimination Cases*, 1 SUP. CT. ECON. REV. 185 (1982).

¹⁹⁴ 392 U.S. 157 (1968).

¹⁹⁵ See, e.g., *Malrite T.V. v. FCC*, 652 F.2d 1140 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

¹⁹⁶ See, e.g., *Pfizer, Inc.*, 81 F.T.C. 23 (1972) (advertiser's failure to produce a reasonable basis for affirmative product or service claims constitutes an unfair trade practice).

¹⁹⁷ See, e.g., Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), reprinted in Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225, 288-96 (1981).

¹⁹⁸ *AMA v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 102 S. Ct. 1744 (1982) (per curiam).

¹⁹⁹ See Manne, *Cash Tender Offers for Shares—A Reply to Chairman Cohen*, 1967 DUKE L.J. 231.

²⁰⁰ *American Trucking Ass'n, Inc. v. Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967).

²⁰¹ 390 U.S. 747 (1968).

gressional design, probably grew out of competition among the parties' complicated and interlocking interests. If consumers of certain regulated services are able to form political organizations capable of bargaining for private benefits, then agency decisionmaking may become adverse to the interests of the regulated. Many agencies have provided support for forming and maintaining such organizations, thereby increasing agency budgets, jurisdictions, and supporting constituencies.²⁰²

Because the economic marketplace does not generally price agencies' products and services, agencies have no profit test for measuring successful performance.²⁰³ Agency output might serve as a surrogate for agency success, but agency output is difficult to measure because a "unit of regulation" remains undefined. The welfare-improvement justification for agency existence provides one possible means of measuring output. Indeed, many agencies attempt such a measurement. For example, the Council on Environmental Quality seeks to document the effects of air-quality improvement, and OSHA reports the incidence of workplace accidents.²⁰⁴ Most agencies, however, avoid collecting such measures, either because it is theoretically or practically impossible to do so,²⁰⁵ because of monitoring problems, or because the agency has an incentive to report different measures of output, which would aid in making its case for a larger budget and an expanded jurisdiction. Rather than trying to identify regulatory-output measures, particularly those concerning welfare-related criteria, many agencies instead measure the economic health of the industries that they regulate.²⁰⁶

An important exception to this rule is that many regulatory agencies view their missions in terms of reducing risks. Yet monitoring constraints can affect the kinds of risks on which an agency focuses, as with the FDA's monitoring of new drugs.²⁰⁷ The FDA can err by setting its

²⁰² See, e.g., Downing & Brady, *Constrained Self-Interest and the Formation of Public Policy*, 34 PUB. CHOICE 15 (1979); Sabatier, *Social Movements and Regulatory Agencies*, 6 POLICY SCI. 301 (1975); Salisbury, *An Exchange Theory of Interest Groups*, 13 MIDWEST J. POL. SCI. 1 (1969); see also *Chamber of Commerce v. Department of Agriculture*, 459 F. Supp. 216 (D.D.C. 1978).

²⁰³ Downs includes the absence of a market output in the definition of a "bureau." A. DOWNS, *INSIDE BUREAUCRACY* 25 (1967). Some agencies that are commonly regarded as "bureaucratic" do sell products in the market (e.g., the Forest Service sells timber from national forests). However, Downs's definition is intended to be functional, not organizational. Thus certain activities of private firms may be considered "bureaucratic" to the extent that they are removed from market measures of performance.

²⁰⁴ See COUNCIL ON ENVIRONMENTAL QUALITY, ANNUAL REPORT 146-89 (1980); DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH STATISTICS OF THE FEDERAL GOVERNMENT, FY 1978 (1979).

²⁰⁵ For example, measuring the consequences that flow from FTC antitrust policies is difficult. See Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075 (1980).

²⁰⁶ See, e.g., CIVIL AERONAUTICS BOARD, FISCAL YEAR 1975 REPORT TO CONGRESS 1, 14-15 (1976); FEDERAL COMMUNICATIONS COMMISSION, ANNUAL REPORT FISCAL YEAR 1977, at 36 (1978). See generally R. NOLL, *supra* note 182, at 15-29.

²⁰⁷ See Peltzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments*,

regulatory filter so low that it licenses drugs that cause more injury than they cure (in statistical theory, a "type-one" error), or by setting its filter so high that large numbers of safe and efficacious drugs are delayed in development or are not developed or brought to market, causing many people to suffer as a consequence (a "type-two" error). In general, type-one errors are more readily perceived and measured, at least by the general public, than are type-two errors. To the extent that general public attitudes shape agency incentives, agency decision making will be skewed by this different perception of the two kinds of errors.²⁰⁸

Budget maximizing, jurisdictional expansion, and output maximizing in their various manifestations may increase private payoffs to agency personnel. These payoffs take the form of prestige or job satisfaction, if not the form of higher salaries or greater perquisites. The beneficiaries of regulation may provide additional payoffs through political support of the agency's mission. Agencies thus enjoy positive incentives to seek out new regulatory avenues for allocating private goods to those whom they serve and to develop new clients.

Most major regulatory agencies also have potent political resources. They represent the principal source for Congress of information about regulatory problems. Agencies also generate supporting constituencies by the selective use of regulation. Within broad limitations, they can beneficially or adversely affect the fortunes of each legislator's constituents, and they can grant particularized favors to constituents through the congressman's good offices. They can even affect the shape of the statutes that give them their mandate. Thus, agencies reinforce the legislative tendency toward the public production of private goods, or the collective satisfaction of high demanders' preferences for public goods.

Students of the regulatory process actively debate whether agencies serve their own interests or the interests of Congress. The "monopoly-bureau" view explains regulatory outcomes as the direct result of bureau decisionmaking over which Congress exercises only fleeting or partial control. By this view, the political capacities of regulatory beneficiaries may actually result in Congress being subjected to agency control. The monopoly-bureau model holds that these agencies have not merely received regulatory authority through delegation, but also have seized legislative authority.²⁰⁹

The alternative view is that commissions are really agents of Con-

81 J. POL. ECON. 1049 (1973). See generally W. WARDELL & L. LASAGNA, REGULATION AND DRUG DEVELOPMENT (1975).

²⁰⁸ Of course, the type of risk to which the agency is most averse depends on the agency's responsiveness to the different external constituents that are monitoring the risk. The general public might not perceive a type-two error, although the regulated industry might clearly perceive it. In such a case the agency's risk preference thus will depend on the relative influence of the public and industry as monitors of agency performance.

²⁰⁹ Wiltse, *The Representative Function of Bureaucracy*, 35 AM. POL. SCI. REV. 515 (1941).

gress that try to track congressional wishes, with varying degrees of success.²¹⁰ The FTC's late renaissance, for example, may be a response to changing congressional-committee preferences. The FTC maintained its activist course until recent committee criticism, brought about by a change in committee membership, convinced it to reconsider its policies.²¹¹

Critical tests of the monopoly-bureau view or of the congressional-dominance view are difficult to imagine. Anecdotal evidence supports both models, and both models may find valid applications.²¹² Either view is consistent with the hypothesis that legislation and regulation derive from demands for the collective provision of private goods or for the level of public goods preferred by high demanders. Furthermore, explanations of the delegation of *legislative* authority to the regulatory agencies and the argument for a reinvigorated nondelegation doctrine do not depend on sustaining one view or the other, but promise public-policy improvement in either case.²¹³

5. Courts

Judicial decisions obviously carry significant public-policy implications. These implications may be specific, as when the Supreme Court finds a particular act of Congress unconstitutional or orders an agency to change its regulatory decision. Whether by positive judicial action or by judicial default, the Supreme Court's pattern of decisions also may shape the general nature of public policy that the other branches of government adopt. Judicial default concerning the delegation doctrine

²¹⁰ See Calvert & Weingast, Congress, The Bureaucracy, and Regulatory Reform (paper prepared for the Second Annual Meeting of the Association for Public Policy Analysis and Management (Boston, October 1980)).

²¹¹ See, e.g., Weingast & Moran, *Bureaucratic Discretion or Congressional Control: Regulatory Policymaking by the Federal Trade Commission*, J. POL. ECON. (1982) (forthcoming); see also Gellhorn, *The Wages of Zealotry: The FTC Under Seige*, 4 REG. 33 (1980); Weingast & Moran, *The Myth of Runaway Bureaucracy and the Case of the FTC*, 6 REG. 33 (1982).

²¹² Congress and a particular bureau may exercise bilateral monopoly control in the same public-policy area.

²¹³ One might argue that if the agencies are actually under congressional control, then delegations of legislative authority seem constitutionally acceptable. But this argument has two problems. First, congressional control implies control by members of those committees overseeing the agencies' activities. These committees can hardly stand as surrogates for the entire, constitutionally prescribed legislative process. The incentives of agencies and committee members may be far more compatible than those of agencies and the entire membership of Congress. See H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* 169-71 (1962); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1409-12 (1977); Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947, 955 (1971); see also M. FIORINA, *supra* note 105, at 62-66. Hence, this arrangement is subject to the same practical and constitutional criticisms as the legislative veto. See Bruff & Gellhorn, *supra*. Second, even supposing that agency decisions fully reflect congressional preferences, as we shall argue later, see *infra* text accompanying notes 221-41, the delegation process itself shares responsibility for sustaining the private goods-producing nature of regulatory policies.

helps sustain the collectively-supplied, centralized regulatory production of private benefits, as well as governmental acquiescence in satisfying the public-goods preferences of high demanders. Thus, we need to investigate the Court's acquiescence in this pattern of public policy.

Landes and Posner's interest-group analysis of the independent judiciary holds that the independence of the courts from political influence is designed to preserve the bargains made in the political market.²¹⁴ The private-goods bargains that Congress and regulatory agencies make with producers, consumers, and others might last a year, a decade, or in perpetuity. Private-sector parties to these public-sector bargains prefer beneficial regulatory arrangements to last as long as possible. Members of Congress and the regulatory agencies also prefer private benefits to flow to their clients over a longer period of time, because they can then claim greater rewards for producing them. Whatever the allocation of the benefits among Congress, the agency, and the benefited group, longer-term regulatory protection increases the net present value of each congressman's share of the bargain, and allows him to capitalize immediately his full share of the regulation's net present value. The preference for a regulatory benefit in perpetuity is especially important to those members of Congress who expect "performance under the contract" to exceed their tenure in office: periodic payments would be of little use to them after they are gone.²¹⁵

There are two threats to this arrangement, however. First, members of a subsequent Congress may demand a renegotiation of the original agreement, with compensating payoffs to themselves. They may even choose to abrogate the original agreement, in which case the original investment may not pay off at all. But the possibility of abrogation lowers the price that interest groups and firms are initially willing to pay for private benefits. The tendency of congressional procedures, such as the filibuster, bicameralism, and the overlapping capacities of committees to kill legislation, to preserve that status quo is a response to this problem. These procedures hamper the termination of old agreements and make more costly the passing of new legislation. Even so, Landes and Posner hypothesize that under a reasonable set of assumptions about groups' willingness to pay for legislation, the net payment to congressmen will be greater with these status-quo-preserving provisions than it would be without them:²¹⁶ the value of the permanence added to those fewer bills that are enacted exceeds the opportunity costs of those that are not.

²¹⁴ Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. LAW & ECON. 875 (1975).

²¹⁵ *Id.* at 877-78.

²¹⁶ "[U]nder plausible assumptions the increase in the value of legislation will exceed the increase in its cost, since a modest increase in the cost of enacting legislation could multiply many-fold the length of the period in which the legislation was expected to remain in force." *Id.* at 879.

The specialized quality of this hypothesis leads to a suggested further refinement. The private-goods view of the legislative process implies that congressmen have incentives to pass private-benefits legislation but not to oppose such legislation. By similar reasoning, the incentives to pass private-benefits legislation remain in the Landes-Posner interpretation, but incentives to abandon existing private-benefits legislation, like incentives to produce collective goods generally, are absent. Therefore, once such legislation is passed, it enjoys a presumptive permanence, even though the majority of a subsequent Congress may oppose it. If members of Congress were concerned solely with producing public goods and suppressing public bads, then this permanence would make little sense, because conditions do change and the managerial explanations for legislative delegation argue for removing incentives to make legislation permanent.

The judiciary poses a second threat to "public contracts" for private benefits that flow in perpetuity. If the judiciary were not independent, it would cancel newly disfavored long-term contracts in response to periodic preference changes within the legislature. Such cancellations would be an inexpensive way for a subsequent Congress to overturn prior congressional bargains while avoiding the legislative process.²¹⁷

The courts enhance the value of current legislation when they affirm prior bargains that Congress (and, by inference, the regulatory agencies) had made with private-sector parties. As a consequence, the present Congress would be less likely to erode the courts' independence by challenging their jurisdictions, tampering with their life tenure, or attacking them by other means, because eroding the courts' independence would undermine the potential value of Congress's present bargains. Of course, the courts' power to overturn congressional legislation slightly reduces the value of new legislation. Nonetheless, this cost is acceptable because the courts also sustain the original bargains through statutory construction.

While this view of the judiciary is concerned primarily with congressional attitudes toward the courts, the judicial response is also instructive. First, by emphasizing that, even after the passage of time, they will only interpret and reinforce the original congressional contract, the courts avoid conflict with Congress. Second, the courts' attempts to preserve the original intent of Congress help to reinforce the permanence and value of the bargains struck. This activity is apparent in the delegation cases, in which the courts generally did not overturn a delegation. In those instances in which a delegation conflicted with an important doctrine, the courts interpreted the original delegation narrowly to preserve the original bargain, or to preserve as much of the

²¹⁷ *Id.*

original regulatory bargain²¹⁸ or legislative intent²¹⁹ as possible. Third, by sustaining broad delegations of legislative power, the courts enhance their own role in the public policymaking process. The absence of clear and specific legislative directives to the agencies not only suits the members of Congress, but it also provides room for "creative" judicial intervention in reviewing agency actions.²²⁰

B. The Legislative Delegation Decision

We have reviewed managerial explanations for delegations of legislative authority and enumerated welfare justifications for collective action. Just as normative welfare criteria do not commonly inform practical political decision making, so delegations do not frequently grow out of attempts to further truly public-regarding goals. Instead, public policy involves the pursuit of private benefits or the level of public goods sought by high demanders to be publicly supplied. Public-policy markets form explicitly around the demands of interest groups, firms, and bureaus, the bargains made by legislators, and, ultimately, bureaucratic and regulatory agency activity.

While developing a theory of regulation construed as a method for allocating private benefits, we have not explained the delegation of *legislative* authority to regulatory agencies. Members of Congress have several alternatives with respect to potential regulatory power. They can do nothing, which allows existing common law or statutory arrangements to continue. They can regulate by statute but provide for judicial enforcement. Or they can provide for regulatory-agency enforcement of the statute, but withhold substantial agency discretion. This alternative entails the delegation of only regulatory authority. Finally, they can permit the regulatory agency to "write" the statute and to resolve political questions. This alternative involves the delegation of both regulatory and legislative authority. What governs the choice among these options? More specifically, why is the last option often chosen? Several explanations are possible, although not all are equally plausible.

One explanation is managerial efficiency. Legislators may view delegation as a device for economizing the use of legislative resources, thereby maximizing output of public goods. This normative explanation suffers from the same positive shortcoming as does welfare theory:

²¹⁸ National Cable Television Ass'n v. United States, 415 U.S. 336 (1974); see *supra* notes 49-52 and accompanying text.

²¹⁹ Kent v. Dulles, 357 U.S. 116 (1958); see *supra* notes 46-48 and accompanying text.

²²⁰ Indeed, in recent years, Congress has moved to expand the role of judicial review of regulatory programs, thus giving evidence that the legislative branch has little to fear from the judiciary. See, e.g., S. 1080, 97th Cong., 2d Sess. (1981) (Senator Bumpers' amendment to 5 U.S.C. § 706). Earlier examples include new or amended agency charters that provide for a more intensive judicial oversight of agency action. See DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257 (1979).

it presumes that legislators or their constituents have an incentive to maximize the output of *public* goods. Specific interest groups, however, will not choose to allocate their scarce resources to lobby for welfare-optimal delegations for the same reason that they would not choose to lobby for other public goods. Moreover, members of Congress can hardly claim credit for maintaining the public interest by delegating legislative authority designed to ensure managerial efficiency; constituents would find such claims by individual congressmen incredible.

The managerial explanation remains plausible, however, if it is separate from the assumption of a welfare-seeking purpose. Legislators delegate authority in order to reduce various costs of legislating, which allows them to legislate more *private* goods. Stated differently, delegation reduces the legislator's marginal cost of private-goods production, which, *ceteris paribus*, yields more legislation and more public-sector private-goods production. Public-sector subdelegations thus perform precisely the same role as do private-sector subdelegations, except that the agency costs of subdelegation generally do not fall on the members of Congress, who perform the subdelegating. Instead, costs are spread over the population. Under a managerial explanation, therefore, delegations no longer share the benevolent characteristics advanced by the public-interest, civics-book model.

Fiorina suggests a second explanation for the delegation of *regulatory* authority.²²¹ He assumes that regulation creates private benefits (or the satisfaction of high demanders of public goods) at collective cost. His explanation is well suited for situations in which free-rider problems prevent proponents or opponents of the proposed regulations from organizing effectively. This explanation also appeals to a variant of the fiscal illusion.²²² The theory assumes that a congressman can vote for a particular regulation to be enforced either by an agency or the judiciary, that the congressman has perfect information about the regulation's benefits and costs, and that the court or the agency will receive only regulatory authority, not legislative authority. In this context, if the regulation is embodied in a judicially enforceable, specific statute, the congressman's affirming vote engenders the unalloyed approval of those benefited and the disapproval of those harmed. But by having an agency enforce the regulation the congressman can shift some degree of both the credit and blame to the agency. The degree to which a legislator succeeds in shifting credit or blame to the agency can vary, and will

²²¹ Fiorina, *supra* note 110.

²²² Goetz, *Fiscal Illusion in State-Local Finance*, in BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH 176 (Borcherding ed. 1977); Wagner, *Revenue Structure, Fiscal Illusion, and Budgetary Choice*, 25 PUB. CHOICE 45 (1976). A fiscal illusion occurs if voters overestimate the value of public programs or underestimate their taxes. The threshold election model described earlier invokes a special variety of the fiscal illusion in that both benefits and taxes may be symmetrically ignored. See *supra* notes 161-87 and accompanying text.

determine his choice of agency or judicial enforcement. If he succeeds in shifting to the agency a preponderantly large part of the blame, then the legislator will prefer agency regulations to judicially enforced statutes. Conversely, if delegation shifts credit for the benefits to the agency, then the legislator will prefer the judicially enforced statutes to regulation by agency.

Other hypotheses, which contain somewhat richer detail, follow from this same theme. If most congressional districts, or interests within districts, are net beneficiaries of a particular regulation, then the members of Congress will prefer the judicially enforced statute to agency regulation. But if the regulation imposes net costs on a majority of districts, then the members of Congress will prefer to shift blame to a regulatory agency. Thus, "widespread [congressional] support for a regulatory agency might make us suspicious about the scope of the anticipated benefits from regulation."²²³ The degree of concentration of benefits and costs in particular groups also figures importantly in the decision to shift responsibility to an agency. If the benefits or costs of collective action are concentrated in a particular organized group, then the group's information-gathering and -disseminating abilities may make the shifting of either credit or blame difficult. Accordingly, for concentrated and well-organized groups whose members are net beneficiaries of regulation, the choice of regulation by agency may be appropriate: the members of these 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.

Congressmen will make the opposite choices, however, if a group is a net loser as a consequence of collective action. For example, a greater reliance on precise legislative enactments and the legal system should occur where regulatory beneficiaries are diffused and those who bear the burdens are concentrated, a condition which seems to characterize much of the new social and environmental legislation.²²⁴ This expectation may overstate the net benefits of the newer "social regulations," and surely it ignores its potential private beneficiaries. More to the point, it seems to confuse statutory specificity with the sometimes related choice to use a regulatory agency or the judicial process to enforce the "will of Congress." Congressional concern may relate partly to creating a "dependent" judiciary in the agencies as compared with an "independent" judiciary in the courts. Members of Congress otherwise should be indifferent to the choice between agency or judicial enforcement, because benefits are diffuse.

Whatever the shift in responsibility for costs and benefits, the characteristics of the agencies provide incentives for delegation. Agencies

²²³ Fiorina, *supra* note 110, at 49.

²²⁴ *Id.* at 48.

certainly collect some of the benefits resulting from the duties allocated to them. They also shoulder some of the costs. They experience electoral accountability only indirectly, however, and therefore can bear widespread discontent better than most congressmen. Fiorina notes the agencies' superior ability to take abuse and argues that the members of Congress may have a perverse incentive to generate regulatory costs.²²⁵ That is, they can then intervene on behalf of their constituents, providing casework, the most intensely divisible of private political benefits.

Members of Congress can and do publicly deride the courts as well as the agencies. Once Congress has established an agency and allocated regulatory tasks to it, however, the agency's subsequent decisions are more susceptible to legislators' demands than are the decisions of the courts. As Posner observes:

[T]he court is more insulated from political control than the agency. The terminal character of many judicial appointments, the general jurisdiction of most courts, the procedural characteristics of the judicial process, and the freedom of judges from close annual supervision by appropriations committees, all operate to make courts freer from the interest group pressures operating through the legislative process, and more disposed to decide issues of policy on grounds of efficiency, than any other institution of government—specifically the administrative agency, where these features are absent or attenuated.²²⁶

The congressman's benefits from delegating regulatory powers do not end with shifting responsibility, deriding the bureaucracy, and engaging in ombudsman-like activities with the agency to extract benefits for identifiable constituents. Congressmen can also threaten adverse agency actions against "uncooperative" constituents.²²⁷ Imposing costs

²²⁵ M. FIORINA, *supra* note 105, at 71.

²²⁶ Posner, *supra* note 145, at 351. Posner's observation would seem to foreclose two possibilities: the monopoly-bureau view of regulation, and his and Landes's theory of legislation. *See supra* note 214. Landes and Posner explain, on value-of-legislation grounds, why the members of Congress want an independent judiciary, but fail to explain why the administrative agencies should not also be independent. *See supra* notes 214-16 and accompanying text. Later we note one possibility: that congressmen use the agencies in "small" ways, not affecting the original legislative bargain, to extract variously denominated payments from groups and constituents.

²²⁷ *See, e.g.,* AUTO SAFETY REGULATION: THE CURE OR THE PROBLEM? (H. Manne & R. Miller eds. 1976):

Here is an industry [automobiles] that . . . has been reluctant to ask special favors from the government and is going on year after year, and congressmen haven't been able to extract any rent out of that industry because the industry hasn't come to it recently for favors, tariffs, or whatever. So, Congress creates a whole new environment [safety regulation], which poses high special costs in the industry, the relief of which then becomes an opportunity for the congressmen to collect some rent from this particular industry. My rather cynical interpretation of government is that a very large part of it is the creation of just such artificial rents, and I think this is a form of artificial rent where the primary beneficiaries are the congressmen themselves.

Id. at 103 (Comments of William A. Niskanen).

on such people by threatened agency action is certainly far easier than doing so by statute, in light of the status-quo-preserving inertia of the legislative process.

One might suppose that a responsibility-shifting explanation for delegations could not fit in a world of rational expectations. For example, when most voters are net losers as a consequence of a particular regulation, one might expect a candidate to adopt a platform exposing the shift and placing responsibility on the incumbent Congress. If voters' thresholds are very low (that is, if they are sensitive to small changes in their welfare), or if the expected net benefits are high, then a legislator using incremental procedures, and perhaps with his eye on a wider constituency than a particular state or congressional district, may espouse general or specific deregulation. Creating a market for the public-sector exchange of this kind of public good, however, is just as difficult as in the private sector. Furthermore, as we noted in the discussion of private goods as issues in elections, these conditions seldom arise, and after the conditions have passed, the shifting of responsibilities to agencies continues on its previous course.²²⁸

The responsibility-shifting model is especially well suited for explaining those situations in which members of Congress understand the incidence of regulation and only one identifiable group is a net beneficiary or loser from regulation. Such a group has solved the problem of political organization. The problem continues, however, for an unorganized and undifferentiated citizenry that respectively pays for or benefits from the regulatory regime, although its members seem largely unaware of these costs and benefits.

Most regulatory agencies, though, are born and periodically renewed in uncertainty and conflict involving more than one group. The groups involved may represent two industries in pursuit of mutually exclusive private benefits of regulation (for example, truckers and railroads). They may be firms in a single industry affected differently by regulation (for example, United Airlines versus Eastern Airlines in pre-deregulation days). They may be high demanders of a public good and specific industries that will bear the cost of supply (for example, environmental groups and pulp or power industries). Or, they may be high demanders and low demanders generally (for example, the sunbelt states versus the northeastern states with regard to new-source pollution standards). Many other patterns of conflict certainly occur, and it is

[T]here is a fairly strong influence of a peculiar kind of transactions cost involved here. The costs of repealing . . . [a statute] are much higher than those of getting an individual committee chairman to exert influence on a staff member of an administrative agency to grant an obscure exemption, which is done informally and with hardly any record at all.

Id. at 109-110 (Comments of Henry G. Manne)

²²⁸ See *supra* text accompanying notes 166-67.

difficult to imagine a regulatory agency to which the members of Congress have delegated broad legislative authority that does not face such conflict.

Given the uncertainty resulting from this conflict, the responsibility-shifting model assumes that legislators know the incidence of regulatory costs and benefits. The links between citizens' welfare and political preferences and between these preferences and candidates' strategies, however, may be weak.²²⁹ The candidate may not know what his constituents want, how regulation will affect them, and which affected group is stronger. He also may not be able to discern a pure strategy equilibrium; such an equilibrium may not exist because of a cyclical majority created in part by the opposing groups' members. The candidate responds to such possibilities with a strategy of ambiguity. Delegating legislative authority by turning a problem over to an administrative agency with little or no direction is one manifestation of a strategy of ambiguity. The responsibility-shifting model, moreover, predicts the strategy of delegation not only when uncertainty exists in the electorate, but also when the legislator himself is uncertain.

Fiorina uses Shepsle's analysis of ambiguity in electoral choice in examining conflicts within the legislature itself and suggests that the delegation of *legislative* authority to regulatory agencies is a mechanism for creating particular instances of ambiguity.²³⁰ This ambiguity, in turn, compels the agency, and sometimes the courts, to enact further "legislation." To explain this ambiguity, suppose that there exists a range of regulatory intervention or control with regard to a particular industry. The legislature can specify the level of intervention exactly, in which case it delegates *enforcement* to the judiciary or *regulatory* authority to an agency. Alternatively, the legislature can delegate decisions about the level of intervention to the agency, in which case it delegates *legislative* authority to the agency.²³¹ Suppose, further, that under complete delegation, neither the legislator nor his interested constituents knows exactly what the agency will do with a grant of legislative authority, but that they can estimate the probability of the different regulatory alternatives. Finally, suppose that a majority of the legislators are "risk-acceptant"²³² over the range of regulatory possibilities. Under these

²²⁹ See *supra* text accompanying notes 133-39.

²³⁰ Fiorina, *supra* note 110, at 55-56; see Shepsle, *supra* note 141. Our analysis departs from Fiorina's in several aspects, however. Most notably, Fiorina seeks to understand legislators' agency-versus-judiciary decisions, but we examine the extent of legislative delegations to agencies. Our technical interpretation and presentation also depart from his analysis; but his important central insight, the application of Shepsle's analysis of risky electoral choices to the regulatory problem, motivates this discussion.

²³¹ Therefore, either in theory or in fact, for procedural or substantive reasons, the delegation is standardless.

²³² The notion of risk-acceptance means that a person will choose a gamble over a certain outcome whose value is equal to the fair value of the gamble. This assumption is contrary to

assumptions, legislators will accept risks over the range of possibilities, preferring the gamble implicit in delegated legislative authority—the regulatory lottery—to the equivalent *ex ante* regulatory certainty. Indeed, Shepsle demonstrates that if the risk-acceptance assumption is satisfied for a majority of voters or legislators, then the gamble (for our purposes, standardless legislative delegation) defeats the certainty (rigorously focused regulatory delegation) in a majority-rule vote.²³³

Fiorina's application of this finding is an important contribution to understanding the delegation of legislative authority.²³⁴ A congressman forced to act on a potential regulatory problem is likely to face conflict within Congress. For example, a legislator who supports the industry to be regulated may want regulatory standards that benefit industry at the expense of consumers. Another legislator may prefer to shackle the industry in order to benefit specific users of the industry's output or manufacturers of a substitute product. A third legislator might have several conflicting interests within his constituency and may wish to satisfy them all, or at least not offend any particular interest. Each legislator will support relegating the entire matter to an agency that will legislate and enforce regulations. This strategy creates a regulatory lottery. Therefore, assuming that they are risk-acceptant, a majority of legislators will support the ambiguous delegation (the regulatory lottery) over an expectationally equivalent certain and specific regulatory occurrence.²³⁵

Precisely this kind of ambiguity surrounded the formation of the ICC. As Haney²³⁶ has recounted, congressmen considering the ICC

the usual microeconomic assumption of risk-aversion, in which a person will choose a certainty over a gamble with the same fair value. Positive political theorists have explained the decisions of those with intensely held preferences using risk-acceptance. See, e.g., A. RABUSHKA & K. SHEPSLE, *POLITICS IN PLURAL SOCIETIES* (1972). Such persons often participate in the early development of regulatory legislation. See, e.g., M. BERNSTEIN, *supra* note 178. The technology of industry response to regulation, considering the high initial compliance costs involved, may also lead firms to have concave payoffs as a function of regulatory intrusiveness, which in turn would generate risk acceptance.

²³³ Shepsle, *supra* note 141, at 564-67.

²³⁴ See Fiorina, *supra* note 110, at 57-60.

²³⁵ An example may help to explain this hypothesis. Suppose that the members of Congress are deciding on an environmental standard concerning pollutant *X*, and that they are considering a range of standards from zero to 20 parts per billion (ppb) for a maximum allowable pollution level. If they turn the determination over to an agency, whose decision is currently unknown, then all outcomes are equally likely, resulting in an expected standard of 10 ppb. Being risk-acceptant, the members of Congress and their various clientele would prefer this regulatory lottery to a *legislated* standard of 10 ppb.

²³⁶ L. HANEY, *A CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES, 1850-1887*, at 306-07 (1910). For a similar account of congressional adoption of the "unfair methods of competition" criterion in the Federal Trade Commission Statute, see generally Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227, 229-38 (1980); Averitt, *supra* note 197, at 228-39.

Act²³⁷ were confused about the exact significance of the long- and short-haul clause. For example, Representative Dibble commented: "Where one member says, 'I will vote for that phraseology, because it means so and so;' and another says, 'I will vote for it [because it] means exactly the reverse,' I say in that case there is not that consensus of legislative intention which makes [for] the proper enactment of law. . . ." ²³⁸ The phrase "substantially similar conditions" engendered similar confusion.²³⁹ Representatives failed to understand whether competition in any form, in export trade, or in something else constituted such conditions. The Senate conferees indicated that this matter was open to judicial interpretation so that each member should consider the courts' likely interpretation when voting.²⁴⁰ This situation resembles remarkably the situation about which Justice Rehnquist complained in his concurring opinion in the *Benzene* case: "I believe that the legislative history [of the Occupational Safety and Health Act] demonstrates that the feasibility requirement . . . is a legislative mirage, appearing to some Members but not to others, and assuming any form desired by the beholder."²⁴¹

As the legislative history of the Interstate Commerce Act demonstrates, the uncertainty explanation for legislative delegation combines the notion of responsibility-shifting with the legislators' desire to seek credit for what the agencies create. All sides of the regulatory dispute feared what the ICC might do eventually. Railroad executives believed that the Commission could be either friendly or unfriendly. Progressives actually preferred a commission to the judiciary because of some unpleasant experiences in the courts, yet they also understood the dangers of regulation by commission. A majority of the voting legislators eventually agreed on the implicit lottery inherent in the delegation of legislative authority. In so doing, they rejected the certainty of specific, judicially enforced statutes, which they had contemplated earlier.

According to both the responsibility-shifting explanation and the uncertainty explanation, the regulatory agency, with its greatly diminished level of electoral accountability, will seize opportunities to expand its jurisdiction and its lawmaking authority. Similarly, the individual members of Congress can use the unpredictability of regulatory output to act as a nonlegislative, election-related ombudsman and to threaten recalcitrant groups.

²³⁷ Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C. §§ 1-16 (1976 & Supp. IV 1980)).

²³⁸ 18 CONG. REC. 839 (1887), reprinted in L. HANEY, *supra* note 236, at 306-07.

²³⁹ L. HANEY, *supra* note 236, at 306.

²⁴⁰ *Id.* at 307.

²⁴¹ *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 681 (1980).

IV

TOWARD A RENEWED NONDELEGATION DOCTRINE

The delegation of legislative authority to agencies, which facilitates the regulatory production of private benefits and the satisfaction of high demanders' preferences at collective cost, has been a growing problem, partially because of the large increase during the 1970s in the already substantial number of regulatory agencies. A renewed nondelegation doctrine that limits the original legislative delegations as well as any subsequent agency assumption of legislative power, however, should reduce the use of regulation to produce private benefits and to satisfy high demanders at collective cost, with all of the inefficiencies that such programs entail.²⁴²

Reinvigorating the doctrine is most obviously advantageous under the monopoly-bureau model. A reinvigoration would resurrect the principle that all lawmaking must reside in the legislature. As applied, the doctrine would invalidate agency actions concerning public policy questions when the agency had acted without specific statutory authorization,²⁴³ and would reject overbroad delegations of legislative authority as constitutionally impermissible.²⁴⁴ These judicial actions would deprive the agencies of their putative control over public policy and the legislators' electoral fortunes.

The revitalized doctrine would also affect the private-benefits problem under a congressional-dominance model. Application of the doctrine would force Congress to legislate in greater detail. Because time constraints alone would limit the amount of legislating that congressmen would undertake, the opportunity costs of each additional bill would rise.²⁴⁵ A rigorous application of the nondelegation doctrine, therefore, would increase the marginal cost of nonspecific legislation in general, and regulatory legislation broadly delegating legislative authority in particular.

Our purpose, however, is not the reduction of legislation as such, but the reduction of legislation aimed at creating purely private benefits. Our justification for applying more rigorous standards to delega-

²⁴² We are not the first to make such an argument. The proposal was advanced on similar (although nontheoretical) grounds in T. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979); see also Wright, Book Review, 81 *YALE L.J.* 575 (1972) (revival of delegation doctrine urged to confine discretionary power).

²⁴³ See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *American Trucking Ass'n v. Atcheson, T. & S.F. Ry.*, 387 U.S. 397 (1967); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

²⁴⁴ See, e.g., *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980).

²⁴⁵ Increases in congressional or committee staff in response to the revitalized doctrine will at least increase each legislator's monitoring costs. In this sense, the added cost is very much like an effluent charge, and the activity to be reduced is itself not unlike undesirable effluents that impose collective costs.

tion rests on the prescription that delegation provides a principal means for the legislative production of private goods. Enforcing more rigorous standards for delegation will increase the marginal cost and, other things being equal, reduce the supply of *private-interest* legislation.²⁴⁶ Admittedly, to the extent that delegation also provides a means of producing truly public goods, the enforcement of more restrictive standards of delegation will similarly raise their marginal cost and reduce their supply. We must view any such reduction as a social loss to set off against the social gains of reducing private-goods legislation. This effect, however, will be small. As the responsibility-shifting and uncertainty models suggest, delegation is predominantly a tool of private-goods production, not public-goods production. We expect that the welfare loss in foregone public goods, therefore, will be insignificant in comparison to the welfare gains from reducing private-interest legislation.

The responsibility-shifting model explains how a renewed nondelegation doctrine would separate good and bad legislation. By delegating both regulatory and legislative authority to the agencies, members of Congress currently shift the cost of settling political conflicts while retaining some of the political benefits of having acted. A renewed nondelegation doctrine would permit the shifting of regulatory authority only after the legislators had settled the principal legislative conflicts. The regulatory agency would subsequently apply a more carefully defined and canalized law. The cost of making highly disputed decisions, however, will rest squarely on the members of Congress. They must pay the cost of legislating, with no fiscal illusion coming to their relief. Through the resulting legislative specificity, opponents of a regulation will know whom to hold responsible at the polls. Congressmen, finding their net benefits from the prevailing process reduced, will have an incentive to cut back on delegating the more focused regulatory authority, thus diminishing the private benefits attending regulation.

A renewed delegation doctrine would have equally beneficial effects under a regulatory-lottery view. In creating a regulatory lottery,

²⁴⁶ In commenting on an earlier draft of this essay, several readers doubted that even a vigorous application of the nondelegation doctrine would have any effect on the production of private-goods legislation. The bases of that skepticism varied. One argument held that there exists, more or less, a constant level of vagueness in the system. According to this assumption, eliminating administrative discretion in the making of laws would merely give rise to discretion in applying them. This assumption, however, only amounts to saying that the nondelegation doctrine has not been enforced. The premise of our argument is that the legislative constraints would bind the agency not merely in its rulemaking functions, but also in its adjudicative and prosecutorial functions. A second argument presupposed that the legislature would always find a way to defeat the system, so that increasing the marginal cost of producing private goods through delegations of powers would merely induce a shift to a different mode of production, such as direct pork-barrel grants. This argument assumes that the legislature is not already maximizing its return from pork-barrel (private-goods) production. We assume the contrary, however, and conclude that an increase in the cost of delegation will reduce the total output of inappropriate legislation.

members of Congress now reflect the risk preferences of two or more opposed groups in their constituencies. Group members prefer the lottery (*i.e.*, standardless delegation) to a legislative certainty (*i.e.*, a specific statute). Only statutory certainties, however, the delegation of *regulatory* authority, would be allowed under a renewed delegation doctrine. Congress would be deprived of the ability to create regulatory lotteries by delegating *legislative* authority to agencies. But because of the nature of the legislative process, any one of the opposed groups could probably defeat a specific regulatory statute that it finds less appealing than the status quo. Hence the delegation doctrine would harness the political power of such a group's opposition to that legislative certainty, to accomplish the public-regarding goal of fostering only those regulatory structures that command a consensus and principally create public, not private goods.

Under a renewed nondelegation doctrine, the judiciary would eventually nullify all delegations of legislative authority: those that preceded the doctrine's rebirth as well as those that managed to pass in the subsequently changed legislative climate. If the agency could not trace its action to a specific delegation far more detailed than an exhortation to regulate in the public interest, then the court would overturn both the agency action and the original statute delegating the legislative authority. Legal challenges to delegations of legislative authority would come from several classes of plaintiffs. These potential plaintiffs include: (1) firms disadvantaged by the cartelization of their industry through regulation, (2) firms that must bear inordinate costs as a consequence of regulation, and in particular, (3) firms attempting to market new processes or products in competition with firms currently protected by delegations of legislative authority.

Should a new competitor successfully mount a court challenge to the agency's assumption of legislative authority, the political opponents of the new competitor may bid for favorable regulation from Congress. Considering the extraordinary support generally required to pass a bill through Congress, however, combined with the greater statutory specificity that the courts would demand, Congress may be more likely to acquiesce in the new competitor's demand that it not be regulated. Consequently, the formerly protected firms will demand the elimination of the regulatory protection so that they can compete against the unregulated (and price-superior) new entrant. The salutary effects of this process extend beyond the encouragement of new and competing products and processes. The enhanced probability that new processes and product competition will enter to challenge an industry protected by regulation effectively reduces the time span over which protected firms can expect a flow of private regulatory benefits. Firms with the economic potential for regulatory protection, therefore, will be prepared to offer

the members of Congress much less in exchange for such benefits. In short, the market for the regulatory production of divisible benefits will be suppressed.

Regulatory legislation as the source of private benefits or as the satisfaction of high demanders grows out of two forms of conflict. The first is conflict between groups. Without this conflict, legislation could be judged on its welfare (efficiency) merits alone. Furthermore, in the presence of at least moderate consensus over regulatory and other public-policy matters, legislators would have less incentive to be ambiguous by delegating legislative authority. On the contrary, legislators would prefer full credit for their activities, and thus will either enact specific statutes or will maintain the status quo, depending on the demands of the consensus. Conflict, the absence of consensus, signals that some group bears an excessive share of the regulatory costs. In other words, conflict signals the presence of a potential regulatory market in private goods (and bads). The nondelegation doctrine would not allow legislators to shift responsibility for imposing such costs and, therefore, the doctrine would suppress this market. Public-policy conflict, and the ensuing difference in preferences for regulation, may also arise between constituencies and regions. The revitalized nondelegation doctrine would then promote either the absence of legislation, whose effects are divisible by district, or the decentralization of legislation and regulation to the point that conflict declines and consensus emerges in each legislative catchment. Hence, the doctrine would enhance the efficiency properties of decentralized collective choice.

We harbor no illusions that the change we propose will come about easily. After all, a central argument of this essay is that delegations of legislative power are not accidental, but instead reflect incentives characteristic of how the political process is currently structured. How will these incentives change? Reliance on the courts to alter the incentives through a change in constitutional doctrine is problematic; it not only requires courts to break established precedent, but also expects them to do so in a way contrary to their own interests by curtailing the power that delegation has permitted them to share with the President and his agencies. If, as we have assumed, courts are conscious of their own stake in the creation and enforcement of legal doctrine, why should we expect them to change the existing doctrine to their apparent detriment?

The potential, but by no means certain, answer lies in enhancing the Court's perception of the importance of judicial interests in a particular constitutional rule, other than those interests involving expansion of judicial power. We assume that courts do recognize other considerations, such as promoting their particular view of the public welfare. The question, then, is how much weight to accord the various competing interests in choosing a particular constitutional principle. Invoking our

earlier application of the Buchanan-Tullock decision rule,²⁴⁷ we may presume that a shared perception of judges—that the external social costs (“agency costs”) of broad delegations generally are overwhelming the administrative benefits of delegation (the delegated “decision costs” of particularizing legislative choice)—might lead to a revitalized nondelegation doctrine, even though this development would entail some sacrifice or shift in judicial power.

To be sure, no signs have arisen to date that indicate any such shared perception. As we observed earlier, the occasional plea for a resuscitation of the nondelegation doctrine has not prompted a response from the Supreme Court or the lower courts. Still, the *idea* of a change in constitutional rules governing legislative delegations has acquired a fresh dignity. It should inspire a serious dialogue if not imminent action.

²⁴⁷ See *supra* text accompanying notes 76-82.