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Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine A Symposium on Administrative Law--The Uneasy Constitutional Status of the Administrative Agencies: Part I--Delegation of Powers to Administrative Agencies: Commentary

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SEPARATION OF POWERS AND THE POWERS THAT BE: THE CONSTITUTIONAL PURPOSES OF THE DELEGATION DOCTRINE*

DAVID SCHOENBROD**

*Even with all its Frankensteinlike warts,
knobs, and (concededly) dangers, the un-
constitutional delegation doctrine is worth
hewing from the ice.*

—Antonin Scalia¹

INTRODUCTION

Richard Stewart² and Richard Pierce³ have turned their considerable talents to arguing that it would be wrong for the Supreme Court to reinvigorate the delegation doctrine. They make two points. First, they argue that no proposed test of improper delegation, including my own,⁴ is judicially manageable so that the delegation doctrine would replace administrative lawmaking with judicial lawmaking.⁵ Second, they argue that enforcing the delegation doctrine would exacerbate overcentralization of decisionmaking.⁶

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I gained much from the comments on earlier drafts offered by Arthur Best, David Chang, George Dent, William Nelson, Michel Rosenfeld, Cass Sunstein, and especially Harry Wellington, who, as a visiting professor at New York Law School, was a continuing source of encouragement and insight. Ilya Frankel provided excellent research assistance.

1. Scalia, *A Note on the Benzene Case*, 4 REG., July-Aug. 1980, at 25, 28.

2. See Stewart, *Beyond Delegation Doctrine*, 36 AM. U.L. REV. 323, 324 (1987) (arguing that judicial enforcement of delegation doctrine is undesirable due to absence of manageable test and because detailed statutory commands will produce less responsible government).

3. See Pierce, *Political Accountability and Delegated Power: A Response To Professor Lowi*, 36 AM. U.L. REV. 391, 393 (1987) (arguing that courts are institutionally incompetent to create and apply a workable delegation doctrine).

4. See Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1249-74 (1985) (developing proposed test of improper delegation).

5. Pierce, *supra* note 3, at 394-95; Stewart, *supra* note 2, at 325-28.

6. Pierce, *supra* note 3, at 404; Stewart, *supra* note 2, at 331.

Part I of this Article shows that Stewart's and Pierce's criticism of my improper delegation test is, at bottom, a criticism of its policy consequences, not its judicial manageability; it is their position that turns courts into policy makers. Part II shows that the concern that delegation is necessary to avoid overcentralization is founded upon a time-honored misconception that delegation leads to concise, open-ended laws while an end to delegation must result in prolix, intrusive laws.

Even if Stewart's and Pierce's points had validity, they would not bury the delegation doctrine if courts saw that it is vital to important constitutional purposes. Specifically, the framers intended that the article I legislative process would provide safeguards for public welfare and individual values, shielding them from the powers that be and their use of factional politics. Delegation undoes these safeguards without providing adequate alternative safeguards. Part III argues that the delegation doctrine is not a formalistic relic, but rather is vital to such constitutional purposes. This is the most important part of the Article.

Stewart denies the delegation doctrine's vital role by suggestion rather than argument. He labels the delegation doctrine formalistic "fundamentalism," thereby implying that it lacks any vital constitutional purpose.⁷ His paper does not squarely defend the legitimacy of administrative lawmaking. Rather, he accurately asserts that the policy problems with regulation have helped to spur the growing questioning of the legitimacy of administrative lawmaking⁸ and seems to assume that his fascinating "reconstitutive" statutory proposals would end serious concern about delegation's legitimacy. But the legitimacy of administrative lawmaking rather than its policy dimensions is particularly relevant to the topic of this symposium—"The Uneasy Constitutional Status of the Administrative Agencies." More important, however, is that delegation's constitutional purposes rather than its policy dimension should be what determines the doctrine's fate before the courts. As the Court made clear in *INS v. Chadha*,⁹ its role is to consider whether procedures are contrary to the Constitution rather than to consider whether they are efficacious.¹⁰

Nonetheless, the Court has treated delegation as a question of policy by deferring to Congress. The fourth and final part of this

7. Stewart, *supra* note 2, at 324-25.

8. *Id.* at 329.

9. 462 U.S. 919 (1983).

10. *See id.* at 944 (arguing that utilitarian justification of one-house veto is not relevant to constitutional analysis).

Article argues that this approach misconceives Congress' ability to consider the delegation issue and is an abdication of the Court's own duty.

In urging the delegation doctrine, I fear being perceived as anti-social, if not lacking in practical sense, even though people with widely divergent political views share my concerns.¹¹ There are reasons why thinking afresh about the legitimacy of administrative power may stir resistance. Agencies play a prominent role in modern life. Some assume, quite wrongly, that the delegation doctrine would force Congress to do all the work now done in the agencies. I have argued elsewhere that enforcement of the delegation doctrine, as properly defined,¹² would allow continued pursuit of regulatory objectives, often more efficiently and successfully.¹³ Nonetheless, restricting delegation would create significant transitional problems. It would also create problems for those of us who think and write about the real world because delegation has long seemed a fixed point in a rapidly shifting legal landscape. Such upset gives a strong reason to support arguments that delegation is legitimate and to reject arguments to the contrary.

Another reason for resistance is that the delegation doctrine was associated with result orientation when used to strike down New Deal legislation.¹⁴ The opinions of Justice Rehnquist¹⁵ suggest once again that the doctrine can be used opportunistically because they have pushed delegation concepts where it suits his politics but, so far, not where it is less convenient. But the same can be said of the case law authored by more liberal jurists that rejects the delegation doctrine's application to economic regulation, but uses essentially the same concept to preserve accountability and check administrative discretion when it suits them.¹⁶ Yet the defenders of the status quo charge that it is the delegation doctrine that is result

11. See Schoenbrod, *supra* note 4, at 1226, 1234-36 (noting various authorities addressing questionable constitutionality of delegation).

12. See *id.* at 1249-70 (articulating definition of delegation doctrine).

13. See *id.* at 1275-81 (arguing that government could perform better if rules statutes were used); Schoenbrod, *Goal Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 803-24 (1983) [hereinafter Schoenbrod, *Clean Air Act*] (arguing that rules statutes, derived from proper delegation theory, provide more efficient means to combat complex air pollution problems).

14. In the two best known applications of the doctrine, *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court seemed to vent personal animosity to the President and philosophical disagreement with regulation.

15. See Schoenbrod, *supra* note 4, at 1236-37 (discussing recent Supreme Court opinions invoking delegation doctrine); see also Mashaw, *Prodelegation: Why Administrators should make Political Decisions*, 1 J.L. ECON. & ORG. 1, 83 (1985) (analyzing recent opinions of Justice Rehnquist and their implications for delegation doctrine).

16. Schoenbrod, *supra* note 4, at 1236-37.

oriented.¹⁷

I. A JUDICIALLY MANAGEABLE TEST OF IMPROPER DELEGATION

Richard Stewart suggests that the Supreme Court should not enforce the delegation doctrine because there is no judicially manageable test of improper delegation.¹⁸ He writes that “in the delegation context, constitutional fundamentalism is fatally compromised by the unchallenged admission that Congress may delegate *some* lawmaking powers to executive officials”¹⁹ Because some delegation is to be allowed, reasons Stewart, there must be a predictable criterion to separate proper from improper delegation.²⁰ He surveys the literature and concludes that “no academic or judicial writer has been able to develop workable criteria that come close to meeting the challenge.”²¹ The essential problem that Stewart finds in the proposed tests is that they are instrumental because they ask the courts to balance the goals of the delegation doctrine against the imperative that Congress cannot decide everything.²²

I have proposed another test of improper delegation, a test that Stewart labels formalistic and that, he argues, is subject to criticisms different from those to which previous tests are subject.²³ My test of improper delegation is somewhat formalistic, but formalism aids judicial manageability and is perfectly consistent with a doctrine having important instrumental purposes.²⁴ In my view, Congress should not delegate *any* legislative powers, but this does *not* mean that Congress must make all the decisions.²⁵ Admissions from other writers that some delegation is necessary derive from an overly broad understanding of “legislative powers.”²⁶

Briefly summarizing a position that I staked out at some length previously, my view is that Congress may not delegate any legisla-

17. See *infra* notes 72-77 and accompanying text (arguing that abandonment of delegation doctrine leads to result orientation).

18. Stewart, *supra* note 2, at 324.

19. *Id.* at 324-25 (emphasis in original).

20. *Id.* at 325.

21. *Id.*

22. *Id.* at 325-27.

23. *Id.* at 326-27.

24. I am sympathetic to Jerry Mashaw's opinion that one must choose to approach a separation of powers issue formalistically or as nonjusticiable because it is difficult to craft a principled instrumental test. Mashaw, *supra* note 15, at 7. Nonetheless, the formalism/instrumentalism dichotomy is overdrawn for the same reason that we cannot rely exclusively on text or context in reading a statute. Instrumental goals can motivate a formalistic test and the test should be interpreted in terms of those goals.

25. Schoenbrod, *supra* note 4, at 1249-51.

26. *Id.* at 1276-77.

tive power that article I assigns to the legislative process.²⁷ At the heart of these legislative powers are the making of rules of private conduct. The executive and judicial branches would enforce these rules, which need not and could not be so specific as to obviate the need for interpretation. Congress could not, however, initiate a scheme of regulation or taxation by expressing its goals and leaving it to others to lay down the rules of conduct. Agencies could also participate by recommending rules to Congress. The President would have some power to manage our foreign affairs and public property without legislated rules because, given the President's inherent powers, presidential power can exist without any legislative act.²⁸

Stewart,²⁹ as well as Pierce,³⁰ correctly perceives that a key question regarding this test is whether the courts can distinguish between a statute that lays down a rule of conduct—such as “do not emit more than so many pounds of a given pollutant”—from a statute that is in the form of a rule but in reality only sets forth goals—“do not emit more pollution than the agency determines is reasonable in light of economic and environmental considerations.” The former would be a rule, the latter would not because it calls for policymaking rather than interpretation. On the other hand, even a seemingly open-ended word such as “reasonable” can be the core of a rule if its meaning in context is clear, such as in a society that has stable customs as to polluting activity.³¹

Stewart and Pierce see my proposed test as requiring Congress to legislate with great precision.³² Pierce, for instance, emphasizes that my test means that a statute could not delegate “*any* policymaking power or discretion to the agency.”³³ That is correct,³⁴ but what is incorrect is the implication that the statute must be so precise as to head off any hard cases, making interpretation a mechanistic exercise. Although a numeric pollution limit is a rule, not all rules must be numeric nor must their interpretation be clear-cut. Indeed, even a numeric pollution limit will generate questions of interpretation, such as whether it really applies to unusual occurrences such as

27. *Id.* at 1249-74.

28. *See id.* at 1260-65 (noting that no legislative delegation of powers occurs when Congress establishes goals for President in foreign affairs and public power matters within the scope of executive power).

29. Stewart, *supra* note 2, at 327.

30. Pierce, *supra* note 3, at 398-99.

31. *See* Schoenbrod, *supra* note 4, at 1255.

32. Pierce, *supra* note 3, at 400; Stewart, *supra* note 2, at 327.

33. Pierce, *supra* note 3, at 399 (emphasis in original).

34. The agency still might have discretion for purposes other than the making of rules of private conduct, such as is the exercise of prosecutorial discretion.

pollution equipment breakdowns or which of several different methods of measuring emission rates are to be used.

Is there any point to limiting agency discretion to make law if there will be hard and debatable decisions as to the interpretation of legislated rules? Yes, for two reasons. First, even though a rule may present hard cases, it will typically present many more easy ones. Therefore, requiring Congress to state a rule means that Congress will have to make clear to most of the affected population the benefits and burdens being imposed. In contrast, when Congress allows an administrator to establish the rules, the statute can, and usually does, lay out all the beneficial goals that should be advanced, leaving most people in the dark as to the statute's adverse effects. So, for instance, when the agency gets to determine how to protect health from pollution, a given factory may be allowed to double emissions or reduce them to zero.³⁵ We should bear this in mind when evaluating whether the delegation doctrine serves a real purpose.

Second, a statute framed to call for interpretation requires the interpreter to play a more constrained role than does a policy maker. While the policy maker is asked to make value judgments, an interpreter must constantly submit to value judgments explicit or implicit in the statute. As I have explained at greater length before,³⁶ the interpreter may deal with the hard cases by gleaning value judgments implied by the statute's disposition of easier cases and by legislative history, including agency and judicial practice prior to enactment or reenactment. Stewart objects that "unless we are given a fuller account of the interpretive process than Schoenbrod provides, not much reliance can be placed on this approach without endorsing an effective delegation of legislative power to the courts, a result Schoenbrod is (understandably) as concerned to avoid as delegation to the administrators."³⁷ Given that scholars have written extensive accounts of interpretation, Stewart apparently means that any such account would be debatable. I agree. But that disagreement should not obscure interpretation's fundamental difference from policymaking. As Ronald Dworkin so eloquently argues, most judges and lawyers act as if they accept this difference and tak-

35. Schoenbrod, *Clean Air Act*, *supra* note 13, at 765-66.

36. Schoenbrod, *supra* note 4, at 1255-58. Stewart takes me to mean that a statute can be upheld, if originally invalid, so long as it is interpreted prior to its challenge on delegation grounds. Stewart, *supra* note 2, at 327 n.27. This is not my position and I agree with Stewart's objections to it. I suggested that interpretation of statutory language prior to its enactment could save an otherwise invalid statute. Schoenbrod, *supra* note 4, at 1277.

37. Stewart, *supra* note 2, at 327 n.27.

ing their opinions and behavior at face value is the most plausible understanding of law's operation.³⁸ So even though different judges may have different theories of interpretation and approach a given statute with different preconceptions,³⁹ they can agree that their role requires them to produce the best interpretation of the statute enacted rather than to create the best statute they can.⁴⁰ The judge must honor the legislature's priorities⁴¹ and, in difficult cases, these priorities can be sought by scrutinizing how the legislation disposes of the easy cases,⁴² as I have suggested before.⁴³

A recent, prominent example of the difference between a statute that states a rule calling for difficult interpretation and a statute that states only goals is the Gramm-Rudman-Hollings Act (Gramm-Rudman),⁴⁴ upheld against a delegation of legislative power challenge by the District Court in *Synar v. United States*.⁴⁵ The statute set precise dollar limits on the size of the deficit, but measuring future deficits is subject to uncertainty, as is measuring pollution, and there are different concepts of what constitutes a deficit. Nonetheless, the district court's opinion defensibly concluded that prior practice and legislative history provided sufficient guidance to give content to Gramm-Rudman's concept of a deficit.⁴⁶ Surely the job of deficit estimation under that Act is far more circumscribed than under an act instructing an agency to determine what size deficit was sufficient to achieve some range of goals, even precisely stated goals such as keeping inflation or interest rates below a certain level.

Another example of a rules statute that calls for nonmechanistic interpretation are the provisions of title VII prohibiting employment decisions based upon race, color, religion, sex, or national origin except where based upon bona fide occupational qualifications.⁴⁷ The statute has required extensive interpretation and these

38. R. DWORKIN, *LAW'S EMPIRE* 37-44 (1986).

39. *Id.* at 301, 304-15.

40. *Id.* at 238, 337-38.

41. *Id.* at 404, 451 n.11.

42. *Id.* at 339-40.

43. Schoenbrod, *supra* note 4, at 1255-58.

44. Balanced Budget and Emergency Deficit Control (Gramm-Rudman-Hollings) Act, 2 U.S.C.A. § 901 (West Supp. 1986).

45. 626 F. Supp. 1374 (D.D.C.), *aff'd on other grounds sub nom.* *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

46. *See Synar v. United States*, 626 F. Supp. 1374, 1387-89 (D.D.C.) (discussing prior practice and legislative history), *aff'd on other grounds sub nom.* *Bowsher v. Synar*, 106 S. Ct. 3181 (1986). Elsewhere, the district court expressed a weak version of the delegation doctrine with which I disagree. *See id.* at 1383-84 (stating that delegation doctrine, although valid law, is properly applied with deferential scope).

47. 42 U.S.C. § 2000e-2 (1982).

interpretations⁴⁸ are subject to debate.⁴⁹ Nonetheless, common perceptions about the meaning of discrimination and bona fide occupational qualification, unlike terms such as public interest, mean that the statute is not a general invitation for the courts or the Equal Employment Opportunity Commission to make policy rather than to interpret. Again, the existence of hard cases under the statute should not blind us to the statute's ability to make many more cases easy.

The Federal Trade Commission Act (Act)⁵⁰ provides a useful counterexample. As originally enacted, the Act prohibited "unfair methods of competition."⁵¹ The Court held that the Act allowed the Federal Trade Commission only to interpret and enforce an existing common law cause of action.⁵² Although the Act as so interpreted might be considered a rules statute, subsequent judicial reinterpretation of the Act gave the Commission a more open-ended mandate to pursue the goals of the Act, unconfined by common law standards.⁵³ Then, in 1938, the Act was amended to give the Commission authority to move against "unfair or deceptive acts or practices,"⁵⁴ a term unconfined by common law or customary standards. The Act today is a goals statute.

Another example of the difference between rules statutes and goals statutes, which I have used before⁵⁵ and which Richard Pierce criticizes,⁵⁶ comes from public utility rate regulation under the "just and reasonable" standard. Pierce's criticism is based upon a confusion whose clarification adds to the illustrative value of the example. According to a book that Pierce coauthored:

The most common method used to control aggregate revenue and to set maximum rates has evolved over more than one hundred years of regulation. It begins with calculation of a firm's revenue requirements through application of the formula: $R = O + B(r)$, where R is the firm's allowed revenue requirements, O is

48. See M. ZIMMER, C. SULLIVAN & J. RICHARDS, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 3-256 (1982) (discussing myriad interpretations of title VII provisions).

49. See, e.g., *id.* at 130-32 (discussing debate surrounding title VII interpretations).

50. 15 U.S.C. § 45 (1982).

51. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. § 45 (1982)).

52. *FTC v. Gratz*, 253 U.S. 421, 427 (1920). *But see id.* at 429 (Brandeis, J., dissenting) (arguing that problems of unfair competition necessitate broad congressional regulatory power).

53. See Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 776 (1975).

54. Federal Trade Commission Act, ch. 49, § 3, 52 Stat. 111 (1938) (current version at 15 U.S.C. § 45 (1982)).

55. Schoenbrod, *supra* note 4, at 1258-59.

56. Pierce, *supra* note 3, at 399-402.

the firm's operating expenses, B is the firm's rate base, and r is the firm's rate of return allowed on its rate base.⁵⁷

The Supreme Court adopted a version of this rule as a limitation upon the states' power to regulate under the takings clause of the fourteenth amendment in the 1898 case, *Smyth v. Ames*.⁵⁸ The approach adopted by the Court also gave content, as a matter of statutory interpretation, to the term "just and reasonable" in many statutes enacted thereafter.

The definition of the rate base in *Smyth v. Ames*, however, presented much discussed problems.⁵⁹ In *Smyth*, the Court held that the rate base, which it termed "fair value of the property," should be framed by considering four different concepts of the utility's capital: the original cost of its plant, its reproduction cost, its earning capacity, and the amount and value of the utility's stocks and bonds.⁶⁰ This definition of rate base tends to undercut the rule character of a statute based exclusively upon *Smyth v. Ames* because these four quantities may be quite different. In addition, the third and fourth concepts are circular because they are functions of the rates that can be charged. Also, the second concept, reproduction cost, presents a problem of policy because it is often difficult to estimate. Today, most jurisdictions use original cost.⁶¹ Rate regulation statutes enacted with an understanding that original cost will be plugged into the formula are rules statutes.

FPC v. Hope Natural Gas Co.,⁶² decided in 1944, worked at least two very different sorts of changes in *Smyth v. Ames*. First, the Court freed regulators from evaluating the rate base in terms of *Smyth v. Ames*' four concepts, thereby allowing, for instance, the use of original cost as the sole measure of rate base.⁶³ Second, the Court held that neither the Constitution nor the statute in question prohibited the Federal Power Commission from departing from the formula altogether, provided that the prices set are reasonably calculated to achieve the goals of rate regulation.⁶⁴ This second change, unlike the first, transforms a rules statute into a goals statute because the Commission has broad discretion to weigh competing interests.

57. E. GELLHORN & R. PIERCE, REGULATED INDUSTRIES IN A NUTSHELL 97 (1982).

58. 169 U.S. 466 (1898).

59. See Schoenbrod, *supra* note 4, at 1259-60 (discussing problems of defining rate base).

60. *Smyth v. Ames*, 169 U.S. 466, 546-47 (1898).

61. See E. GELLHORN & R. PIERCE, *supra* note 57, at 112 (noting that 38 states use original cost analysis exclusively); 2 G. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 496 (1969) (describing majority's use of original cost analysis in terms of accuracy, practicability, and expediency).

62. 320 U.S. 591 (1944).

63. *Id.* at 602-03.

64. *Id.* at 607.

Nonetheless, the formulaic rule still remains important, as the Pierce book suggests,⁶⁵ partly because some statutes were enacted against an understanding that the agencies would be constrained by the rule.

Pierce claims that “[s]cholars unanimously applaud the wisdom of the Court’s decision in *Hope* to abandon its prior rigid rules approach”⁶⁶ and that *Hope* “demonstrates the futility of an effort to require statutory precision in statutes that delegate regulatory power.”⁶⁷ The authorities Pierce cites, his own book included, however, criticized the *Smyth v. Ames*’ definition of rate base rather than its concept that rates should be governed by rule rather than discretion.⁶⁸ Pierce thus confounds the first change that *Hope* worked, which aids governing rates through a rule, and the second change, which ensures that rate regulation is a matter of policy. Pierce also writes as if I were unaware of *Hope* and its impact on rate regulation, which is manifestly wrong.⁶⁹

65. See E. GELLHORN & R. PIERCE, *supra* note 57, at 108-10 (noting that modern agencies have carried over many of same principles of formulaic rule); see also G. PRIEST, *supra* note 61, at 501 (stating that impact of *Hope* was softened by constitutional and statutory provisions in many states).

66. Pierce, *supra* note 3, at 402.

67. *Id.* at 400.

68. See E. GELLHORN & R. PIERCE, *supra* note 57, at 105-10; A. KAHN, THE ECONOMICS OF REGULATION 37-39 (1970). Kahn suggests in another passage that original cost versus reproduction cost may be advantageous or disadvantageous to the utility depending upon whether the times are inflationary or deflationary. A. KAHN, *supra*, at 40. As a matter of constitutional law, the second element of *Hope* would certainly allow a commission to choose between original cost, or reproduction cost, or some combination thereof because the commission is allowed flexibility. Such flexibility is inconsistent with a rules statute, but denying such flexibility seems not to present great policy problems because, as noted, most jurisdictions use original cost. See *supra* note 61 and accompanying text (describing majority’s use of original cost analysis).

69. That is the suggestion of his text, but I take up *Hope* explicitly as a counterexample. Schoenbrod, *supra* note 4, at 1259. Pierce acknowledges as much in a footnote, but claims that I mistakenly read *Hope* as applying solely to natural gas cases. Pierce, *supra* note 3, at 399 n.53. I have recognized the widespread impact of *Hope* elsewhere. Schoenbrod, *Clean Air Act*, *supra* note 13, at 789 n.285. I did suggest, however, that the problems of applying cost of service to natural gas pricing at the wellhead helped to produce the result in *Hope*. Schoenbrod, *supra* note 4, at 1259. As already discussed, the amount and value of stocks and bonds and the earning potential of the property involve circularity. For most utilities, however, original cost and reproduction cost make conceptual sense as a way to value the rate base. Nonetheless, they do not make much sense when applied to the price of natural gas at the wellhead. Reproduction cost is a far-fetched concept when applied to a nonrenewable natural resource which often cannot be synthesized at competitive prices. In the case of natural gas, original cost also can be problematic because, at a time when the only substantial markets are regulated, the price that someone will be willing to pay for gas in the ground is a function of the price for which the gas can be sold, which leads to circularity. The same problem does not exist for an electric generating plant, for example, because the elements of its construction have market prices.

My original discussion of *Smyth v. Ames* and *Hope* did not address the complexities of calculating the rate base nor did it assess systematically the approach to ratemaking in different jurisdictions for different products at different times. *Id.* The original discussion was but a

Stewart and Pierce object to my proposed test on the grounds that it would invalidate a major portion of the United States Code, with Pierce estimating that ninety-nine percent of it would fall⁷⁰ and Stewart wondering why I do not fess up by providing a percentage estimate of my own.⁷¹ But it is easy to see why Pierce's estimate is wildly high and Stewart's call for a neat number is unreasonable. Many statutes that are not precise still will be valid on the basis that their imprecision calls for interpretation rather than policymaking. Any serious effort to evaluate the validity of a range of statutes would have to investigate not just their language but also their contexts and legislative histories, including the possibility that an otherwise invalid statute was given content through administrative or judicial interpretation, which was then ratified through reenactment. Moreover, my proposed test would not invalidate statutes dealing with matters within the President's inherent powers.

Stewart and Pierce set out to argue that no one has offered a test of delegation that would avoid result orientation, but they end up arguing that they do not like the results that my test would produce.⁷² Their coming full circle in this way suggests that nonenforcement of the delegation doctrine itself presents the danger of result orientation. Stewart and Pierce would have the Court avoid the doctrine for want of a manageable standard, but the Court regularly applies less manageable standards.⁷³ To avoid the delegation doctrine for lack of a manageable test would be a pretext for result orientation.

Result orientation is apparent in the Court's present approach to delegation and related doctrines. The Court has routinely turned aside modern challenges to economic regulation stated in delegation terms, but has struck down official actions for similar delegation-like reasons without providing a principled explanation for the

page long and its point was not to lay out the law of rate regulation, but rather to illustrate the distinction between statutes that contain rules and those that do not. *Id.*

70. Pierce, *supra* note 3, at 401.

71. Stewart, *supra* note 2, at 327.

72. Pierce, *supra* note 3, at 401; Stewart, *supra* note 2, at 327-28. Pierce makes a particular point of criticizing the National Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1982), which I cited for the proposition that Congress can mobilize itself to enact detailed regulation if it thinks that important, not as necessarily good policy. Pierce, *supra* note 3, at 402-03; Schoenbrod, *supra* note 4, at 1276 n.299. In any event, Pierce's use of that Act to demonstrate the policy superiority of delegation is far from convincing because the broad delegation under *Hope* that he so praises resulted in terrible natural gas shortages and motivated Congress to pass the Act. Schoenbrod, *supra* note 4, at 1276.

73. *E.g.*, *Davis v. Bandemer*, 106 S. Ct. 2797, 2804 (1986) (creating test for unconstitutional gerrymandering that entails evaluation of whether election management weakens voters' influence on general political process).

difference in outcome.⁷⁴ *Chadha*, for instance, is a delegation case in all but name.⁷⁵

Another reason why ignoring the delegation doctrine perpetrates result orientation is that courts face petitions to review administrative lawmaking, which inevitably tempts many judges to make policy in the guise of judicial review.⁷⁶ As then Professor Scalia stated:

The argument may be made that in modern circumstances the unconstitutional delegation doctrine, far from permitting an increase in judicial power, actually reduces it. For now that judicial review of agency action is virtually routine, it is the courts, rather than the agencies, that can ultimately determine the content of standardless legislation. In other words, to a large extent, judicial invocation of the unconstitutional delegation doctrine is a *self-denying ordinance*, forbidding the transfer of legislative power not to the agencies but to the courts themselves.⁷⁷

If enforcement of a constitutional doctrine causes practical difficulties that are sufficiently severe, it may well be appropriate for the Court to find a way to avoid the harm. Assuming that is so, the appropriate response for the Court is not to forget the constitutional concern, as Stewart and Pierce appear to suggest, but to deal with the policy concerns in a way that does the least possible harm to the constitutional principle. For instance, the courts did not shrink from striking down malapportioned legislatures even though invalidating all laws enacted by such legislatures would have wreaked havoc. Instead, the courts left previously enacted laws in force.⁷⁸ There are a variety of ways that the courts could preserve previously promulgated administrative lawmaking if they concluded that chaos would otherwise result.⁷⁹

74. See Schoenbrod, *supra* note 4, at 1231-35 (noting inconsistencies in Court's treatment of economic regulations).

75. See Schoenbrod, *supra* note 4, at 1235-36 (arguing that Court's rationale in *Chadha* was inconsistent with Court's usual practice in delegation cases).

76. This is a standard point in teaching materials and scholarship. See, e.g., R. STEWART & J. KRIER, *ENVIRONMENTAL LAW AND POLICY* 673-732 (2d ed. 1978) (acknowledging judicial overreaching in light of broad scope of judicial review); Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 485 (1985) (discussing impact of judges' personal political philosophies on statutory interpretation); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1809-10 (1975) (analyzing scope of judicial review as vehicle for judicial policymaking).

77. Scalia, *supra* note 1, at 28.

78. See *infra* note 136.

79. First, challenges to previously promulgated administrative laws may be barred by statutory or equitable deadlines for filing petitions to review. Second, as in the malapportionment cases, the courts could invoke the delegation doctrine on some prospective basis. Antonin Scalia suggested the possibility of applying the doctrine only to statutes enacted after the date of a decision breathing new life into the doctrine. Scalia, *supra* note 1, at 28. Application of the doctrine solely to such regulations promulgated after that date is another possibility.

II. THE DELEGATION DOCTRINE CAN REDUCE RATHER THAN ACCENTUATE THE PROBLEM OF OVERCENTRALIZATION

Richard Stewart has criticized many statutory schemes that employ administrative lawmaking for stifling innovation and efficiency through overcentralization, for making decisions through unduly protracted procedures, for losing sight of public purposes, and for being co-opted by private actors.⁸⁰ Stewart would deal with these problems by replacing prescriptive statutes—statutes that call for command and control regulation—with “reconstitutive” statutes—statutes that make use of less centralized decisionmaking processes such as market mechanisms or state governments.⁸¹

Stewart argues that the delegation doctrine would exacerbate the centralization problem by requiring that decisions about a complex and varied country be made not just within the national government, but within one part of that government: the legislative process. He suggests, for instance, that I find the lengthy Clean Air Act⁸² insufficiently specific and would advocate a more lengthy and detailed statute.⁸³ Stewart's assertion is based upon the old assumption that statutes that delegate must be more brief and less intrusive than statutes that establish rules.

The Clean Air Act illustrates the error in this assumption. Despite its great length, most of the Clean Air Act delegates rather than establishes rules.⁸⁴ Why is the Act so long, even though it delegates so freely? As Stewart suggests, part of the reason is that it eases the application of administratively created laws to specific industries, a practice that, as this Act illustrates, can occur in statutes that delegate as well as those that do not. But the major reason for the Act's prolixity is that it delegates in great detail, even though it avoids coming to grips with the most important issues of policy.⁸⁵ The Clean Air Act, like most delegating statutes, does not simply pass the buck but rather passes it along with complicated instructions.

80. See Stewart, *supra* note 2, at 328-29 (arguing that overcentralization caused by administrative lawmaking inadequately addresses modern, complex regulatory needs); Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1275 (1981) (urging fundamental changes in administrative framework to ensure both productive economy and healthy environment); Ackerman & Stewart, *Reforming Environmental Laws*, 37 STAN. L. REV. 1333, 1365 (1985) (advocating reform of environmental lawmaking through use of market mechanisms in order to maximize environmental resources, encourage environmentally superior technologies, and avoid penalties on innovation and investment).

81. Stewart, *supra* note 2, at 335-37.

82. 42 U.S.C. §§ 7401-7642 (1982).

83. Stewart, *supra* note 2, at 332.

84. Schoenbrod, *Clean Air Act*, *supra* note 13, at 762-66.

85. *Id.*

Some of reasons for such complicated instructions are not commendable. First, complicated instructions often serve to camouflage the buck passing because legislators can hardly claim credit for solving a problem when the statute hands the problem to an agency without saying more. Second, the complication in a statute serves to compromise legislative disputes as to whether an agency should be granted a power by granting the power, but in a form that makes it hard to use it. Third, the complication obscures the legislative mandate requiring agencies to reconcile irreconcilable goals.⁸⁶ Fourth, the complication helps to prevent the unsophisticated from realizing that a benefit has been conferred on a more sophisticated faction.⁸⁷

How could one Congress sitting in Washington deal with an issue such as air pollution, in a statute that does not delegate, given wide variations in environmental conditions and problems of pollution control? I dealt with this precise question at length previously and concluded that, as a matter of policy, Congress ought neither to delegate or prescribe inflexible emissions limits for all sources.⁸⁸ My proposal was that Congress prescribe emission limits for select categories of sources, leaving others to state control.⁸⁹ In addition, sources should be allowed to deviate from the statutory limits through market mechanisms allowing for the buying and selling of emission rights.⁹⁰ In other words, I proposed the use of what Stewart calls reconstitutive approaches as a way of limiting the need for central control.

Stewart, along with Bruce Ackerman, proposed a related approach to the air pollution problem in which Congress would establish a limit on the emission of given pollutants in a given region and then provide for the auctioning off of these emission rights to potential sources.⁹¹ This is a reconstitutive approach, although in my view not the best one.⁹² It is also a rules statute—a rule prohibiting

86. *Id.*

87. Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 10 (1982).

88. Schoenbrod, *Clean Air Act*, *supra* note 13, at 803-16.

89. *Id.* at 813.

90. *Id.* at 814-15.

91. Ackerman & Stewart, *supra* note 80, at 1352-55. Their proposal comes in two versions. The first version is a rules statute because Congress would establish the operative rule of conduct, prohibiting emission pending the purchase of pollution rights at auction, and Congress would specify the total emission rights sold for each region. *Id.* The second version seems to call for delegation. *See id.* at 1355 (stating that proposed statute would confer discretion on federal, state, and local agencies).

92. I am troubled by the equity of the government claiming the right to sell pollution rights to property owners that have long considered that their property includes the right to emit to an extent that does not unreasonably, as determined by some government process, harm others. This feature, however, is not a necessary part of a market-based approach to pollution control.

emissions unless one owns emissions rights purchased under the scheme. It illustrates my point that reconstitutive strategies do not necessarily require delegation.

One troubling aspect of Stewart's stance is that policy analysts have long urged Congress to adopt market-based approaches to pollution, but have had little success.⁹³ Stewart and Pierce contend that Congress is more apt now than before to use reconstitutive strategies because the demise of the legislative veto and related events require Congress to exert its power through more meaningful legislation, and reconstitutive legislation is the best way to be meaningful.⁹⁴ The central premise of this argument is, as Pierce puts it, that "Congress . . . can exercise that [policymaking] power only through use of the procedures provided in the Constitution . . ."⁹⁵ This premise is flawed; Congress can continue to delegate and still exert influence through the appropriations process, oversight hearings, threats to amend the delegation, and Senate review of appointments. In any event, Pierce's argument does not deal with a central reason as to why congressional members prefer delegations: delegation and the factional legislation that it facilitates enhance the private interests of members of Congress. That these private interests seem to mean more to many in Congress than the institution in which they serve throws further doubt on Pierce's prediction that Congress will take more responsibility in establishing regulatory schemes. Enforcement of the doctrine would undercut these private motivations.⁹⁶

Stewart makes the additional point that specific statutes are often simply unwise, citing Bruce Ackerman and William Hassler's classic study of the regulation of coal burning electric generators under the Clean Air Act.⁹⁷ Ackerman and Hassler argued that the Environmental Protection Agency (EPA) adopted an unnecessarily costly strategy to meet its air pollution goals partly because Congress got

93. F. ANDERSON, D. MANDELKER & A. TARLOCK, *ENVIRONMENTAL PROTECTION: LAW & POLICY* 269 (1984).

94. See Pierce, *supra* note 3, at 414-15 (arguing that Congress will adopt reconstitutive strategies due to judicial return to constitutional fundamentalism and increased activism of executive branch); Stewart, *supra* note 2, at 342-43 (following Pierce).

95. Pierce, *supra* note 76, at 524.

96. Stewart says that the courts should not reinvigorate the delegation doctrine so that Congress will adopt reconstitutive legislation. Stewart, *supra* note 2, at 343. Rather, the Court should enforce the delegation doctrine because it is part of the Constitution and has earned its constitutional status because it serves to discourage the abuse of public power. See *infra* notes 132-40 and accompanying text (discussing constitutional values of delegation doctrine).

97. Stewart, *supra* note 2, at 332 n.45. See B. ACKERMAN & W. HASSLER, *CLEAN AIR/DIRTY COAL* 116-28 (1981) (discussing problems arising from congressional attempts to combat complex environmental problems).

involved in the specifics of the regulation. Ackerman and Hassler pieced together an important story, but they draw the wrong moral from it when they conclude that Congress should leave the specifics to agencies. The problem was not in Congress deciding, but in Congress delegating.⁹⁸ The regulation that Ackerman and Hassler criticize as unwise was not enacted but promulgated pursuant to a delegation.⁹⁹ Congress helped to create the extra cost of pollution control by requiring, somewhat ambiguously, that the EPA regulate in a way to protect the eastern coal industry.¹⁰⁰

Delegation helped to shield Congress from political responsibility for the extra costs that it was imposing for two reasons. First, no one could begin to estimate those costs because Congress was not enacting the rules of conduct. Indeed, other provisions of the delegation called upon the agency to promulgate regulations that were cost efficient so that Congress could point to its concern for pocket-book issues.¹⁰¹ Second, the requirement that the agency protect eastern coal was itself ambiguous, thereby further diffusing Congress' responsibility.

Delegation encourages Congress to enact unnecessarily costly laws, unnecessarily ambiguous laws, and flatly contradictory laws. In short, delegation encourages bad laws because members of Congress do not have to take responsibility for the rules of conduct that eventually emerge from the delegation process. So long as delegation allows politicians to enact laws that promise all things to all people, exhorting them to delegate in a different way is spitting into the wind.

My policy preference for Congress to take responsibility by enacting rules derives not from any belief that members of Congress are particularly public spirited. To the contrary, I distrust them as well as the Executive and believe that the most effective check on those I distrust is requiring action through the legislative process. This apparently was also the view of those who played key roles in drafting the Constitution, as the next part argues. Their views are far more relevant to the constitutional questions than the policy preferences of Richard Stewart, Richard Pierce, myself, or other participants in this debate.

98. See Schoenbrod, *Clean Air Act*, *supra* note 13, at 750-51 (arguing that problems of Clean Air Act stem from broad delegation).

99. See *id.* at 801-02 (discussing breadth of agency delegation under Clean Air Act).

100. See Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 *YALE L.J.* 1466, 1493 (discussing EPA attempts to protect eastern coal industry).

101. See Clean Air Act, 42 U.S.C. § 7411(a)(1) (1982) (requiring agency to assess cost of achieving emission reduction).

III. THE LEGISLATIVE PROCESS AS A DEFENSE AGAINST FACTIONS

*When you censure the age,
 Be cautious and sage,
 Lest the courtiers offended should be.
 If you mention vice or bribe,
 'Tis so pat to all the tribe,
 Each cries, 'That was levell'd at me!'*
 —John Gay¹⁰²

The authors of *The Federalist Papers* did not believe that just any political processes, let alone any one legislative process, would heed the public interest. Rather, they designed a particular legislative process, involving the House, Senate, and President, that they hoped would at least tend to protect the public interest.

Their distrust of ordinary political processes was based upon fear of “factions.” Madison defined “faction” as “a number of citizens whether amounting to a majority or minority of the whole who are united and actuated by some common impulse of passion or interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”¹⁰³ This suggests that a faction is a group that pursues its own interests without regard to its impact on others; in other words, a group that beggars its neighbors. For instance, a faction that is a majority may seek some small benefit for each of its members at the cost of grave harm to the minority. For another example, a faction that is a minority may achieve, by superior organization, some gain for its members, even though the harm to the rest of the community is larger.

There is of course much room for disagreement as to how to judge the “permanent and aggregate interests of the community.” We need not settle on any one criterion of the public interest, however, because the framers did not require laws to serve the permanent and aggregate interests of the community. Rather, the framers designed a legislative process to frustrate factions.

Although the word “faction” has an old-fashioned ring, suggesting something like a group of bewigged merchants or politicians meeting in a colonial tavern, faction is also a modern concern. Today’s factions are trade associations that co-opt regulation, ideological organizations that impose their ethics on the rest of us, or other powers that be. Today we use a variety of tags to express similar concepts. Aranson, Gellhorn, and Robinson talk about public

102. *The Beggar's Opera* Act II, aria 27 (libretto, The Decca Record Company, Ltd., 1981).

103. THE FEDERALIST No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961).

power being used to produce private goods;¹⁰⁴ others speak of special interests or interest groups. Theodore Lowi labels modern acceptance of government based upon factions as "interest group liberalism."¹⁰⁵

The authors of *The Federalist Papers* explained how procedure, a lawyerly response, would tend to frustrate factions. Their procedural protection was the requirement that lawmaking go through the article I process. To show the continuing importance to the Constitution of this protection, this part makes four points: (1) the framers specifically designed the legislative process to include safeguards against factions, safeguards that the administrative process lacks; (2) contemporary economic analysis provides reason to believe in the efficacy of these safeguards; (3) these safeguards protect not just community welfare, but also important constitutional values; and (4) the Supreme Court and many modern commentators err in believing that the administrative process offers adequate alternative safeguards.

A. *The Legislative Process' Safeguards Against Factions*

1. *Bicameralism and the presidential veto*

Article I provides multiple safeguards against factions that the administrative process lacks. The framers involved a Senate, a House, and the President in the legislative process as a check on factions.¹⁰⁶ Defeat or inaction in any of these three different institutions would ordinarily stymie the faction.¹⁰⁷ That each is elected for different tenures based upon different apportionments of voting power would make it harder for parochial interests to succeed in all three institutions.¹⁰⁸ As Hanna Pitkin characterized Madison's approach to the problem of factions, "the danger is action and the safeguard

104. See Aranson, Gellhorn & Robinson, *supra* note 87, at 6-7 (discussing collective production of private goods and corresponding managerial view of delegation).

105. See T. LOWI, *THE END OF LIBERALISM* 71 (1969) (explaining that interest group liberalism is premised on idea that policy and public interest is defined in terms of organized interests in society).

106. See *THE FEDERALIST* No. 62, at 378 (J. Madison) (C. Rossiter ed. 1961) (arguing that Senate is additional guard against ill-advised legislation); *THE FEDERALIST* No. 73, at 443 (A. Hamilton) (C. Rossiter ed. 1961) (discussing purpose of presidential veto as guard against factions).

107. The exception is, of course, that presidential opposition can be overcome by supermajorities in the House and Senate. U.S. CONST. art. I, § 7.

108. See *THE FEDERALIST* No. 62, at 378-79 (J. Madison) (C. Rossiter ed. 1961) (discussing number of senators and duration of their tenure as disincentive to factions); see also Bruff, *Legislative Formality, Administrative Rationality*, 63 *TEX. L. REV.* 207, 218-20 (1984) (analyzing structure of congressional decisionmaking and presidential veto as promoting stability of legislation and reducing influence of factions).

is stalemate."¹⁰⁹ In comparison, delegation from the legislative process to an agency simplifies action by giving the power to one institution. Indeed, ease of action is a supposed virtue of delegation.

2. *The educational value of the legislative process*

Madison hoped that the time elapsed in stalemate would allow for the public to learn of the issues at hand, thereby producing more mature and educated decisions.¹¹⁰ As political theorists have pointed out, representation should not be just a one way street: the representative should not only represent constituents to the central government, but also represent the nation to local factions.¹¹¹ In other words, representatives should also return home to explain how it is that parochial desires cannot be achieved. This should bring maturation.

Delegation undercuts this maturation by allowing legislators to include many conflicting parochial desires among the goals for an agency to pursue "to the extent practicable." The legislator can then come home claiming victory. When the constituents become frustrated later, the legislator can blame those "damned bureaucrats." This is a recipe for alienation, not maturation. It is also a political form of "bait and switch" advertising.

3. *The size and diversity of the representative bodies*

Madison claimed that a republic large enough to include many factions with legislative bodies large enough to include representatives from many factions would hinder factions.¹¹² Bringing many

109. H. PITKIN, *THE CONCEPT OF REPRESENTATION* 195 (1972). The Constitution, of course, did not seek to frustrate action altogether. Indeed, inability to act under the Articles of Confederation helped to spur the Constitution.

110. *See id.* at 195-96 (discussing Madison's philosophy that political process allows community to prevail over selfish faction interest).

111. *See* J. PENNOCK, *DEMOCRATIC POLITICAL THEORY* 310 (1979) (noting that elections provide voice for community to express its own interests and allows representative to inform voters of national interests); H. PITKIN, *supra* note 109, at 196 (discussing dual nature of national representation).

112. *See* THE FEDERALIST NO. 10, at 81-84 (J. Madison) (C. Rossiter ed. 1961) (discussing advantages of large republics in guarding against factions); THE FEDERALIST NO. 51, at 325 (J. Madison) (C. Rossiter ed. 1961) (concluding that variety of interests embraced by American republic discourages oppression by factious majorities); THE FEDERALIST NO. 63, at 383 (J. Madison) (C. Rossiter ed. 1961) (arguing that requiring concurrence of select and stable body promotes accountability for long-term consequences).

Madison also was concerned, however, that a legislature with so many members would devolve real power upon a few individuals. *See* THE FEDERALIST NO. 10, at 82 (J. Madison) (C. Rossiter ed. 1961) (stating that number of representatives should serve to guard against faction, but also should avoid confusion of multitude); THE FEDERALIST NO. 55, at 341-44 (J. Madison) (C. Rossiter ed. 1961) (concluding that size of Senate and House will help to prevent tyranny); THE FEDERALIST NO. 58, at 356-57 (J. Madison) (C. Rossiter ed. 1961) (commenting on possible augmentation of number of representatives in terms of distribution of

different factions together in one process would increase the chance that factions would frustrate each other.

Delegation radically reduces the membership of the entities that adopt rules. Delegation is from large bodies to a single administrator or a small group of commissioners, the majority of whom typically come from one political party. As noted, Madison believed that an appropriately-sized body was more likely to encompass the diverse interests among the public. A similar belief that a larger group is more likely to see diverse sides of an issue probably is the genesis of such traditions as the jury¹¹³ and the corporate board of directors.¹¹⁴

Delegation creates balkanization in which factions can avoid facing each other in one legislative process. Instead, we create a separate administrative process for each major faction. Despite the theory that interest groups will be represented at the agency level,¹¹⁵ in practice only a few interests get heard.¹¹⁶ Often the only interests heard from will be the industry regulated or, more accurately, those members of the industry that are large firms or who have some control over the trade association. Sometimes other organized groups will be effective, such as rival industries or state officials. Sometimes too, citizen organizations become involved. But

real power). Madison expressed varying views as to the appropriate absolute size of the House. See *Whelan v. Cuomo*, 415 F. Supp. 251, 257-58 (E.D.N.Y. 1976) (noting Madison's views on appropriate size of House and his concern with preventing oligarchic influences on government). Article I, § 2 of the Constitution expressly limits the size of the House of Representatives to no more than one representative per 30,000 population, U.S. CONST. art. I, § 2, cl. 3, but that limit is no longer meaningful as there could be over 7000 members of the House with today's population. See *Whelan v. Cuomo*, 415 F. Supp. 251, 253 (E.D.N.Y. 1976) (noting vast increase in House membership if increased to constitutional maximum).

Richard Stewart is probably right that laws would be better made by far fewer than 535 persons, the combined membership of the House and Senate. Stewart, *supra* note 2, at 331. But, the size of the House has been and could be changed by statute. Thus, at least in theory, there is no need to choose between delegation and an overstuffed House. See 2 U.S.C. §§ 2, 2(a) (1982) (providing mechanism for reapportionment of House); see also *Whelan v. Cuomo*, 415 F. Supp. 251, 253 (E.D.N.Y. 1976) (discussing past congressional reapportionments). Therefore, Stewart's point should be a concern for political processes rather than a reason for the Court to forget the delegation doctrine. That the legislative process has the power to reduce the size of the House does not mean, however, that the power will be used. Members of Congress appear to oppose either losing their jobs or doing them. For that matter, if we now have too many senators to make the Senate an august body, amending the Constitution to provide for one senator per state instead of the two per state, now required by the seventeenth amendment, would be more consistent, in my view, with the spirit of the Constitution than allowing massive delegation of legislative power.

113. See generally D. JONES, *THE LAW OF CRIMINAL PROCEDURE: AN ANALYSIS AND CRITIQUE* 16-18 (1981) (discussing origins of jury system).

114. A. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 47 (1977).

115. See Stewart, *supra* note 76, at 1760-61 (discussing interest group representation in agency adjudication).

116. See *id.* at 1760-90 (analyzing adequacy and practicability of interest representation system).

they have the resources to intervene in only a small fraction of all matters that affect their constituencies. And even if a public interest organization is involved, it may well not be able to address effectively matters of importance to other citizens. For instance, a group devoted to health and safety issues would have no direct interest in, or political standing to assert, consumers' interests in preventing existing suppliers from using regulation to discourage potential competitors from entering the market.

Instead of reducing the power of factions by playing them off against one another, agencies typically accentuate the power of factions. An agency established to regulate a given industry is likely to find a mutuality of interest with that industry. The agency tends to help the industry's trade association gain favor with the industry's members and to defend the industry in Washington. The industry is likely to return the favor when the agency seeks appropriations or when its officials seek jobs outside of government.

B. *The Safeguards of the Legislative Process Tend to Work*

The discussion so far has relied upon what *The Federalist Papers* said as to why article I was framed as it was. Were these sayings wishful thinking or is there sound reason to believe that article I really will offer protection against factions? Richard Stewart, after all, provides good reason to believe that factions will sometimes get their way within the legislative process.¹¹⁷ In a recent article, Jonathan Macey evaluates article I's safeguards in light of the economic theory of legislation.¹¹⁸ He concludes that this microeconomic analysis supports the position that article I is structured to discourage factional legislation.¹¹⁹ Macey also argues that, because factional legislation "cannot be eliminated without cost, one cannot conclude that the Constitution seeks to facilitate [factional legislation] merely because it fails to eliminate it entirely."¹²⁰

Aranson, Gellhorn, and Robinson also contend that microeconomics supports adherence to the article I process. They argue persuasively that delegation can help legislators reduce the political costs that they would otherwise bear from satisfying such

117. See Stewart, *supra* note 2, at 332 (discussing dangers of use of subdelegation to meet organized interest group demands).

118. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 247-49 (1986) (concluding that Constitution was designed to impede interest groups from obtaining economic advantage through political means).

119. *Id.* at 249.

120. *Id.* at 245.

concentrated interests.¹²¹ When the special interests get what they want from the delegate, they will understand which legislators helped them, but those hurt by the administrative action will be less likely to blame the legislators whose acts were the indirect and remote cause of their woe.¹²²

In still another recent article, Cass Sunstein evaluates *The Federalist Papers'* safeguards against factional legislation.¹²³ While Macey and I rely on the structural features of the federalist program, such as bicameralism, presidential veto, and the composition and method of selecting the two houses of Congress and the President, Sunstein refers to these features,¹²⁴ but emphasizes another strand in Madison's thinking—an idea that legislators would rise above factional self-interest and deliberate on the common good.¹²⁵ Microeconomic theory and practical experience suggest that one ought not to bank on politicians preferring the public interest to private ambition, as Sunstein points out.¹²⁶

Madison, however, did not rely exclusively on the public spiritness of political animals, whether legislators or administrators as Sunstein acknowledges.¹²⁷ It is true that Edmund Burke would have representatives vote their view of the long-term public interest rather than their constituents' private desires.¹²⁸ Although Madison

121. Aranson, Gellhorn & Robinson, *supra* note 87, at 57 (noting that members of Congress often attempt to shift blame to agencies when regulations have negative impact on constituent interests).

122. *Id.* Mashaw criticizes Aranson *et al*, but does not effectively counter their main point, summarized in the text. Mashaw, *supra* note 15, at 89-90. Mashaw suggests that what Aranson *et al* discuss is a fiscal illusion that will necessarily catch up with the legislators. *Id.* The voters, however, are likely to blame the delegates not the legislators. Mashaw argues that their model does not fully account for legislative behavior and is not backed by empirical data. *Id.* That of course is true. But then again, no one has come up with an empirically supported and complete model of administrative behavior. Nor is it reasonable to expect one. While the Aranson *et al* account may leave room for improvement, its conclusion remains plausible.

123. See Sunstein, *Interest Groups In American Public Law*, 38 STAN. L. REV. 29, 43-48 (1985) (concluding that much of modern legal doctrine focuses on federalists' concerns with controlling factions).

124. See *id.* at 40 (explaining that diversity of interests inherent in large republic discourages factional tyranny); *id.* at 43-44 (discussing safeguards of bicameralism, electoral college, indirect election, and separation of powers).

125. *Id.* at 31-35, 41-42, 45-48.

126. See *id.* at 48-49 (suggesting that factional struggle that Madison sought to escape resembles contemporary political practices).

127. *Id.* at 42.

128. See H. PITKIN, *supra* note 109, at 193-96 (discussing Burke's view of proper legislative concerns). Many now think of Burke as elitist, patronizing, and unrealistic. Indeed, early proponents of delegation saw expert agencies as the way to transfer power from selfish legislators who pandered to special interests. This reliance on expertise has proved no less elitist, patronizing, and unrealistic than Burke's. Many scholars have commented upon the unrealism of hoping to find public officials who would steadily steer towards the long-term public good. See Schwartz, *Of Administrators and Philosopher-Kings*, 72 NW. U.L. REV. 443, 450-53 (1977) (discussing knowledge shared by array of philosophers and analysts that government cannot be administered by leaders dispensing wisdom for people and polity). The reality is

hoped that legislators would be better than their constituents, he also pointed out the danger in relying completely on such hopes.¹²⁹

It is vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.¹³⁰

As Sunstein shows, agencies lack all of the structural features upon which Madison relied to protect against factions when enlightened statesmen fail.¹³¹

C. *The Legislative Process Protects Key Constitutional Values*

The legislative process protects not just the general welfare but also two additional constitutional values—accountability and individual rights.

1. *Accountability*

The sharp differences between the legislative process and the administrative process go to a key constitutional value—electoral accountability. In traditional thinking, legislators in a republic are accountable because their continuance in office depends upon reelection.¹³² Delegation to an agency undercuts accountability because the delegate is unelected.

Is accountability unimportant because the electorate does not understand the substance of much legislation? No. Editorials, ratings by interest groups, and political opponents give voters who care to listen information on where their representatives stand. All this puts representatives in fear of their constituents on issues about which their constituents care. Such a system will not produce legis-

that much agency decisionmaking requires interest balancing rather than just experience. See Stewart, *supra* note 76, at 1684 (noting that agency interest-balancing forces nebulous and conflicting policies into specific factual contexts); see also J. PENNOCK, *supra* note 111, at 325 (stating that Burke did not believe that representatives should ignore constituent desires).

129. R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 6 (1956) (noting Madison's belief that accumulation of power absent external checks leads to tyranny and deprivation of individual rights); H. PITKIN, *supra* note 109, at 194-95 (referring to Madison's fear that filtering effect of wise representation could not control factions).

130. THE FEDERALIST NO. 10, at 80 (J. Madison) (C. Rossiter ed. 1961).

131. Sunstein, *supra* note 123, at 59-68 (discussing problem of controlling factions in administrative law).

132. See J. PENNOCK, *supra* note 111, at 310 (stating that elections are great sanction for assuring representative behavior).

lation based consistently on good information, let alone legislation that is rational. Such legislation would please neither Edmund Burke nor the early advocates of administrative agencies who wanted lawmaking to be a rational process. But both our legislative and our administrative processes respond, in my view, more to pressures than to reason. But the legislative process has safeguards designed to minimize the harm caused by unreasoning pressures.

Jerry Mashaw argues that legislation need not be specific in order for voters to know where their representatives stand so that delegation does not undercut accountability.¹³³ This misses the point of accountability. Accountability is intended to impose public responsibility on those persons who make the rules. This purpose is defeated if members of Congress do not make the rules that govern our conduct.

Do PAC's undermine accountability because members of Congress may respond more to heavy money than to the true interests of their constituents? PAC money, as well as other sources of campaign funds, undoubtedly affects how Congress acts. Money, however, also influences how agencies operate. It takes money to hire lawyers to appear before an agency, more money to hire the right lawyers, and still more money to make campaign contributions to the right members of Congress to intervene in one's behalf before the agency. The point here is not that Congress is immune from financial influence, but that money talks in Congress and in the agencies. At least in the congressional context, the use of money is more visible.

The argument that campaign contributions distort legislation assumes, reasonably, that a clever campaign to some extent can blind constituents to their true interests. This point cuts more heavily against delegation than the legislative process because, as Aranson, Gellhorn, and Robinson have argued, delegation helps legislators obscure their responsibility for costs imposed upon their constituents.¹³⁴

Finally, it is arguable that delegation to an agency is no worse on accountability grounds than the people's original delegation to Congress¹³⁵ because there is no particular reason to suppose that an

133. See Mashaw, *supra* note 15, at 87-88 (arguing that statutory vagueness does not diminish electorate's knowledge of legislators because voters are interested in legislators' general ideological tendencies rather than stances on particular statutes).

134. Aranson, Gellhorn & Robinson, *supra* note 87, at 38.

135. Every exertion of the police power, either by a legislature or by an administrative body, is an exercise of delegated power. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935).

agency would mimic the results of a referendum in which the voters participated directly any less well than would the legislature. The electorate's grant of legislative power to representatives is, in itself, a delegation made partly for convenience. Reposing the legislative power in representatives rather than the voters themselves is generally thought wise because many voters are too numerous to debate the issues, because some issues require rapid action, and because representatives are likely to be better informed than voters. Today, these same reasons of convenience allegedly require delegating the legislative power from the legislature to the agency.

According to this argument, delegation from Congress to agencies is different in degree, but not in kind, from the sort of delegation blessed in the Constitution. This argument is wrong because the delegation from the people is to a legislative process designed to incorporate protections against factions, protections that the administrative process lacks. It is also wrong because the legislative process is not supposed to mimic the results of referenda where the majority might well be a faction.

2. *The rights of regulatees*

The legislative process protects regulatees as well as the public. Their rights are not rights in the same sense that persons have rights, for example, under the first amendment. Regulatees have no immunity from the desire of the majority to regulate them so long as the majority employs the article I process to enact the regulation. The putative right under article I is, like procedural due process, counter-majoritarian as to the process through which restrictions are imposed, not their substance. In other words, persons have a right to be regulated only through the super-majoritarian processes of article I.

Should we regard regulatees' interest in the use of the legislative process as a right? One may believe that the delegation doctrine, for the regulatee, serves nothing more than a bare interest to avoid regulation, unjustified by any principle. Enforcement of the delegation doctrine, however, will not always serve regulatees' interests. The legislative process will produce regulations when the administrative process would not, just as the administrative process will in other instances regulate when the legislative process will not. Indeed, industries often seek retention of regulatory statutes that delegate because they fear the rules that the legislative process would otherwise enact.

At the same time, regulatees do have a principled claim to the

protection of the delegation doctrine.¹³⁶ Regulators have ample reasons to use their power for purposes that they would prefer to keep secret. Their motive for action may be, for example, to reward a campaign contribution, to secure the support of a trade association or a key member of Congress in legislative battle, or to punish someone on an enemies list. Or, in better faith, the regulator may wish to secure a benefit for the public that a court, if it knew the true motive, would construe as a taking of property requiring compensation.

Judicial deference where regulations are challenged on the basis of due process, equal protection, or takings helps the regulators mask their motives. Courts will ordinarily not look behind an agency's articulated regulatory purpose¹³⁷ and will accept the agency's contention that there is a factual basis to believe that the regulation will substantially further that purpose, even though the agency's position is highly debatable.¹³⁸ This deference deprives many regulatees of liberty and property for reasons that are venal or simply the commandeering of private property for public purposes without compensation. The reason for this deference is the supposition that the political process is generally well-suited to decide whether the restrictions on the regulatees are reasonably necessary.¹³⁹

If the regulatees are denied the benefit of careful judicial review on the theory that the political process is adequate, then the regulatees ought to have the benefit of the sort of political process—the article I legislative process—that the framers thought was suitable. Indeed, Alexander Hamilton saw separation of powers as a protection of civil rights. In arguing against amending the Constitution to

136. A similar question is whether legislative malapportionment can be challenged by regulatees as well as by voters. An argument for the general invalidity of the laws passed by a malapportioned legislature failed in *Ryan v. Tinsley*, 316 F.2d 430, 432 (10th Cir.), *cert. denied*, 375 U.S. 17 (1963), when the court refused to hold a state habitual criminal statute unconstitutional under a collateral attack on a habeas corpus motion by the defendant. The court held that, despite a failure to redistrict in accordance with constitutional mandate, legislative offices created by the state constitution were *de jure* offices, and incumbent legislators were at least *de facto* officers, rendering their acts valid as acts of *de jure* officers. *Id.* The basis for the decision was not lack of standing but fear of chaos that would be produced by retrospective rather than prospective invalidation. *Id.* If the court decided that delegation and malapportionment should be treated analogously, it would not deny rights to regulatees, but it might make its rulings prospective if it thought chaos would otherwise result.

137. *See, e.g.*, *Kleppe v. Sierra Club*, 427 U.S. 390, 404-05 (1976) (noting acceptance of agency's statement of purpose of its action).

138. *See, e.g.*, *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-36 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1977).

139. *See McLean v. Arkansas*, 211 U.S. 539, 547 (1909) (upholding statute on grounds that legislature's greater knowledge of local conditions makes it, rather than court, primary authority).

include enumerated rights, he wrote that the Constitution without a bill of rights is "in every rational sense, and to every useful purpose, A BILL OF RIGHTS."¹⁴⁰ Separation of powers is a kind of bill of rights because, in our legal system, everything is permitted except that which is prohibited by proper legal action. In the Constitution, we the people authorized government to regulate us only in one way—through a legislative process structured to minimize prohibitions for factional purposes, whether they hurt majorities or minorities.

*D. The Administrative Process Does Not Provide Adequate
Alternative Safeguards*

Proponents of delegation have not successfully defended its legitimacy. Some of the best writing on administrative law argues for delegation without dealing with its legitimacy.¹⁴¹ Supreme Court opinions have stayed away from trying to state a case for the legitimacy of delegation in recent years. Previously, the Court had tried to legitimize delegation to agencies on the basis that it is consistent with accountability and judicial review to ensure adherence to the legislative will.¹⁴² But accountability and judicial review to ensure adherence to the legislative will are perfectly consistent with factional legislation. In any event, delegation has failed in practice to deliver on these values.¹⁴³

Richard Stewart and other important figures in administrative law argue that the administrative process provides safeguards against discretionary power that are equal to or better than those provided in article I.¹⁴⁴ This section confronts these arguments.

1. Argument: delegation to an agency is better than delegation to a congressional committee

Richard Stewart asserts that the "iron law of transaction costs"

140. THE FEDERALIST No. 84, at 515 (A. Hamilton) (C. Rossiter ed. 1961).

141. Stewart concludes that delegation is necessary both as a practical matter and because the courts lack a judicially manageable test, but he does not argue its legitimacy. See Stewart, *supra* note 76, at 1693-98, 1802-13. Professor Bruff discusses the problem of factions, but deals with delegation only briefly. See Bruff, *supra* note 108, at 215-20, 227. Professor Strauss presents a way of reading the Constitution's text that accommodates a fourth branch, but does not show how that reading serves the purposes of the delegation doctrine. See Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

142. Schoenbrod, *supra* note 4, at 1237-49.

143. *Id.*

144. *E.g.* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.15 (2d ed. 1978); Mashaw, *supra* note 15, at 80-85.

forces Congress to delegate to someone.¹⁴⁵ Stewart prefers that Congress delegate to an agency with established procedures rather than to a congressional committee.¹⁴⁶ Kenneth Culp Davis similarly writes that delegations are fine so long as sufficient safeguards constrain the exercise of agency power.¹⁴⁷ Some safeguards that he has in mind are statements of reasons and the following of precedent.¹⁴⁸

Stewart's argument has two flaws. First, Congress and the President must still act on a congressional committee's recommendations. At least for politically important decisions, accountability will still exist. Second, the agencies' established rules of procedure are not such a large advantage as Stewart suggests. Congress itself usually provides something similar to a notice and comment rulemaking procedure when it calls hearings, accepts testimony, and publishes committee reports attempting to justify decisions. If Congress enacts the rule, an individual cannot be sanctioned for breaking it without various procedural protections provided under the Constitution and statute. Agency rulemaking does involve, however, one procedural step that congressional action lacks—judicial review for compliance with statutory mandates.

But judicial review is of limited help in assuaging the concerns that gave rise to the delegation doctrine. Typically, the delegating statute gives the agency latitude to balance incommensurate, competing interests in developing its regulatory restrictions. It is the agency rather than the legislative process that sets priorities, thereby undercutting accountability. The scope of review is limited, based as it is upon the "arbitrary and capricious" test. That test allows the agency ample room to choose among a wide variety of outcomes so long as it mouths the appropriate statutory rubrics.¹⁴⁹ So the regulatees are largely at the mercy of administrative discretion.

One might try to put more "oomph" into agency procedures by requiring more intrusive judicial review of agency rulemaking. This, however, would place a difficult burden on judges, whose lack of time and expertise would compel most of them to avoid a policymaking role. In any event, expanded judicial review would try to

145. Stewart, *supra* note 2, at 342.

146. See *id.* at 332 (arguing that subdelegation within Congress creates serious political accountability problems).

147. K. DAVIS, *supra* note 144, § 3.15.

148. *Id.*

149. See Bruff, *supra* note 108, at 239 (observing that agency desiring particular policy outcome may perform "charade" of hearing from all interested parties, responding to them in rational discourse, and issuing decision consistent with agency policy).

overcome unaccountable agency power by creating policymaking power in unaccountable courts.

To assert that procedures make agency decisions more principled than those in Congress is to forget an observation that I will dub the "iron law of political intervention," which holds that political power will influence any agency. As Sunstein concludes, judicial efforts are "highly unlikely to accomplish a great deal" in making agencies truly deliberative.¹⁵⁰ In any event, established procedures do little good for interests that are not represented, a frequent problem as Stewart has taken the lead in showing.¹⁵¹

In any event, the "iron law of transaction costs" is invalid. The virtue of Stewart's own "reconstitutive strategies" is to reduce transaction costs by decentralizing decisions. Stewart is wrong in stating that opponents of delegation reject such strategies.¹⁵²

2. *Argument: the administrative process can be supplemented by other sources of accountability*

Numerous devices offer to reconcile delegation with accountability by providing alternative ways to control the lawmaking process. One such device was the legislative veto, which permitted Congress to delegate to the Executive, yet retain control by vetoing actions through the votes of one or two houses. The Court, in *INS v. Chadha*,¹⁵³ declared the legislative veto unconstitutional for several reasons in line with Madison's concerns. The veto allows lawmaking to proceed through the action of one or two institutions, rather than the full three specified in article I as a safeguard against factions.

150. Sunstein, *supra* note 123, at 68.

151. See Stewart, *supra* note 76, at 1760-90 (explaining that high costs associated with agency decisionmaking processes create environment where agency decisions usually conform to interests of regulated concerns).

152. See Schoenbrod, *Clean Air Act*, *supra* note 13, at 812-14 (recognizing strategies that may meet needs inadequately filled by delegation); Schoenbrod, *supra* note 4, at 1277-79 (opposing delegation but acknowledging that reconstitutive techniques could result in simplicity, efficiency, and reduced burden on legislative processes). The delegation doctrine would also filter out the enactment of some statutes. Other statutes, such as those dealing with the management of government property rather than the coercion of private action, do not raise delegation problems. As to the remaining statutes, Congress' work in a world without delegation would be far less than the sum of Congress' and agencies' work in a world with delegation. Much of the agencies' work is not drafting rules of conduct, but in following elaborate procedures that Congress mandates to give supposed content to its delegation. Congress' own job in delegating is complicated by these elaborate instructions, that frequently go on for many pages of sections and subsections, all of which need to dovetail. It is hard to compromise over such legislation because each part affects every other. But when Congress itself sets the rules, such as it might for instance by enacting emission limits for electric power plants, it can compromise upon the limits in the same way as one haggles over the price of a rug in a street market. Congress would also save time because its members would need far less oversight of the operation of agencies to whom it broadly delegates.

153. 462 U.S. 919 (1983).

Veto provisions also allow lawmaking to proceed by Congress failing to act, thereby reducing the extent to which members of Congress need take responsibility for their exercise of power.

Related to the legislative veto is the concept that legislative oversight introduces electoral accountability into the agency lawmaking process. Agencies may be dissuaded from action by the harsh words of a key member of Congress or a subcommittee, suggesting perhaps that some proposed action would result in a funding cut. Legislative oversight has all the shortcomings of the legislative veto, plus others. Congressional control is informal and therefore often invisible. The control often is by a single committee or even an individual member rather than the full house so that most members need not take any responsibility for it. These features allow members of Congress to avoid responsibility so that their political costs do not correspond to the costs borne by the public. Accordingly, there is no reason to suppose that the tension between members of Congress and the Executive in legislative oversight will make administrative action responsive to the interests of the public. There may be tension in legislative oversight, but the stakes are as likely to be the division of power "within the beltway" as the interests of the constituents without.

Another approach is to claim that the accountability of the legislative process lost through delegation is replaced by the accountability of the President, who appoints the officials who will exercise the delegated power. As the Court stated in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*:¹⁵⁴

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices resolving the competing interest which Congress itself inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in the light of everyday realities.¹⁵⁵

This approach sacrifices many of the protections of the full legislative process, particularly the requirement of action by three distinct institutions.

Pierce places considerable reliance on the accountability of the presidency in arguing that delegation is legitimate.¹⁵⁶ Yet he ac-

154. 467 U.S. 837 (1984).

155. *Id.* at 865-66. *Chevron's* holding did not address the propriety of delegation. Pierce cites this language from *Chevron* as a rejoinder to the delegation doctrine. See Pierce, *supra* note 76, at 506.

156. See generally Pierce, *supra* note 3.

knowledges, in passing, that the "president is imperfectly accountable to the electorate."¹⁵⁷ There are solid reasons for this admission, which cuts the ground from under Pierce's own position. For example, the President's actual political responsibility for some appointee's interpretation of a statute is likely to be less than that of Congress and its members for the enactment of a statute. A member of Congress' political responsibility for a given vote is softened by voters having to choose between candidates who present a broad array of positions.¹⁵⁸ The voters cannot choose candidate "A" for the purpose of one issue and candidate "B" for the purpose of another issue. The requirement that voters elect one package of positions or another may be a weakness or a strength, but it surely does not negate accountability. After all, in many political contests, a six percent margin of victory is considered substantial. That margin can be wiped out by a swing in three percent of the votes. In any one local contest, there are likely to be quite a few issues that could make for such a swing and the incumbent cannot necessarily tell what those issues will be when voting in Congress. That the voters need to choose the votes of their representatives wholesale still does not free the representative from political tension on many issues.¹⁵⁹

At the presidential level, electoral responsibility for a decision is far weaker. Issues of local interest are diluted. Questions about the behavior of the President's role in domestic lawmaking must take their place along with other factors that voters consider, including foreign affairs. Also, personality may well be a bigger factor at the presidential level. Finally, a legislative representative must accept responsibility for a vote, the President need not accept responsibility for someone else's action, even though that someone was appointed by the President. Presidents have often distanced themselves from the decisions of their appointees.

Before legitimizing broad agency powers on the basis that an elected President appoints the delegate, one ought to consider that we frequently view as dictatorial governments in which the dominant form of electoral participation is election of the chief of state. Doubtless there are many differences between such regimes and our administrative state, but this country is not magically immune to dictatorial power.

157. *Id.* at 409.

158. Mashaw, *supra* note 15, at 87.

159. Representatives from safe districts tend to vote the interests of their constituents. J. PENNOCK, *supra* note 111, at 317.

3. *Argument: safeguards in the administrative process are unimportant because regulatees can take care of themselves*

One might argue that regulatees, such as big industrial concerns, are powerful and can protect themselves perfectly well, whether from a legislature or an agency. This argument totally ignores the public's interest in accountable government and is only partially responsive to regulatees' interest in fair regulation.

It is true that agencies frequently disregard the beneficiaries of regulation. But the relative powerlessness of regulatory beneficiaries before the agency does not necessarily translate into the immunity of regulatees from discretionary power. Many regulatees are small concerns with little access to the powers that be. Some corporations may, in fact, use their resources to get regulators to protect them from competition, thereby hurting other private concerns and, often, the supposed beneficiaries of regulation. Even big concerns can get pushed around in the regulatory process when public anxiety has been aroused. For instance, during the scandals concerning the Environmental Protection Agency's handling of toxic dumpsites, regulatees found it difficult to get agency officials to give necessary approvals for quite innocent actions.¹⁶⁰

Both the regulation's beneficiaries and the regulatees may lose power because another force is gaining discretionary power—the agency. Administrative law practitioners know that the best argument to an agency is “this will benefit the agency,” or, even more frankly, the official making the decision.¹⁶¹ Bureaucrats that wield the power may get various sorts of payoffs: power for its own sake, expanded job opportunities upon retirement from government, prestige, promotions within government, or larger appropriations from Congress. The White House, the Office of Management and Budget, and members of Congress influence this discretionary power and also claim their share of the spoils in the same coin as well as in campaign contributions.

Perhaps this account overstates agencies' power. Agencies do have trouble getting much done. That, however, in no way negates the private sector's loss of power to the agencies. Subjecting people or corporations to complicated bureaucratic processes or prolonged uncertainty as to what the agency will permit is a substantial power,

160. See Comment, *To Police the Police: Functional Equivalence to the EIS Requirement and EPA Remedial Actions Under Superfund*, 33 CATH. L. REV. 863, 868 n.36 (1985) (discussing agency inertia during Superfund scandals).

161. See DeLong, *How to Convince an Agency*, 6 REG., Sept.-Oct. 1982, at 28-31 (suggesting strategies for advocating policies before government agencies).

but it is not necessarily getting anything done. In other words, the power lost by the private sector can be said to be less than the power gained by agencies because of the transaction costs of delegation. Delegation ordinarily carries high transaction costs for two reasons. First, the agency lacks Congress' political standing, which is often needed to resolve conflicts. Second, delegation is usually not pure buck passing, but rather it usually requires that agencies go through complicated procedures before they resolve an issue.

These procedures involve participants in a merry-go-round of administrative proceedings, legislative oversight hearings, and judicial reviews. Jerry Mashaw responds to broad concerns about the smothering effect of legalism in a poignant observation concerning *The Trial* by Kafka.¹⁶² Mashaw says that "due process," with all heaviness, is better than just "process," which is the literal translation of the novel's German title.¹⁶³ This suggests that the horror for Kafka's hero was being put to a trial without any rules, while at least in our administrative state there are rules. This actually understates the hero's problem. It is suggested to Kafka's hero that there are rules, and that he should know what they are. His inability to understand the rules thus heightens his guilt and sense of helplessness.¹⁶⁴ This is the situation of those subject to the administrative state who cannot afford a lawyer with the right expertise and political connections.

IV. CONCLUSION: The Court's Job

The Court has not directly addressed the delegation issue since 1948.¹⁶⁵ Unlike many other separation of powers questions where a clash between the executive and the legislative branches forces the Court to face the issue, delegation is a separation of powers issue where these two branches consent not to be separated. Congress, after all, voted for the delegation of its own power and in no federal case has the executive claimed to have been assigned too much power. But in a recent speech that gained wide attention, Attorney General Meese attacked many concepts used to rationalize delegations, including the idea of "quasi-legislative" powers.¹⁶⁶ Nonetheless, when it has come to specifics, he has tracked the interests of his client. He has attacked delegations to independent agencies, but

162. *Id.* at 268.

163. *Id.* at 267-68.

164. S. HAYMAN, *KAFKA: A BIOGRAPHY* 73-78 (1967).

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

166. Address by Attorney General Meese before the Federal Bar Association Annual Meeting, Detroit, Mich. (Sept. 13, 1985).

not to agencies in the President's direct control.¹⁶⁷ The Supreme Court has, however, repeatedly taken on separation of powers issues when raised by private parties rather than a branch of government.¹⁶⁸

Congress, it might be argued, is the expert on ways of legislating so that the Court should defer. But members of Congress are also interested parties. Delegation allows them to take popular positions and avoid difficult choices. Election is easier for the politicians who avoid hard choices through delegation. It also allows them to share in the agency patronage, to use Theodore Lowi's term.¹⁶⁹ Members receive campaign contributions and other help for assisting the private sector deal with the agencies whose broad powers come from delegation.¹⁷⁰ At the same time, the political price for delegation is small, nullifying the argument that there is accountability because the electorate has consented to it.¹⁷¹ It takes a sophisticated voter to understand the issue. When delegation became a negative for Congress, as during the debates leading up to the 1970 Clean Air Act, Congress simply camouflaged its broad delegation with compli-

167. Mr. Meese questioned the constitutionality of the Federal Trade Commission on the basis that it was an agency insulated from presidential control. "The Constitution As a Bill of Rights: Separation of Powers and Individual Liberties," Lecture by Attorney General Meese, University of Dallas 10-11 (Feb. 2 1986). In *Bowsher v. Synar*, 106 S. Ct. 3181, 3184 (1986), the Reagan administration opposed power being granted to the General Accounting Office on the basis that it was not in the control of the President.

168. This is true, of course, of early delegation cases. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935) (striking down congressional delegation to President of authority to approve codes of fair competition on grounds that Congress may not abdicate essential legislative functions); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935) (invalidating statute that allowed President to prohibit interstate transportation of petroleum because limitations on Congress' authority to delegate are necessary to maintain constitutional system). There are also more recent cases with delegation overtones. See, e.g., *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 639-46 (1980) (construing regulatory statute to avoid potential delegation issue); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976) (holding that agent of government may not arbitrarily subject aliens to different substantive rules than those applied to citizens without congressional authorization); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-42 (1974) (construing statute to avoid potential delegation issue); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-70 (1972) (holding vagrancy statute unconstitutionally vague); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (construing narrowly delegated powers that impinge on citizens' right to travel). There are other examples as well. E.g., *INS v. Chadha*, 462 U.S. 919, 951-59 (1983) (striking down one-house legislative veto of deportation decisions made by Attorney General); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57, 64, 87 (1982) (ruling that Congress is not constitutionally empowered to create legislative courts to adjudicate bankruptcy matters); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 609-12 (1983) (Powell, J., concurring) (arguing that task of Internal Revenue Service is to administer revenue laws, not promote public policy); *Fullilove v. Klutznick*, 448 U.S. 448, 508-10 (1970) (Powell, J., concurring) (stating that Congress has constitutional discretion to choose suitable remedy to redress racial discrimination).

169. T. Lowi, *supra* note 105, at 137.

170. Aranson, Gellhorn & Robinson, *supra* note 87, at 58.

171. See Mashaw, *supra* note 15, at 87 (stating that voters rely heavily on perceptions of candidates' broad ideological stances and not their action on particular bill).

cated instructions that fooled even many specialists into believing that Congress has made the hard choices.¹⁷² In short, the political process cannot police the legislative process' yearning to delegate.

The Supreme Court does, in other doctrinal settings, overturn legislative judgments on the basis that they insulate government from majority control. *Baker v. Carr*¹⁷³ and its progeny protect the majority of the public against the self-interested machinations of legislative incumbents.¹⁷⁴ The courts strike down constraints on speech not just on the basis that the majority is controlling minority views, but also on the basis that officials are suppressing criticism. The rationale for these two lines of cases is captured in the second paragraph of a *United States v. Carolene Products Co.*¹⁷⁵ footnote which calls for judicial intervention to protect governmental accountability.¹⁷⁶ In addition to accountability, the rights of regulatees should provoke enforcement of the delegation doctrine.

172. Schoenbrod, *supra* note 13, at 745-46, 751.

173. 369 U.S. 186 (1962).

174. *Id.* at 193.

175. 304 U.S. 144 (1938).

176. *Id.* at 152 n.4.

