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The Fourth Branch: Reviving the Nondelegation Doctrine

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Article I of the Constitution vests "*[a]ll legislative Powers* . . . in a Congress . . . which shall consist of a Senate and House of Representatives," and states that Congress is "*[t]o make all laws* which shall be necessary and proper."[1] However, from the very beginning of the Republic, Congress has delegated its lawmaking authority to others.[2] The United States Supreme Court has invalidated Congress's delegation of authority on article I grounds on only two occasions, in *A.L.A. Schechter Poultry Corp. v. United States*[3] and *Panama Refining Co. v. Ryan*.[4] The

1. U.S. CONST. art. I, §§ 1, 8 (emphasis added).

2. A legislative body delegates power when it confers upon an administrative agency powers and discretion that the legislature itself could exercise. When Congress initially creates an administrative agency, it delegates certain rulemaking and adjudicatory functions to the agency. The inherent conflict between such delegation of authority and the notion of separation of powers has produced the nondelegation doctrine. The nondelegation doctrine has two separate but related parts. First, under the separation of powers principle, the legislature cannot delegate its authority; and second, even though a delegation is proper, if the agency acted ultra vires, then it is unconstitutionally exercising legislative power.

The first Congress delegated to courts the power "to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States," Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83; it delegated to district courts power to impose "whipping, not exceeding thirty stripes," *id.* at 77; it delegated power to provide for military pensions "under such regulations as the President of the United States may direct," Act of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95; it delegated to the president power to fix pay, not more than a fixed maximum, for military personnel wounded or disabled in the line of duty, Act of April 30, 1790, ch. 10, § 11, 1 Stat. 119, 121; it delegated discretionary power to the secretary of the treasury to mitigate or remit fines and forfeitures in designated circumstances, Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122-23; it authorized superintendents to license "any proper person" (without defining the word proper) to engage in trade or intercourse with the Indian tribes under such "rules and regulations as the President shall prescribe." Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137.

3. 295 U.S. 495 (1935).

Supreme Court has regularly sustained the constitutionality of delegations while at the same time asserting that delegation of legislative power to the president runs counter "to the integrity and maintenance of the system of government ordained by the Constitution."[5] Justice Jackson's likening of the Court to Byron's Julia who, "whispering 'I will ne'er consent,'—consented,"[6] although used in a different context, perhaps best describes the Court's inconsistent behavior in dealing with delegation to administrative agencies.

Commentators have tried to rationalize the Court's behavior, labeling inconsistent statements as "unrealistic verbiage"[7] and "theoretically unsatisfactory."[8] Others have criticized the Court for permitting greater delegation of legislative authority than necessary for wise or effective governance.[9] Nevertheless, the Court has been reluctant to once again take up *Panama* and *Schechter*'s approach of not acquiescing to every expression of the legislature. In recent years, however, important delegation questions have resurfaced: Does the Constitution forbid Congress to delegate its power to administrative agencies? Should Congress decide every question of major policy, or may it delegate its power to decide some questions to administrative agencies? Finally, under what circumstances, if any, may Congress delegate its power to an administrative agency?

This comment argues that current congressional delegation of power to administrative agencies often violates constitutional separation of powers requirements. The Framers intended that the separation of powers doctrine be strictly interpreted to prevent the abuse of delegation of power. With increasing frequency, congressmen have delegated the responsibility of making important policy decisions to administrative agencies, thereby avoiding accountability and possible electoral defeat. Unfortunately, courts have accommodated this practice by finding ways to uphold congressional grants of power to government officials.

Despite the overwhelming trend toward delegation, some

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4. 293 U.S. 388 (1935).

5. Field v. Clark, 143 U.S. 649, 692 (1892).

6. Everson v. Board of Educ., 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

7. K. DAVIS, ADMINISTRATIVE LAW TEXT § 2.01, at 26 (3d ed. 1972).

8. J. FREEDMAN, CRISIS AND LEGITIMACY, THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 78 (1978).

9. *See, e.g.*, T. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 129-46, 297-99 (1969).

cases, including *Panama, Schechter,* and several more recent decisions, present a workable nondelegation framework that, if judicially implemented, would help restore separation of powers. In addition, the Supreme Court's recent decision in *Immigration and Naturalization Service v. Chadha*[10] invalidating the legislative veto mechanism provides Congress substantial incentive to (1) delegate less, and (2) provide better policy standards when it does delegate. Revival of the nondelegation doctrine to invalidate blanket delegations of power by Congress is past due.

I. Judicial Acquiescence to Delegation

The Supreme Court has taken various approaches in accommodating increasingly broad congressional delegations of power to regulatory agencies. It has prohibited delegation while allowing the "ascertainment of facts"[11] or "filling in the details,"[12] reluctantly accepted delegation if the grant of authority is accompanied by standards or guiding principles,[13] and embraced broad delegations of authority without any standards or principles.[14]

A. "Ascertaining a Fact"

In *Field v. Clark*[15] Congress had empowered the president to raise tariff schedules and suspend trade with a foreign country if he determined that a duty imposed by the foreign country on American products was "reciprocally unequal and unreasonable." However,

> Congress itself prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea or hides, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. . . . *As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.* Legislative power

10. 103 S. Ct. 2764 (1983).
11. *See infra* notes 15-19 and accompanying text.
12. *See infra* notes 23-28 and accompanying text.
13. *See infra* notes 29-40 and accompanying text.
14. *See infra* notes 41-76 and accompanying text.
15. 143 U.S. 649 (1892).

> was exercised when Congress declared that the suspension should take effect upon a named contingency.[16]

In *Field* the president "was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."[17]

Nearly eighty years before *Field*, in *The Brig Aurora v. United States*,[18] the Supreme Court had rejected the argument that a statute delegated too much discretion to the president by authorizing him to lift a trade embargo against Britain and France if both ceased violating "the neutral commerce of the United States."[19] The *Brig Aurora* Court did not articulate the ascertainment standard. However, that case easily fits within the standard, since the statute required the president to lift the embargo after ascertaining whether and when the two nations ceased violating "the neutral commerce of the United States." Thus, *Brig Aurora* is consistent with the *Field* "ascertainment of fact" category of cases.

B. "Congress Legislated as Far as Reasonably Practicable"

In *Buttfield v. Stranahan*[20] the Court articulated another condition precedent to proper delegation when it upheld the delegation of authority to the secretary of treasury to prohibit the importation of impure and unwholesome tea. The Court noted that the case fit within the *Field* agency principle because the statute fixed a "primary standard, and devolved upon the secretary of treasury the mere executive duty to effectuate the legislative policy declared in the statute."[21] The Court then added that "Congress legislated on the subject as far as was reasonably practicable."[22] This standard raises an important separation of powers question: Which branch can best determine when Congress has legislated as far as "reasonably practicable"?

C. "Fill Up the Details"

Within twenty years of *Field* the Court retreated to a lower

16. *Id.* at 692-93 (emphasis added).
17. *Id.* at 693.
18. 11 U.S. (7 Cranch) 382 (1813).
19. *See id.* at 383-84, 386.
20. 192 U.S. 470 (1904).
21. *Id.* at 496.
22. *Id.*

standard, holding that officials lawfully could be given far greater authority than the power to recognize a triggering condition. In *United States v. Grimaud*[23] the Court "admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations."[24] The Court cited *Field's* prohibitory language against delegation,[25] but deflated its meaning by stating that "the authority to make administrative rules is not a delegation of legislative power."[26] Borrowing Chief Justice Marshall's language in *Wayman v. Southard*,[27] the Court commented on the difficulty in demarcating the line between "those important subjects, which *must* be entirely regulated by the legislature itself, [and] those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[28]

D. "Primary Standards" or "Intelligible Principles"

The next retreat from strict nondelegation involved the shift to permitting delegation if accompanied by an adequate standard. *United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad*[29] upheld Congress's delegation of authority to the Interstate Commerce Commission (ICC) to authorize, approve, and place conditions on the issuance of securities by a carrier in accordance with a reorganization plan.[30] The Court admitted that filling up the details was an exercise of legislative power, but found the delegation to be constitutional because it was limited by a congressionally prescribed standard.[31]

In *United States v. Shreveport Grain & Elevator Co.*[32] the Court reiterated the importance of Congress fixing a "primary standard" before it could "devolve upon administrative officers the 'power to fill up the details.' " *Shreveport Grain* upheld a

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23. 220 U.S. 506 (1911).
24. *Id.* at 517.
25. *Id.* at 521.
26. *Id.*
27. 23 U.S. (10 Wheat.) 1 (1825).
28. *Grimaud*, 220 U.S. at 517 (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43) (emphasis in original).
29. 282 U.S. 311 (1931).
30. Transportation Act of 1920, Pub. L. No. 152, ch. 91, § 439, 41 Stat. 456, 494 (1919-1921) (codified as amended in scattered sections of 49 U.S.C.).
31. 282 U.S. at 324.
32. 287 U.S. 77, 85 (1932).

delegation of authority in the Food and Drug Act of 1906 to establish regulations defining permissible variations from quantities marked on packages.[33] However, only by a strained interpretation of the phrase "reasonable variations" could the Court say it was a "primary standard."[34]

In *J.W. Hampton, Jr., & Co. v. United States*[35] the Supreme Court changed its primary standard test to require congressionally established principles: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[36] The *Hampton* Court upheld delegation of authority to the president to audit tariffs in order to equalize differences between costs of goods produced domestically and those produced by foreign competitors. The act also established certain guidelines for determining trade imbalances, fixing limits of exchange, and making investigation by the Tariff Commission a prerequisite to changing duties.[37]

The intelligible principle test was carried forward in *Yakus v. United States*.[38] The *Yakus* Court sustained the grant of broad price-fixing authority in the Emergency Price Control Act of 1942[39] to prevent wartime inflation. The Court said that the standards were "sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator . . . has conformed to those standards."[40]

E. No Standards

The intelligible principle standard proved to be a spring-

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33. Food and Drug Act of 1906, Pub. L. No. 384, ch. 3915, 34 Stat. 768 (1905-1907), *repealed by* Federal Food, Drug, and Cosmetic Act of 1938, ch. IX, § 901, 52 Stat. 1040, 1059.

34. *See* 287 U.S. at 85.

35. 276 U.S. 394 (1928).

36. *Id.* at 409.

37. Tariff Act of Sept. 21, 1922, Pub. L. No. 318, ch. 356, § 315(a), 42 Stat. 858, 941 (1921-1923), *repealed by* Tariff Act of 1930, Pub. L. No. 361, ch. 497, § 651(a)(1), 46 Stat. 590, 762.

38. 321 U.S. 414 (1944); *see also* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 745-46 (D.D.C. 1971).

39. Emergency Price Control Act of 1942, Pub. L. No. 421, ch. 26, 56 Stat. 23, *as amended by* Inflation Control Act of Oct. 2, 1942, Pub. L. No. 729, ch. 578, 56 Stat. 765 (relevant sections terminated by Price Control Extension Act of 1946, Pub. L. No. 548, ch. 671, 60 Stat. 664).

40. 321 U.S. at 426.

board for later Court decisions upholding delegations with standards so ambiguous as to be almost meaningless. For example, in *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*[41] the Court upheld a grant of authority to the Federal Radio Commission to grant licenses "as public convenience, interest or necessity requires."[42] The *Nelson Brothers* Court cited *New York Central Securities Corp. v. United States,*[43] in which the Court had found public interest to be an adequate standard.[44] Other vague tests upheld by the Court include "just and reasonable,"[45] "unfair methods of competition,"[46] "reasonable variations,"[47] " 'unreasonable obstruction' to navigation,"[48] and "unduly or unnecessarily [complicate] the structure" of a holding company system or "unfairly or inequitably [distribute] voting power among security holders."[49]

Arguably, nothing should depend on the presence or absence of such hollow phrases as "public convenience," "public interest" or "just and reasonable." Indeed, notions of public interest and reasonableness are generally assumed to attend congressional deliberations. A popularly elected and accountable legislative body is created to further the public interest. Passing legislative authority to administrative officials substantially undermines this end.

The step from delegations requiring an intelligible principle to delegations without any standards at all was barely noticeable. In *Fahey v. Mallonee*[50] the Supreme Court upheld a delegation of power under the Home Owners Loan Act of 1933 to provide for liquidating savings and loan associations and appointing

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41. 289 U.S. 266 (1933).

42. *Id.* at 285; *see* Radio Act of 1927, Pub. L. No. 632, ch. 169, § 9, 44 Stat. 1162, 1166 (1925-1927), *amended by* Act of Mar. 28, 1928, Pub. L. No. 195, ch. 263, § 5, 45 Stat. 373 (1927-1929), *repealed by* Communications Act of 1934, Pub. L. No. 416, ch. 652, § 602(a), 48 Stat. 1064, 1102 (1933-1934).

43. 287 U.S. 12 (1932) (upholding delegation of authority to the Interstate Commerce Commission to act in the public interest in authorizing a carrier that controls others by stock ownership to have control also by lease).

44. *Id.* at 24-25; *see also* Chesapeake & O. Ry. v. United States, 283 U.S. 35, 42 (1931); Colorado v. United States, 271 U.S. 153, 163 (1926); Avent v. United States, 266 U.S. 127, 130 (1924); Railroad Comm'n v. Southern Pac. Ry., 264 U.S. 331, 343, 344 (1924); Intermountain Rate Cases, 234 U.S. 476, 486 (1914).

45. Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 431 (1930).

46. FTC v. Gratz, 253 U.S. 421, 422 (1920).

47. United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 82 (1932).

48. Union Bridge Co. v. United States, 204 U.S. 364, 385-87 (1907).

49. American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946).

50. 332 U.S. 245 (1947).

conservators or receivers to take charge of the associations.[51] Congress's delegation of power included no standard, no policy, nor any intelligible principle.[52]

The three judge district court in *Fahey* had relied on *Panama* and *Schechter* in summarily condemning the delegation as unconstitutional.[53] However, the Supreme Court reversed without even pretending to find a legislative standard. The Court stated:

> It may be that explicit standards . . . would have been a desirable assurance of responsible administration. But the provisions . . . are not penal provisions . . . . The provisions are regulatory. . . . Banking is one of the longest regulated and most closely supervised of public callings. . . . A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields.[54]

Fahey rejected the requirement that Congress delegate pursuant to a standard, policy, or intelligible principle.

In *Carlson v. Landon*[55] the Court upheld Congress's delegation of discretionary authority to the attorney general to grant or deny bail to aliens pending determination of deportability. Although some deportation standards existed, and the Court articulated the need for a bail standard, the statute prescribed

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51. *Id.* at 249.

52. Earlier cases indicated that Congress need not legislate as far as it reasonably can, provide standards, nor state an intelligible principle. For example, in McKinley v. United States, 249 U.S. 397 (1919) the relevant statute provided the secretary of war with authority to "do everything by him deemed necessary to suppress . . . houses of ill fame . . . within such distance as he may deem needful of any military camp." *Id.* at 398. Violation of the regulation was a misdemeanor. The Court gave short shrift to the delegation question: "Congress . . . may leave details to the regulation of the head of an executive department . . . ." *Id.* at 398-99. In Intermountain Rate Cases, 234 U.S. 476 (1914), the questioned act prohibited charging more for short hauls than for long hauls but gave the ICC broad power to grant exceptions. The act did not state any standards or guiding principles—not even public interest. Although this was an immense power—it could make or destroy whole cities—the Court dismissed the delegation question by appealing to authorities and observing that "the mere statement of the contention in the light of its environment suffices to destroy it." *Id.* at 486; *see also* St. Louis, I.M. & S. Ry. v. Taylor, 210 U.S. 281 (1908) (American Railway Association given authority to certify to the ICC a standard height for drawbars on freight cars and a specified time during which noncomplying cars should not be used; no standard prescribed).

53. Mallonee v. Fahey, 68 F. Supp. 418, 420-21 (S.D. Cal. 1946), *rev'd*, 332 U.S. 245 (1947).

54. 332 U.S. at 250.

55. 342 U.S. 524 (1952).

none.[56] The Court stated that "Congress can only legislate so far as is reasonable and practicable, and must leave to executive officers the authority to accomplish its purpose."[57]

On several occasions the Court has gone beyond allowing delegation without standards and permitted an administrative agency to reject a congressionally provided standard and to substitute its own standard—even if Congress had previously rejected that standard.[58] For example, in *Federal Power Commission v. Hope Natural Gas Co.*[59] Congress had authorized the Federal Power Commission (FPC) to fix "just and reasonable" rates for natural gas. The context of the act and the legislative history indicated that Congress intended that the FPC follow traditional rate-making principles. As Justice Reed noted in a dissenting opinion, these principles "were well known to Congress and had that body desired to depart from the traditional concepts . . . it would have stated its intention plainly."[60] However, the majority felt that if the rates the FPC set were reasonable, the FPC could employ whatever standard it desired to establish those rates. It made no difference that Congress had specifically rejected the very standard adopted by the FPC. In fact, two Justices would have allowed the FPC to fix rates without any valuation method:

> Whether the Commission will assert its apparently broad statutory authorization over prices and discriminations is, of course, its own affair, not ours. It is entitled to its own notion of the 'public interest' and its judgment of policy must prevail. . . . If we return this case it may accept or decline the proffered freedom.[61]

In *American Trucking Associations v. United States*[62] the Court upheld a standardless delegation of authority to the ICC to issue rules drastically changing the leasing practices of motor

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56. The statute simply provided that "such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond . . . ; or (3) be released on conditional parole." *Id.* at 528 n.5.

57. *Id.* at 542.

58. *See, e.g.*, FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), *on remand*, 238 F.2d 24 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 1004 (1957); American Trucking Ass'ns v. United States, 344 U.S. 298 (1953); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944).

59. 320 U.S. 591 (1944).

60. *Id.* at 622 (Reed, J., dissenting).

61. *Id.* at 660 (opinion of Jackson, J.).

62. 344 U.S. 298 (1953).

carriers. The ICC promulgated a rule prohibiting equipment leases lasting less than thirty days, which effectively prohibited return trip leasing. The Court upheld the regulatory order as "valid even if its effect is to drive some operators out of business."[63] The Court relied on a provision granting the ICC power to "administer, execute, and enforce all . . . provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedures for such administration."[64] The Court held that the rules fell "within the Commission's power, despite the absence of specific reference to leasing practices in the Act. . . . The grant of general rule-making power necessary for enforcement compels this result."[65] Despite finding no standard or principle upon which to base its decision, the Court rejected the delegation argument: "[T]he power . . . is geared to and bounded by the limits of the regulatory system of the Act which it supplements. It is thus as clearly defined for constitutional purposes as the specified functions of the Commission . . . ."[66]

Doubting the validity of the authorizing statute, Justices Black and Douglas asserted in dissent that the ICC had exceeded its powers by running "counter to the Act in [several] important respects."[67] The short-term oral lease problem, which made effective regulation so difficult, was nonexistent at the time the Motor Carrier Act was enacted; yet Congress only provided for the problem by way of a broad grant of rule-making power to the ICC.

In *FCC v. RCA Communications, Inc.*[68] the Supreme Court overturned a Federal Communications Commission (FCC) decision granting a license to a competing operator in the field of radio telegraph service. The FCC's decision was based on a statutorily expressed national policy in favor of competition. The statute provided: "All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts or agreements in restraint of trade are hereby declared to be ap-

63. *Id.* at 322.

64. Motor Carrier Act of 1935, Pub. L. No. 255, ch. 498, § 204(a)(6), 49 Stat. 543, 546 (1935-1936) (amending the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379) (codified as amended in scattered sections of 49 U.S.C.).

65. 344 U.S. at 312.

66. *Id.* at 313.

67. *Id.* at 328 (Black, J., with Douglas, J., dissenting).

68. 346 U.S. 86 (1953).

plicable to . . . interstate or foreign radio communications."[69] The FCC's order was reversed by the United States Court of Appeals for the District of Columbia Circuit.[70] The Supreme Court vacated the decision and remanded, suggesting that the FCC should have determined for itself the proper policy regarding competition, rather than rely on congressional guidance.[71] On remand the FCC again granted the license, and on review the court of appeals found that the commission had relied on its own judgment.[72]

Hope Natural Gas, American Trucking and *RCA Communications* represent the high water mark of congressional delegation of power. If anything, they negate the principle that delegation of power should be limited by congressional standards or intelligible principles.[73] Recent cases also demonstrate the Court's acquiescence to sweeping delegations of congressional authority.[74] In hundreds of decisions involving governmental policymaking by administrative bodies, the authority granted to

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69. Communications Act of June 19, 1934, Pub. L. No. 416, ch. 652, § 313, 48 Stat. 1064, 1087 (1933-1934), *amended by* Act of Sept. 13, 1960, Pub. L. No. 86-752, § 5(b), 74 Stat. 888, 893 (current version at 47 U.S.C. § 313 (1982)).

70. RCA Communications, Inc. v. FCC, 201 F.2d 694 (D.C. Cir. 1952), *vacated*, 346 U.S. 86 (1953).

71. 346 U.S. at 94-96.

72. RCA Communications, Inc. v. FCC, 238 F.2d 24, 27-28 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 1004 (1957).

73. The constitutional principle of forbidding congressional delegation of authority and the later principle forbidding delegations without standards or intelligible principles have become so diluted that Justice Marshall recently observed:

> The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes, at least in the absence of a delegation creating "the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of [constitutionally] protected freedoms . . . ." This doctrine is surely as moribund as the substantive due process approach of the same era . . . .

Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring) (citations omitted); *see also* National Cable Television Ass'n v. United States, 415 U.S. 336, 352-53 (1974) (Marshall, J., dissenting).

74. *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157 (1968). The Court upheld the FCC's regulation of community antenna television, which did not exist when the Communications Act of 1934 was enacted. The regulation was pursuant to a grant of power to "make available . . . [an] efficient . . . wire and radio communication service." *Id.* at 167. The act granted the FCC power to "issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.' " *Id.* at 178. *See also* Permian Basin Area Rate Cases, 390 U.S. 747, 766-67 (1968) (upholding the FPC's maximum rate fixing system as applied to sales by independent producers that the FPC originally thought were outside its authority; no statutory guide was provided except the phrase "just and reasonable").

the administrative agencies was unaccompanied by even the slightest meaningful expression of standards or guiding principles.[75] In most, if not all, of these cases, the Supreme Court could have held that the agency lacked power to act on those subjects because Congress had not specified that it was delegating power regarding the subject matter before the Court.[76]

II. The Case for a New Nondelegation Doctrine

The Supreme Court has invalidated congressional delegations to government authorities on two occasions—in *Panama Refining Co. v. Ryan*[77] and *A.L.A. Schechter Poultry Corp. v. United States*.[78] Both decisions were handed down in 1935 during the New Deal era, and some scholars consider them to be of doubtful validity today, except in their own limited factual settings.[79]

A. *The* Panama *and* Schechter *Decisions*

In *Panama* the Court invalidated a delegation of authority to the president to prohibit shipment in interstate commerce of "hot oil" (oil produced in violation of state law). The Court found no adequate criteria in the statute to control the authority of the president. Nor did the Court find that the president was required to make any factual findings.[80] Instead, the Court found only general policy statements and declared them inadequate.[81] These statements generally admonished the president "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof," "eliminate unfair competitive practices," and "conserve natural resources."[82]

The Court distinguished earlier cases that upheld congressional delegations of power as falling within one or more of several categories: (1) authority to regulate foreign relations, trade, and commerce;[83] (2) adjudicatory authority to determine when

75. *See* 1 K. Davis, Administrative Law Treatise § 3.6, at 170 (2d ed. 1978).
76. *See id.* § 3.7.
77. 293 U.S. 388 (1935).
78. 295 U.S. 495 (1935).
79. *See, e.g.*, 1 K. Davis, *supra* note 75, § 3.8.
80. 293 U.S. at 415.
81. *Id.* at 416-20.
82. *Id.* at 417.
83. *Id.* at 421-24.

conduct falls within a particular law previously established by Congress;[84] (3) execution or enforcement authority to administer laws already in force;[85] and (4) authority granted to the president as commander in chief.[86]

The Court noted that in all previous cases upholding congressional delegation of power there were limits on its exercise. The delegation at issue in *Panama* went beyond permissible limits. However, since state laws and quotas could have been deemed sufficient restrictions on the president's authority to prohibit shipments of oil produced in excess of state law, the Court could have easily fit this case into at least one of the delegation categories noted above. The president's delegated authority was very narrow. He had only to ascertain whether and when oil traveling in interstate commerce had been produced in excess of state ceilings on production. He was not to determine what to prohibit from traveling or under what circumstances a prohibition should occur. The criteria for such decisions were outlined in the statute.[87]

The question of standards or principles was not the deciding factor in the Court's decision in *Panama*. Rather, the key factor was the Court's recognition that "[t]he question is not of the intrinsic importance of the particular statute . . . but of the constitutional processes of legislation which are an essential part of our system of government."[88]

The *Schechter* Court struck down a sweeping delegation of authority, holding that the delegation of power to the president in section 3 of the National Industrial Recovery Act of 1933 was both unconstitutional on its face and as applied.[89] The policy standards were the same as those in *Panama*,[90] but the delegation included power to approve detailed codes of fair competition on the president's own initiative or upon application by the

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84. *Id.* at 427-28.

85. *Id.* at 427-29.

86. *Id.* at 428.

87. *Id.* at 406.

88. *Id.* at 430. Professor Davis believes that this decision is best explained by extraneous factors such as (1) other parts of the act providing for "delegations running riot," and (2) the fact that the contents of the code concerning criminal liability were not readily ascertainable. 1 K. DAVIS, *supra* note 75, § 3.8.

89. 295 U.S. at 495.

90. *See* National Industrial Recovery Act of 1933, Pub. L. No. 67, ch. 90, § 1, 48 Stat. 195 (1933-1934) (declared unconstitutional by A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

trade associations or industries affected—a much broader authority than merely determining when a prescribed condition was met.[91] Although the Court's opinion focused on the absence of standards or restrictions to guide the use of the powers granted,[92] the scope of the delegated powers and discretion granted to the president in "approving or prescribing codes" was also determinative.[93]

Although the rationale of the *Schechter* and *Panama* opinions arguably has been "abandoned by the Court for all practical purposes,"[94] some comments in recent cases indicate that the nondelegation principle, at least in theory, retains some vitality.

B. Recent Decisions

Three dissenting Justices in *Arizona v. California*[95] referred to the nondelegation doctrine when they argued that

> [t]he delegation of . . . unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts. . . . The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. *First,* it insures that the fundamental policy decisions in our society will be made not by

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91. *Compare Schechter,* 295 U.S. at 521-22, 538-39, *with Panama Refining Co.,* 293 U.S. at 406, 415.

92. 295 U.S. at 530-41. The Court summarized its discussion of standards by stating:

> Section 3 of the Recovery Act . . . supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one.

Id. at 541.

93. *Id.* at 541-42.

94. Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring); National Cable Television Ass'n v. United States, 415 U.S. 336, 352-53 (1974) (Marshall, J., dissenting).

95. 373 U.S. 546 (1963). The Supreme Court in this case upheld the delegation of authority to the secretary of the interior to use his discretion within certain limits in determining the apportionment of water along the Colorado River and its tributaries. The statute in question could be interpreted to limit California's share of certain water to between 3,000,000 and 4,400,000 acre-feet. However, the statuto contained no apportionment standards within the limits. California argued for application of the law of prior apportionment in determining each state's share. But the Court held that "the Secretary . . . is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own." *Id.* at 593.

> an appointed official but by the body immediately responsible to the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.[96]

In 1967 Justice Brennan made a similar argument:

> Because the statute contains no meaningful standard by which the Secretary is to govern his designations, and no procedures to contest or review his designations, . . . [it] is constitutionally insufficient to mark "the field within which the [Secretary] is to act so that it may be known whether he has kept within it in compliance with the legislative will."[97]

In *National Cable Television Association v. United States*[98] the majority opinion invoked the *Schechter* nondelegation doctrine[99] to narrow the statutory language at issue—which otherwise could have been understood as delegating to the FCC the power to tax—and thus avoided a serious constitutional question. In *National Cable* a trade association representing community antenna television (CATV) systems challenged an FCC fee schedule. The schedule was imposed pursuant to a statutory standard requiring fees to "be fair and equitable taking into consideration direct and indirect cost to the Government, *value to the recipient, public policy or interest served, and other pertinent facts* . . . ."[100] If the statute did no more than permit the FCC to impose fees measured by the "value to the recipient," no serious question of unconstitutional delegation would have been involved. But the statute also permitted the FCC to consider the "public policy or interest served, and other pertinent facts" in levying fees. The statute reasonably could be interpreted as delegating to the FCC the authority to tax. In order to avoid constitutional problems, Justice Douglas, writing for the majority, opined that because "[i]t would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal

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96. *Id.* at 626 (Harlan, J., with Stewart, J., and Douglas, J., dissenting in part) (emphasis in original) (citations and footnotes omitted).

97. United States v. Robel, 389 U.S. 258, 272-73 (1967) (Brennan, J., concurring) (quoting Yakus v. United States, 321 U.S. 414, 425 (1944)). Justice Brennan would apparently restrict the nondelegation doctrine to cases in which protected freedoms and criminal sanctions are involved. *See* 389 U.S. at 276.

98. 415 U.S. 336 (1974).

99. *Id.* at 342.

100. Independent Offices Appropriations Act of 1952, Pub. L. No. 137, tit. V, 65 Stat. 268, 290 (codified as amended at 31 U.S.C. § 9701 (1982)) (emphasis added).

agency the taxing power, [the statute should be read] narrowly as authorizing not a 'tax' but a 'fee.' "[101] This construction virtually wrote out of the statute the phrase "public policy or interest served, and other pertinent facts" by limiting the FCC's power to consideration of the "value to the recipient."

The *National Cable* Court seemed to indicate that Congress must be held responsible for exercising the taxing power itself. The power to tax is one of the most important legislative powers in the Constitution.[102] Chief Justice Marshall indicated why the taxing power was to he a function of the legislative branch when he said: "The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."[103] The *National Cable* Court warned Congress that certain responsibilities may not be delegated even though Congress itself may constitutionally exercise the power in question. Appropriate factors to consider in determining whether a case fits within the *National Cable* nondelegation principle are (1) whether the power was properly vested in Congress, and (2) whether the power sought to be delegated is resistant to the formulation of manageable governing standards.[104]

Kent v. Dulles[105] involved a problem of statutory construction similar to that in *National Cable*. *Kent* involved a broad grant of authority to the secretary of state to "grant and issue passports . . . under such rules as the President shall designate and prescribe."[106] The regulations required passport applicants "to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist

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101. 415 U.S. at 341.

102. One of the dominant themes of the revolutionary heritage of the Founding Fathers was decrying taxation without representation. Chief Justice Marshall observed that "the power to tax involves the power to destroy." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819). The *National Cable* Court quoted Justice Holmes's rejoinder: "The power to tax is not the power to destroy while this Court sits." 415 U.S. 336, 341 n.4 (1974) (quoting Panhandle Oil Co. v. Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting)).

103. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819).

104. Besides the power to levy taxes, the power to impeach is an excellent example of a power assigned to Congress—the House to accuse and the Senate to try. For an insightful discussion of this framework as applied to the impeachment power, see J. FREEDMAN, *supra* nota 8, at 86-88.

105. 357 U.S. 116 (1958).

106. *Id.* at 123.

Party."[107] Kent challenged the constitutionality of this requirement. If the statute authorized the secretary to grant or withhold passports because of beliefs or associations, the Court would have been faced with serious constitutional questions. But the Court held that Congress had not delegated power to restrict travel on the basis of beliefs and associations. Thus, by narrowly construing the statute the Court avoided a potential first amendment problem. The Court also gave Congress a chance to reconsider its delegation of power while being aware that affirming the secretary's policy would call fundamental rights into question.

The *Kent* case indicated that a broad delegation may be overturned not only by holding it invalid, but by implying a much narrower standard in order to save the statute. *Kent* advanced another possible application of the nondelegation doctrine: If Congress's ability to accomplish its substantive objective is constitutionally doubtful, such as in cases in which Congress has delegated power that threatens to invade personal constitutional rights, then the delegation should be invalidated unless it can be shown that (1) Congress has fulfilled its responsibility to make basic policy decisions before delegating its power, and (2) the delegation accurately reflects that Congress has considered and decided between the various alternatives.[108]

When elected representatives cease legislating and pass that responsibility on to appointed government bureaucrats, responsible government ceases; unelected officials in the executive branch and, derivatively, unelected judges are often forced by default to assume the role of legislators. Two recent decisions vividly illustrate the problem that occurs when Congress delegates to administrative agencies the responsibility of deciding questions of major policy.

In *Industrial Union Department v. American Petroleum Institute*[109] and *American Textile Manufacturers Institute, Inc. v. Donovan*[110] nine unelected justices considered whether "the statistical possibility of future deaths should ever be disregarded

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107. *Id.* at 118 n.2.

108. *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). This case supports the proposition that government action bordering on constitutional infringement of fundamental rights can be held unconstitutional if a basic policy determination is made by someone other than Congress. *Id.* at 116. Congress's expression of its will may very well be the decisive factor.

109. 448 U.S. 607 (1980).

110. 452 U.S. 490 (1981).

in light of the economic costs of preventing those deaths."[111] The *American Petroleum* case determined the validity of a standard set by the secretary of labor fixing an exposure limit on airborne benzene at one part benzene per million parts air. Under the Occupational Safety and Health Act,[112] the secretary of labor is given broad authority to promulgate safety regulations of working conditions. Section 6(b)(5) authorizes the secretary to promulgate a standard for toxic substances that "most adequately assures to the extent feasible . . . that no employee will suffer material impairment of health . . . even if such employee has regular exposure."[113] Section 3(8) defines a standard as being "reasonably necessary or appropriate to provide safe or healthful employment."[114]

The plurality in *American Petroleum* stated that section 3(8) "requires the Secretary, before issuing any standard, to determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment" and found that "the Secretary did not make the required thresbold finding."[115] The dissenting justices believed that the word "feasible" was determinative and construed it to require implementation of safety measures unless it would bankrupt the industry. The Court split four to four on whether the Occupational Safety and Health Administration (OSHA) was authorized to forbid carcinogen exposure to avoid possible loss of future lives up to the point of bankrupting the industry. Since Justice Rehnquist believed Congress had unconstitutionally delegated authority to the secretary to make such a determination, he concurred with the plurality's decision to set aside the standard.[116]

Justice Rehnquist argued that if congressional delegation is ambiguous or unclear, it is unconstitutional. The nondelegation doctrine "ensures . . . that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will." It "guarantees . . . an 'intelligible principle' to guide the exercise of the delegated discretion," and "ensures that courts charged with reviewing the exercise of

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111. 448 U.S. at 672 (Rehnquist, J., concurring); *see Donovan*, 452 U.S. at 506-22.

112. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970-1971) (codified at 29 U.S.C. §§ 651-678 (1982)).

113. 29 U.S.C. § 655(b)(5) (1982).

114. *Id.* § 652(8).

115. 448 U.S. at 639-40.

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

delegated legislative discretion will he able to test that exercise against ascertainable standards." He concluded: "I believe the legislation at issue here fails on all three counts."[117]

Justice Rehnquist went on to explain that the "decision [at issue] is quintessentially one of legislative policy. For Congress to pass that decision on to the Secretary in the manner it did violates . . . John Locke's caveat . . . that legislatures are to make laws, not legislators."[118] He noted that neither the statutes at issue nor their legislative history "provide the Secretary with any guidance that might [have led] him to his . . . conclusion."[119] Finally, he "suggest[ed] that the standard of 'feasibility' renders meaningful judicial review impossible."[120]

The *Donovan* Court, in a five to three decision, upheld an OSHA cotton dust standard. At issue was whether the costs of imposing such a standard bore a reasonable relationship to its benefits. The same statute, section 6(b)(5), was again the subject of dispute. More particularly, the question was whether the words "to the extent feasihle" required cost-henefit analysis—the issue left unresolved in *American Petroleum.*[121] The Court held that the costs did not have to bear a reasonable relationship to the benefits.[122]

Justice Rehnquist dissented and cited to his concurring opinion in *American Petroleum.* He again emphasized that

> Congress simply abdicated its responsibility for the making of a fundamental and most difficult policy choice—whether and to what extent "the statistical possibility of future deaths should . . . be disregarded in light of the economic costs of preventing those deaths. . . ." That is a "quintessential legislative" choice and must be made by elected representatives of the people, not by nonelected officials in the Executive Branch.[123]

Justice Rehnquist concluded that Congress failed to choose between three positions regarding cost-benefit analysis—to require, prohibit, or permit it. Congress failed to decide because it

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117. *Id.* at 685-86 (Rehnquist, J., concurring).

118. *Id.* at 686 (Rehnquist, J., concurring).

119. *Id.*

120. *Id.*

121. This issue was not reached in *American Petroleum,* since "the Secretary did not make the required threshold finding" that the standard was "reasonably necessary and appropriate to provide safe or healthful employment" under § 3(8). *Id.* at 639-40.

122. 452 U.S. at 506-12.

123. *Id.* at 547 (Rehnquist, J., dissenting).

simply could not. "The words 'to the extent feasible' were used to mask a fundamental policy disagreement in Congress. I have no doubt that if Congress had been required to choose . . . there would have been no bill for the President to sign."[124]

These cases, along with recent promptings from several prominent scholars, suggest that the time is ripe for reviving the nondelegation doctrine.[125] Admittedly, Congress has been called upon to deal with novel and increasingly complex problems. Furthermore, Congress is often ill-equipped to deal with many of these complex problems on the level required to protect its constituents. Thus, Congress has an incentive to take a broad stroke at the problem and let the administrative experts fill in the details.[126] But situations requiring experts must be distinguished from those in which Congress delegates its power for internal political reasons or to avoid political responsibility. Legislators and commentators have been able to make the distinction.[127] Federal and state courts are also aware of the distinction between subject matter permeated with technological complexities and subject manner fairly amenable to a common

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124. *Id.* at 545-46 (Rehnquist, J., dissenting).

125. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW 131-34 (1980); J. FREEDMAN, *supra* note 8, at 78-94; T. LOWI, *supra* note 9, at 129-46, 297-99; Wright, Book Review, 81 YALE L.J. 575, 582-87 (1972) (reviewing K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969)). *Cf.* W. DOUGLAS, GO EAST YOUNG MAN 217 (1974). *But see* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 49-51 (1969); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1693-97 (1975). Although Professors Davis and Stewart both oppose any efforts to revitalize the doctrine with respect to congressional enactments, both have made alternative proposals aimed at accomplishing what they consider to be the same goals the nondelegation doctrine accomplishes. Professor Davis would require that agencies, rather than Congress, devise standards to guide their decision making and would hold the agencies to those standards. Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 728-29 (1969).

126. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 37 (1965); Stewart, *supra* note 125, at 1695.

127. *Compare* 122 CONG. REC. H31,634 (1976) (statement of Rep. Levitas) ("Congress is far too lax in delegating authority broadly and without guidelines to administrative agencies. When hard decisions have to be made, we pass the buck to the agencies with vaguely worded statutes. Who can, or should, vote against safe cars, clean air, or nondiscrimination? But when the implementing regulations [are formulated] . . . the actual benefit of safe cars, clean air, or nondiscrimination [is] called into question."), *with id.* at H31,617-19 (statement of Rep. Flowers) (supporting congressional delegation when the "complexities of our day require that the Government have the flexibility to meet varied demands and problems").

Commentators have also argued the necessity of delegation while recognizing the dichotomy suggested in the text. *E.g.*, Fuchs, *Introduction: Administrative Agencies and the Energy Problem*, 47 IND. L.J. 606, 608 (1972); Stewart, *supra* note 125, at 1695-96.

sense policy decision or a layman's standard.[128] Such a distinction could improve the effectiveness of judicial review.

However, rather than resolve difficult policy issues, Congress often compromises by delegating to an agency decisionmaking power accompanied by some vague standard such as "to the extent feasible."[129] Whether Congress simply wishes to avoid

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128. *See, e.g.*, Addison v. Holly Hill Fruit Prod., Inc., 322 U.S. 607, 618 (1944); Clean Air Constituency v. California State Air Resources Bd., 11 Cal. 2d 801, 818, 523 P.2d 617, 627, 114 Cal. Rptr. 577, 587 (1974).

129. *See, e.g., Donovan*, 452 U.S. at 545-46 (Rehnquist, J., dissenting). Quoting his concurring opinion in *American Petroleum*, Justice Rehnquist went on to say:

> In drafting § 6(b)(5), Congress was faced with a clear, if difficult, choice between balancing statistical lives and industrial resources or authorizing the Secretary to elevate human life above all concerns save massive dislocation in an affected industry. That Congress recognized the difficulty of this choice is clear. . . . That Congress chose, intentionally or unintentionally, to pass this difficult choice on to the Secretary is evident from the spectral quality of the standard it selected.

Id. at 547 (quoting *American Petroleum*, 448 U.S. at 685); *see also* Rodway v. United States Dept. of Agriculture, 514 F.2d 809 (D.C. Cir. 1975). In *Rodway* food stamp recipients sought to determine whether the allotment system devised by the department of agriculture (DOA) fulfilled the statutory directive under The Food Stamp Act of 1964, Pub. L. No. 88-525, § 4(a), 78 Stat. 703, 704 (codified as amendod at 7 U.S.C. § 2013 (1982)). The words "an opportunity . . . to obtain a nutritionally adequate diet" were replaced by the words "an opportunity to obtain a more nutritious diet" by an amendment to The Food Stamp Act in 1977. Food and Agriculture Act of 1977, Pub. L. No. 95-113, tit. XIII, § 4(a), 91 Stat. 913, 961 (amending 7 U.S.C. § 2013 (1976)).

The legislative history of this provision shows that the imprecise phrase "nutritionally adequata" was chosen over several more specific alternative proposals. These proposals would have fixed a month's allotment for a family of four at various points from $106 to $134 by focusing on one of two alternative allotment plans previously prepared by the DOA. The "nutritionally adequate" language was originally proposed by the Nixon administration and was included in the bill passed by the House. There are some indications that the administration and the House originally intended the phrase "nutritionally adequate" to be synonymous with the less general of the two DOA plans—the so-called economy plan, which would have allotted $106 to a family of four. *See, e.g.*, H.R. REP. No. 1402, 91st Cong., 2d Sess. 31, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 6025, 6045 (dissenting views of Reps. Foley and Lowenstein). The Senate, however, precipitated a conference committee battle by adopting the DOA'a so-called low-cost plan, which would have allotted $134 to a family of four. *See* CONF. REP. No. 1793, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 6051, 6052. In conference the Senators proposed a compromise which would have "split the difference" between the two plans, allotting $120 for a family of four. 116 CONG. REC. S44,441 (1970) (remarks of Sen. Miller). Although the House prevailed on the Senate to accept the "nutritionally adequate" language, by this time the phrase's meaning had become even less clear. The Senate agreed to the House language only after being assured that House supporters of the "nutritionally adequata" provision "did not care whether [the allotment for a family of four] cost $50, $100 or $150; whatever it cost [it] must provide for an adequate and nutritious diet." *Id.* at 44,440-41.

In light of the availability of the two DOA plans and other supporting data, Congress itself had the ability to make an informed policy choice as to the exact amount of

congressional impasse or to evade responsibility for highly controversial legislation,[130] delegation subverts the democratic decision-making process, imposes a substantial legislative burden on the administrative process, and makes judicial review a legislative function. The next section outlines a framework of analysis that offers one workable solution to these problems.

C. A Proposed Analytical Framework

The preceding cases yield the following framework as an alternative for determining the constitutionality of congressional delegations of power:

(1) A heavy presumption should exist in favor of popularly elected representatives of the people making important policy decisions.

(2) The factors weighing against delegation of power must be balanced against the need for and benefits to be gained by delegation.

(a) Factors weighing against delegation include:

(1) the subject matter has been constitutionally committed to Congress;

(2) the subject matter is resistant to the formulation of manageable governing standards;

(3) precise and meaningful standards are absent;

(4) existing standards are vague or general;

(5) the delegation involves constitutionally protected freedoms, or criminal sanctions;

(6) Congress has failed to make basic policy decisions before delegating or the delegation does not reflect a policy decision that Congress has made; and

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money the government should spend on upgrading the diets of the nation's low income citizens. However, the price of the Senate's hurried passage of the conference bill on the last day of 1971 was its decision to postpone the difficult political decision, leaving it for arguably lees qualified (if only because not elected) administrators to make and judges to review.

130. Representative Flowers has admitted:

> We in the Congress pass myriad laws and pieces of legislation that go on the books, and we invest the agencies with all of this vast power to make rules and regulations, and then we stand back and say when our constituents are aggrieved or oppressed hy various rules and regulations, "Hey, it's not me. We didn't mean that. We passed this well-meaning legislation and we intended for those people [in various agencies] to do exactly what we meant, and they did not do it."

122 CONG. REC. H31,622 (1976) (stetement of Rep. Flowers).

(7) the policy decision to be made is relatively important.

(b) Factors weighing in favor of delegation include:

(1) there is an expressed need for delegation;

(2) delegation would achieve specific benefits;

(3) the issues are complex;

(4) the decision requires technological or industrial expertise;

(5) policy determinations are not necessary to the decision;

(6) the issues are related to foreign relations, trade, or commerce;

(7) the delegation involves merely ascertaining whether and when conduct falls within a previously established, well-defined statute; and

(8) the delegation involves only execution or enforcement responsibilities pursuant to a previously established statute.

All of these factors are not necessarily entitled to equal weight but must be carefully considered in light of the presumption against delegation and the facts and circumstances of each case that indicate a special need for delegation. A framework such as the one proposed here may discourage irresponsible delegation of congressional authority, promote more efficient legislative government, and ensure proper guidelines when Congress does choose to delegate. The Supreme Court has recently taken a step, discussed in the next section, that could further these ends.

III. Congressional Responsibility and the Legislative Veto Case

In one of the most significant constitutional cases in recent history, *Immigration and Naturalization Service v. Chadha*,[131] the Supreme Court held unconstitutional section 244(c)(2) of the Immigration and Nationality Act.[132] That act allowed either house of Congress to override by legislative veto[133] a decision by

131. 103 S. Ct. 2764 (1983).

132. Immigration and Nationality Act, Pub. L. No. 414, ch. 477, § 244(b), 66 Stat. 163, 216 (1952) (codified as amended at 8 U.S.C. § 1254(c)(2) (1982)).

133. The legislative veto is a procedural device that permits Congress to control executive or agency actions outside the ordinary legislative process, although the scheme must originate in a statute passed by the usual means, including presidential approval or a two-thirds vote of both houses to override the Presi-

the Attorney General to suspend the deportation of an alien.

> dent's veto. In typical form, the device works as follows. The underlying statute provides that the agency must report proposed actions of a prescribed type to Congress before they take effect. Any such action may proceed after a stated period (usually thirty to ninety days), unless Congress formally states its disapproval within that time. The statute specifies the precise congressional response necessary. Some schemes permit a single committee to block the initiative. More commonly, a single house's adoption of a resolution of disapproval is needed. Other schemes require disapproving action by both houses, in the form of a concurrent resolution.

Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 256 (1982) (footnotes omitted).

Commentary generally favorable to the legislative veto device, both on prudential and constitutional grounds, includes, Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislotive Prerogatives*, 52 IND. L.J. 323 (1977); Boisvert, *A Legislative Tool For Supervision of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638 (1956-57); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH L. REV. 467 (1962); Dry, *The Congressional Veto and Constitutional Separation of Powers*, in THE PRESIDENCY IN THE CONSTITUTIONAL ORDER 195 (J. Bessette & J. Tulis eds. 1981); Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Nathanson, *Seporation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064 (1981); Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953); Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 U. KAN. L. REV. 277 (1975); Rodino, *Congressional Review of Executive Action*, 5 SETON HALL L. REV. 489 (1974); Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351 (1978); Schwartz, *Legislative Control of Administrative Rules and Regulations: I. The American Experience*, 30 N.Y.U. L. REV. 1031 (1955); Stewart, *Contitutionality of the Legislative Veto*, 13 HARV. J. ON LEGIS. 593 (1976); Note, *"Laying on the Table"—A Device for Legislative Control Over Delegated Powers*, 65 HARV. L. REV. 637 (1952).

Commentary generally unfavorable to the legislative veto, on constitutional or prudential grounds, or both, includes J. Bolton, THE LEGISLATIVE VETO: UNSEPARATING THE POWERS (1977); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C.L. REV. 423 (1978); FitzGerald, *Congressional Oversight or Congressional Foresight: Guidelines From the Founding Fathers*, 28 AD. L. REV. 429 (1976); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 HARV. J. ON LEGIS. 735 (1979); Scalia, *The Legislative Veto: A False Remedy for System Overload*, REG., Nov.-Dec. 1979, at 19; Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975); Comment, *Congressional Oversight of Administrative Discretion: Defining the Proper Role of the Legislative Veto*, 26 AM. U.L. REV. 1018 (1977); Note, *Congressional Veto of Administrative Action: The Probable Response to a Constitutional Challenge*, 1976 DUKE L.J. 285; Recent Developments, *The Legislative Veto in the Arms Export Control Act of 1976*, 9 LAW & POL'Y IN INT'L BUS. 1029 (1977); *see also* McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977) (avoids statements implying ultimate approval or rejection of the legislative veto, but poses pointed questions about its exercise and states a preference for other means of controlling delegations); *Oversight and Review of Agency Deci-*

The immediate impact of *Chadha* is substantial: "The Court not only invalidate[d] § 244(c)(2) . . . but also sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.' "[134] But the subtle implications of *Chadha* may be even more far-reaching than its immediate effect. The decision's implicit imperative is that Congress ought not delegate important policy decisions. The effect that this decision will have on administrative government and delegation is uncertain, but it may mean that (1) there will be less delegation of sensitive policy matters, and (2) when delegation does occur, it will be accompanied by more effective standards.

In holding the one-house legislative veto unconstitutional, the *Chadha* Court returned to a stricter interpretation of separation of powers. After quoting article I, section 1 and the bicameral and presentment clauses in article I, section 7, the Court stated: "These provisions of Art. I are integral parts of the constitutional design for the separation of powers. We have recently noted that '[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents they drafted.' "[135] The Court also emphasized the "Framers['] [conviction] that the powers conferred on Congress were the powers to be most carefully circumscribed."[136]

Justice White's dissenting opinion sheds light on Congress's motive in using the legislative veto: "It has become a central means by which Congress secures the accountability of executive and independent agencies."[137] Indeed, accountability is vital to republican forms of government. But Justice White's analysis failed to recognize the reason underlying the special need for administrative accountability to Congress: impermissible congressional delegation. The answer is not, as Justice White advocated, making agencies more responsible to Congress via the legislative veto. This approach only enables Congress to further avoid political responsibility. Congress's only action under a veto resolution is to disapprove the regulation in question; Congress is not required to compare the agency's regulation against other alter-

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sionmaking Part II, Morning Session, 28 AD. L. REV. 661 (1976) (views of Congressman Levitas, Assistant Attorney General Scalia, and others).

134. 103 S. Ct. at 2792 (White, J. dissenting).

135. *Id.* at 2781 (quoting Buckley v. Valeo, 424 U.S. 1, 124 (1976)).

136. *Id.* at 2782.

137. *Id.* at 2793 (White, J., dissenting).

natives. Nor is Congress required or motivated to propose alternatives. This is so because the agency will ultimately determine whether another alternative will be presented for congressional review. Thus, the legislative veto is very convenient for congressmen because it does not obligate them to state the reasons behind their vote of disapproval on highly controversial issues. The congressmen can easily justify their votes without offending parties on either side of the issue. Congressmen need only find some minor technical flaw in the details of the regulation. This flexibility is politically very attractive.[138]

The Constitution requires that Congress address difficult policy issues, even in the face of political accountability. The possibility of a legislative veto encourages broad standardless delegation, and allows Congress to receive credit for addressing important policy questions without taking direct responsibility for affirmative action. Without the legislative veto provision, Congress will be left with the choice either to refrain from delegation or to emphasize specific standards when it does delegate.

IV. Conclusion

Judge Henry Friendly in his book, *The Federal Administrative Agencies,* observed:

> We still live under a Constitution which provides that "all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives"; even if a statute telling an agency "Here is the problem: deal with it" be deemed to comply with the letter of that command, it hardly does with the spirit.[139]

Judicial application of the balancing test proposed in this comment would help ensure that congressional delegations of legislative power comply with both the letter and spirit of the constitutional command that "all legislative powers . . . be vested in a Congress." Moreover, the *Chadha* decision invalidating the legislative veto could motivate Congress to legislate more responsibly. The nondelegation doctrine, born of separation of powers, must be revitalized to help curb the abuses of legislative power

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138. Martin, *supra* note 132, at 272-73.

139. H. Friendly, The Federal Administrative Agencies 21-22 (1962).

that occur when Congress delegates its power to administrative officials.

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