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Delegation and Its Discontents (reviewing David Schoenbrod, Power Without Responsibility

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BOOK REVIEW

DELEGATION AND ITS DISCONTENTS

POWER WITHOUT RESPONSIBILITY. By David Schoenbrod. Yale University Press, 1993. Pp. ix, 197. $28.50.

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Congresses come and go, but no matter what their substantive agendas, all in the last century have relied extensively on delegation of policymaking authority to administrative agencies. Agency regulations touch almost every facet of our daily lives, from the houses we live in to the food we eat, and they strongly influence, if not control, the course of American business. The massive transfer of power from electorally accountable members of Congress to comparatively faceless bureaucrats has led to what some have termed a peaceful revolution in governmental form.[1]

Most academics have decried the impact of such extensive delegations on American life,[2] lamenting both the inordinate benefits obtained by concentrated interests and the deviation from representative democracy that—in the view of Theodore Lowi—has left us serfs without a direct say in governance.[3] The problem of delegation occupies center stage in any account of public law today.[4]

Despite the near universal disapproval of delegation, most commentators have accepted the demise of a judicially imposed nondelegation doctrine, which requires Congress in delegating authority to articulate, at

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1. See Bruce Ackerman, We the People: Foundations 47–50 (1991); Cass R. Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 447–48 (1987). Congress has conferred discretionary power on agencies irrespective of party allegiance and views on regulation. See Theodore J. Lowi, Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power, 36 Am. U. L. Rev. 295, 297–99 (1987).

2. See, e.g., John H. Ely, Democracy and Distrust 131–34 (1980); James O. Freedman, Crisis and Legitimacy 80–94 (1978); Theodore J. Lowi, The End of Liberalism 93 (2d ed. 1979); Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123, 135–38, 153–58 (1994); Symposium, The Uneasy Constitutional Status of the Administrative Agencies, 36 Am. U. L. Rev. 277 (1987). But see Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81 (1985) (defending delegation).

3. See Lowi, supra note 1, at 321. More particularly, Lowi writes that "[s]erfdom is a condition of dependency on patronage," with the patronage dispensed by unelected bureaucrats in the agencies. Id.

4. See, e.g., Alfred C. Aman, Jr. & William T. Mayton, Administrative Law 9–40 (1993); 1 Kenneth C. Davis, Administrative Law Treatise 149–223 (2d ed. 1978); Richard J. Pierce, Jr. et al., Administrative Law and Process 32–64 (2d ed. 1991); Bernard Schwartz, Administrative Law 41–74 (3d ed. 1991).

a minimum, intelligible principles to cabin subsequent agency action.[5] They offer various justifications, including that the electorate has ratified the administrative state,[6] that too much delegation has occurred to turn back the clock,[7] that delegation is inevitable given the complexities of governance today,[8] and that the judiciary cannot apply a coherent test to distinguish permissible from impermissible grants of authority.[9] Although individual jurists at times have joined the chorus of those condemning delegation of policymaking authority and have voted to invalidate particular enactments,[10] they have been more than willing on other occasions to uphold extensive delegation.[11] In short, the nondelegation doctrine seemingly has died a death not of neglect, but of will.

In *Power Without Responsibility*, David Schoenbrod manifests little tolerance for the apologists of delegation. He relentlessly attacks contemporary congressional practice and judicial, as well as academic, acquiescence

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5. See Ackerman, supra note 1, at 50, 107–08; Freedman, supra note 2, at 79; Greene, supra note 2, at 135–36; Richard J. Pierce, Jr., Political Accountability and Delegated Power: A Response to Professor Lowi, 36 Am. U. L. Rev. 391, 393–403 (1987); Richard B. Stewart, Beyond the Delegation Doctrine, 36 Am. U. L. Rev. 323, 324–28 (1987) [hereinafter Stewart, Delegation]; Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1693–97 (1975) [hereinafter Stewart, Reformation]; Sunstein, supra note 1, at 447–48. An intelligible principle can guide agencies in implementing or fleshing out legislation and courts in confining agencies to legislative direction. See infra text accompanying notes 53–54.

6. See Ackerman, supra note 1, at 47–50.

7. See E. Donald Elliott, *INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto, 1983 Sup. Ct. Rev. 125, 173–74; Sunstein, supra note 1, at 492, 498–99.

8. See 1 Davis, supra note 4, at 149–157; Louis L. Jaffe, Judicial Control of Administrative Action 28–40 (1965).

9. See Greene, supra note 2, at 135–36; Pierce, supra note 5, at 393–403; Stewart, Delegation, supra note 5, at 324–28; Stewart, Reformation, supra note 5, at 1693–97.

10. See, e.g., American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543–48 (1981) (Rehnquist, J., dissenting) (finding that OSHA vested with insufficient guidelines in balancing worker safety against economic efficiency); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (finding that Congress improperly delegated to Secretary of Labor responsibility to balance statistical possibility of future deaths against economic costs of preventing these deaths); Hampton v. Mow Sun Wong, 426 U.S. 88, 114–16 (1976) (Stevens, J.) (limiting authority of administrative agency in absence of explicit delegation); National Cable Television Ass'n v. United States, 415 U.S. 336, 340–43 (1974) (Douglas, J.) (finding that Congress vested FCC with authority only to impose fees on broadcasters for benefits provided to them, curtailing agency's ability to tax broadcasters to support benefits shared by all); Arizona v. California, 373 U.S. 546, 625–26 (1963) (Harlan, J., dissenting) (finding Secretary's discretion to allocate water unbounded).

11. See, e.g., Touby v. United States, 111 S. Ct. 1752, 1756–57 (1991) (upholding delegation to Attorney General to schedule drug as controlled substance if "necessary to avoid an imminent hazard to the public safety"); Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 223–24 (1989) (permitting delegation of power to set schedule of user fees to Department of Transportation, despite *National Cable Television Ass'n*); Mistretta v. United States, 488 U.S. 361, 374 (1989) (upholding delegation to Sentencing Commission of the power to create mandatory sentencing guidelines).

to that practice. In analyzing the theoretical and pragmatic difficulties posed by delegation of lawmaking authority to agencies, Schoenbrod draws on his past experience as a litigator for the Natural Resources Defense Council (pp. 78–79, 120–21, 147–48). For instance, he concludes that the overarching problem in implementing the Clean Air Act has not been agency capture, state recalcitrance, or judicial myopia, but rather Congress' initial failure to specify the necessary tradeoffs between clean air and jobs (pp. 58–81). He therefore urges adoption of a reinvigorated nondelegation doctrine to stanch the flow of rule-making authority from Congress to unelected bureaucrats. Few who consider Schoenbrod's detailed analysis of the political and economic ramifications of delegation—the excessive benefits to concentrated interests and the political disenfranchisement of citizens—will fail to be impressed by the inefficiency and inequity of many of the resulting administrative schemes. Schoenbrod's book is the most comprehensive analysis to date addressing the failings of congressional delegation of lawmaking authority.[12]

Part I of this Essay reviews Schoenbrod's carefully crafted analysis of the policy ramifications of congressional delegation. Using case studies involving the marketing of navel oranges and industry compliance under the Clean Air Act, Schoenbrod portrays the baneful consequences of delegation. Interweaving public choice theory and republican insights, Schoenbrod then presents a substantial, though not airtight, case against delegation in general. Moreover, he innovatively argues that Congress can regulate effectively without relying on bureaucrats in agencies. Schoenbrod's many arguments condemning delegation as bad public policy, however, do not preclude the possibility that delegation in a limited range of circumstances will serve the public interest.

Part II focuses more extensively on Schoenbrod's proposal for a newly constituted nondelegation doctrine. Although he agrees with most academics that the current nondelegation doctrine is moribund, Schoenbrod vigorously asserts that a judicially crafted test to restrain Congress is not only possible, but absolutely essential to safeguarding liberty. Schoenbrod's originality lies in his exhortation to judges to invalidate all delegation that articulates goals instead of prescribing rules of private conduct. Despite the surface appeal of a rules/goals test, Part II questions its administrability as well as effectiveness in preventing agencies and courts from fashioning rules shaping private conduct.

Finally, Part III disputes the constitutional pedigree of Schoenbrod's proposal. Like many, Schoenbrod argues that Article I of the Constitution prohibits Congress from delegating its lawmaking authority

12. Schoenbrod has developed many of the arguments previously. See David Schoenbrod, The Delegation Doctrine: Could the Court Give it Substance?, 83 Mich. L. Rev. 1223, 1243–46, 1284–85 (1985); David Schoenbrod, Goals Statutes or Rules Statutes: The Case of the Clean Air Act, 30 UCLA L. Rev. 740, 751–56 (1983); David Schoenbrod, Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine, 36 Am. U. L. Rev. 355, 368–70 (1987).

to any other entity.[13] He posits that the Constitution vests the lawmaking function exclusively in the legislature's hands.[14] But there is neither textual nor historical warrant for Schoenbrod's assertions, and Part III sketches the dangers implicit in understanding the separation of powers doctrine to accord each branch an exclusive function that cannot be exercised by the others. Part III concludes by suggesting that judges can nevertheless help to restrain Congress through prudent use of a clear statement approach, limiting the reach of delegation when agency action impinges upon constitutional norms.

I. Public Policy Ramifications of Delegation

A. *The Public Choice Critique*

Schoenbrod's policy critique of delegation, based substantially on public choice literature, is largely familiar. According to the public choice account, interested parties seek regulation in the same way that they seek other commodities.[15] Individuals and groups attempt to purchase beneficial regulation from Congress by such means as mobilizing support for particular lawmakers, contributing to their campaigns, and paying generous honoraria (p. 86). The financial and organizational advantages of special interest groups enable them to devote resources to purchasing regulation more readily than dispersed majorities (p. 86). However, members of Congress run the risk of voter displeasure if they overtly sell regulation to special interest groups (pp. 89–91). For this reason, they covertly confer benefits on groups by delegating regulatory authority to agencies, knowing that the exercise of such authority will ultimately line the pockets of influential constituents or special interest groups at the expense of their constituency as a whole (pp. 90–91). Con-

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13. See, e.g., Ernest Gellhorn, Returning to First Principles, 36 Am. U. L. Rev. 345, 349 (1987) ("Modern government's constitutional breach has been its failure to abide by the Constitution's requirement that the legislature make all laws."); Lowi, supra note 1, at 296 (arguing that "delegation of broad and undefined discretionary power from the legislature to the executive branch deranges virtually all constitutional relationships and prevents attainment of the constitutional goal . . . of limitation on power"); Sunstein, supra note 1, at 446–47 ("[T]he New Deal . . . measures have not produced a system that even remotely resembles the constitutional system of checks and balances . . . . [A]gency actors lack electoral accountability and often are not responsive to the public as a whole.").

14. In using the term "lawmaking," Schoenbrod means the power to set rules of conduct, and thus the terms "lawmaking" and "rule-making" to him are virtually identical. I use the term "policymaking" in a broader sense to refer to any governmental act involving political discretion that is binding. Thus, "policymaking" includes law interpretation and enforcement choices that Schoenbrod would not generally classify as "lawmaking."

15. For the general public choice analysis, see, e.g., Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction (1991) (discussing many aspects of public choice analysis and some of their possible applications); Dennis C. Mueller, Public Choice II: A Revised Edition of *Public Choice* (1989); Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (Harv. Econ. Studies Series No. 124, 2d ed. 1971); Peter H. Aranson et al., A Theory of Delegation, 68 Cornell L. Rev. 1, 21–62 (1982).

centrated interests, whether Sunkist Growers, Inc. or the Chemical Manufacturers Association, wield disproportionate influence over public policy.

For instance, Schoenbrod convincingly asserts that, in the absence of delegation, Sunkist would not have been able to obtain advantageous marketing orders from the Secretary of Agriculture limiting the quantity of fresh oranges allowed to be shipped for consumption within the country (pp. 8–9). This quota increases growers' revenues at the expense of consumers (pp. 5–7, 50–51), and Sunkist benefits more than other growers because of its size and role in manufacturing juice and other citrus products (p. 6). Indeed, to preserve its preeminent position, Sunkist successfully used its influence through aggressive lobbying to block referenda among all orange growers on whether to approve the marketing orders (pp. 52–54).

At the same time, delegation of lawmaking authority gives members of Congress more time to engage in casework among constituents and more opportunity to incur the gratitude of concentrated interests affected by the delegation (pp. 85–86, 94–95). Members of Congress intervene before agencies to obtain promises of preferential treatment for influential constituents subject to agency jurisdiction (p. 93). The time legislators currently devote to casework does not serve the public interest because casework is "often at the expense of other citizens waiting to be served by the same agency" (p. 86). Schoenbrod concludes that legislators should not be able to reap personal advantage from casework: "Our legislators have no more right to attach their names to the help given to constituents through public funds than they have to sign personally the Social Security checks that go to their constituents." (Id.)

Through delegation Congress shirks responsibility for some of the most fundamental political questions affecting our society—for example, how to balance the risk of toxic agents in the workplace against jobs,[16] or how to compare the gravity of drug offenses to espionage activities.[17] Congress has failed to agree upon which military bases to close,[18] and which organizations merit broadcast licenses.[19] Yet members of Congress can claim credit for attempting to solve the problems of the environment and the economy by authorizing agencies to tackle the problems, and then distance themselves from the ensuing regulation if unfavorable to their constituents. Delegation permits legislators to "look good" to their constituents without necessarily providing tangible benefits (pp. 86–87).[20] Congress may too readily distribute rights without imposing

16. See Occupational Safety and Health Act, 29 U.S.C. § 655 (1988).

17. See Sentencing Reform Act of 1984, 28 U.S.C. §§ 991–998 (1988).

18. See Defense Base Closure and Realignment Act of 1990, 10 U.S.C. § 2687 (West Supp. II 1990); see also Melissa Healy, Not Playing Politics in Base Closings, Cheney Tells Panel, L.A. Times, Apr. 16, 1991, at A20; Gwen Ifill, Public Debate on Base Closings Disorients Capital's Power Brokers, N.Y. Times, June 23, 1991, at A18.

19. See Communications Act of 1934, 47 U.S.C. §§ 303, 307–308 (1988).

20. Schoenbrod does not argue that all delegation is the product of legislators' self-

commensurate obligations, concealing the tradeoffs that must necessarily follow (p. 9).

Indeed, Schoenbrod further observes that members of Congress might try to benefit politically by excoriating an agency's performance before some constituents while taking credit for the agency's efforts before others (pp. 88–94). Schoenbrod explains that "[j]ust as deficit spending allows legislators to appear to deliver money to some people without taking it from others, delegation allows them to appear to deliver regulatory benefits without imposing regulatory costs. It provides 'a handy set of mirrors . . . by which a politician can appear to kiss both sides of the apple.'" (p. 10).[21] Citizens are confused by the game and fail to hold legislators accountable for the resulting policy choices by administrators. In short, delegation permits members of Congress to maximize credit while minimizing blame for legislation, and the less that legislators appear to make the important policy choices that govern the nation, the more estranged from politics citizens may become (pp. 130–31).

Schoenbrod also notes that delegation of lawmaking authority in detailed statutes (which he terms "narrow delegation," p. 78) can be as problematic as open-ended delegation to agencies to regulate in the public interest (pp. 78–81).[22] Despite the welter of subsidiary rules in detailed laws such as the Clean Air Act, delegation harms the public whenever Congress enacts legislation setting forth goals such as "a safe environment" without stating clearly how those goals are to be met.

The accuracy of the gloomy picture Schoenbrod portrays is of course open to dispute. Members of Congress often act from ideology and not just from the desire to maximize their chance for reelection, as Schoenbrod recognizes (pp. 85–88 & n.23). Citizens may vote for representatives not only on the basis of benefits brought home to their districts, but also on the basis of the candidates' political vision. Some voters also perceive the connection between Congress and agencies and therefore hold legislators responsible for the exercise of delegated authority. Moreover, the nexus between delegation and rent-seeking is inexact: Congress at times is quite specific in approving funding for bridges or particular weapon systems that are likely not needed; and some agencies, whether the Federal Reserve Board or the Securities and Exchange Commission, implement statutory directives in a way that may well serve the public interest. Therefore, prohibiting all delegation might not enhance

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interest, but that much can be explained not only by legislators' narrow desires for reelection, but also by their more general desire to look good to the electorate (p. 88 n.23), even when attempting to act in a public-regarding fashion.

21. Quoting statement of former EPA deputy administrator John Quarles, as quoted in H.R. Rep. No. 410, 96th Cong., 1st sess., pt. 2, at 71 (1979) (dissenting view of Rep. Corcoran).

22. For examples of such open-ended delegations, see Securities Exchange Act of 1984, 15 U.S.C. § 78j (1988); Federal Communications Act, 47 U.S.C. § 303(r) (1988); Interstate Commerce Act, 49 U.S.C. §§ 1, 5, 15 (1988).

public welfare, for lawmaking by Congress, at least at times, might be worse.[23]

Nonetheless, Schoenbrod's skepticism is partly warranted. Legislators often adapt their conduct in office to maximize the chance for reelection, or at least to appear conscientious in the public eye, and delegation of lawmaking authority offers a vehicle for furthering such goals. Delegation has resulted in the rent-seeking Schoenbrod describes, as his informative explications of the navel orange marketing order (pp. 49–57) and the Clean Air Act (pp. 58–81) demonstrate. The risk of abuse is particularly acute when Congress does not specify the governing rules. Thus, although the extent of abuse is debatable, few would reject Schoenbrod's central thesis that delegation often confers benefits on concentrated interests.

B. *The Policy Arguments Supporting a Nondelegation Doctrine*

Despite the acknowledged dangers of delegation, many academics and judges tolerate the practice because of compensating attributes of agency rule-making, or because the prospect of direct legislative rule is much worse. Schoenbrod systematically considers and rejects almost every conceivable argument defending contemporary congressional practice and dismisses the alternative strategy of attaining accountability through greater executive branch control over the delegated authority. In the place of delegation, he embraces a Madisonian or republican norm of direct democratic decision-making by Congress (pp. 99–105).[24] Schoenbrod creatively argues that delegation is not needed because Congress can rely on other strategies to protect the public good (pp. 135–52). His arguments are impressive.

With respect to the presumed expertise of agencies, Schoenbrod argues first that agency heads typically are not any more expert than legislators (p. 120). Although agencies employ scientists and engineers, the judgments of agency experts are subject to and often altered by the political priorities of agency heads (p. 100). Instead, Congress can, and does,[25] use professionals to aid its legislative efforts (p. 120). Second, Schoenbrod argues that technical responsibilities cannot be delegated apart from underlying public policy issues (p. 119). For example, automobile safety standards cannot be mandated without taking into account the problem of costs and international competition in the auto industry. In other words, there is rarely an issue facing the Office of Safety and

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23. See generally Mashaw, supra note 2, at 91–99 (arguing that agencies are more responsive to public concerns in their policymaking than is Congress).

24. For Madison's general argument, see The Federalist Nos. 10, 51 (James Madison).

25. Congress routinely solicits and receives advice from the Congressional Budget Office (for a recent example, see Eric Pianin, OMB Opens Campaign for a Biennial Budget; Proposal is Part of 'Reinventing Government,' Wash. Post, Oct. 8, 1993, at A25), and from the Office of Technology Assessment (for a recent example see Philip J. Hilts, Rise of TB Linked to a U.S. Failure, N.Y. Times, Oct. 8, 1993, at A23).

Health Administration (OSHA) or the National Highway Transportation Safety Administration (NHTSA) that can be resolved without resorting to some political judgment.

In a related argument, Schoenbrod debunks the view that the independence of agencies generates social benefits. Although individual agency officials may be protected by civil service laws and do not rely on campaign contributions, agencies as a whole, he argues, are more subject to influence by concentrated interests than members of Congress (pp. 124–25). Agencies can be captured, at least in part, by the industries they are to regulate, for those industries have great organizational and resource advantages over the public as a whole. At times, Schoenbrod notes, only industry groups participate in agency rule-making (p. 109), and special interest groups enjoy access to agency officials to discuss a wide range of issues (p. 112). Indeed, the apparent independence of agencies makes delegation a more attractive option for legislators, because it insulates them from the blame attached to agency policies even when those policies directly result from legislative direction, whether formal or informal. And the independence of agencies from the President also encourages delegation because Congress need not fear executive branch hegemony over the delegated authority.[26]

Nor do procedures such as notice-and-comment rule-making provide sufficient protection for the public. Schoenbrod argues, as have others,[27] that the rule-making process is often a sham because of the lack of widespread participation in, or even knowledge about, agency decision-making (pp. 111–12). Concentrated interests control the agency agenda and influence the agency's proposals for change (p. 112). Judicial review under the lenient standard of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[28] cannot suffice to replace the checks of direct decision-making under Article I of the Constitution (pp. 113–14).[29] In the absence of congressional specification of clear rules, judges cannot meaningfully review agency policy choices.

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26. Unlike some public choice theorists, Schoenbrod acknowledges that the President has a role in agency policymaking, even with so-termed independent agencies. Nevertheless, he argues that presidents may also take advantage of delegated authority to gain credit from influential supporters and distance themselves from unpopular regulation (pp. 105–06). In any event, he argues that presidential oversight cannot substitute for the Article I protections of bicameralism and presentment (pp. 95–96).

27. See Aranson et al., supra note 15, at 14 n.58 (procedural requirements of notice-and-comment rule-making inadequate to rein in administrators bent on different political agenda); Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 74–75 (1985) (informal procedures at agencies can lead to capture by regulated industries).

28. 467 U.S. 837 (1984).

29. See infra text accompanying notes 34–37. Nor is the litigation process necessarily immune from the influence of concentrated interests. See Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L.J. 31, 66–87 (1991).

Schoenbrod acknowledges that delegation can at times overcome legislative gridlock (p. 121). When there is no agreement within Congress over the policy to be adopted, members of Congress may agree instead to delegate that issue to an agency. But in the long run, he argues, such benefit is illusory. Impasse can exist at the agency level as well, or the agency may delay action in light of the absence of any consensus (pp. 121–22). Indeed, the procedural requirements confronting agencies may frustrate speedy resolution of the policy issues.[30] Schoenbrod recounts the Environmental Protection Agency's (EPA) experience under the Clean Air Act to make his point (pp. 79–80), and much the same story can be told about NHTSA's episodic encouragement of passive restraint systems in automobiles.[31] In addition, delays may arise because agency rules are more difficult to enforce than laws. Businesses may refuse to comply with agency directives and seek judicial review, or they may circumvent the new requirement by pressuring influential members of Congress to alter the recently promulgated rule (p. 122). Agency rules may also lack the authoritative force attributed to congressional enactments—Congress has more legitimacy in the eyes of the public, and its laws of general applicability engender more respect than the case-specific determinations (smokestack by smokestack) of agency officials (p. 122). In any event, legislative gridlock may at times be public-regarding if the momentum for change stems from lobbying by special interest groups.

Schoenbrod also argues that the decision-making process in agencies is far less rational than in Congress itself. He dismisses the fears of vote cycling in Congress as overblown (pp. 131–34).[32] Moreover, he points

30. Congress at times has directed agencies to proceed only by formal rule-making, which is analogous to a full trial with evidentiary protections. See, e.g., Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 371 (West Supp. 1993). Rule-making under these procedures typically lasts years. See generally Bernard Schwartz, supra note 4, § 4.11, at 193 ("No proceeding under the Food, Drug, and Cosmetic Act has been completed in less than two years; two have taken over ten years.").

31. See Jerry L. Mashaw & David L. Harfst, Regulation and the Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. on Reg. 257, 280–83 (1987); Marianne K. Smythe, Judicial Review of Rule Rescissions, 84 Colum. L. Rev. 1928, 1931–32 (1984).

32. Academics such as Kenneth Arrow have demonstrated that under certain conditions, democratic choices cannot be stable because the outcome of voting may hinge on the pairing of choices presented to voters, and not necessarily on the substance of the choices. Schoenbrod responds that choices in Congress tend to be arrayed along a liberal/conservative continuum and thus are not subject to vote cycling (p. 132). Moreover, he notes that the prospect of presidential veto helps prevent cycling (pp. 132–33). He also argues that the problem of agenda setting, which arises when committee chairmen influence the voting outcome by manipulating the order and presentation of issues for voting, is likely to be as acute in agencies as it is in Congress (p. 133). See also William T. Mayton, The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies, 1986 Duke L.J. 948, 950–58 (arguing that cycling problems do not infect Article I decision-making); Richard H. Pildes & Elizabeth S. Anderson, Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 Colum. L. Rev. 2121, 2184–85 (1990) (similarly arguing that cycling rarely plagues congressional determinations).

out (pp. 126–28) that even well-meaning agency regulation is subject to unrealistic legislative deadlines, tight legislative control of resources (if not more invidious intervention),[33] and possible interference by judges unable to provide sound guidance because of Congress' failure to make clear the policy underlying the delegated authority (pp. 132–33).

Instead, Schoenbrod is convinced that Congress, if forced to legislate itself, would enact far sounder measures than agencies currently do through rule-making or adjudication. He argues, as have others,[34] that the Constitution's Article I procedures of bicameralism and presentment[35] restrain excesses, minimize the chance for rent-seeking by interest groups, and discourage arbitrary rule by factions, the forebears of contemporary special interest groups (pp. 109–11). Even though lawmakers at times legislate selfishly (pp. 109–20), they may well hesitate before engaging in pork-barrel politics that the public can directly attribute to them. Overall, the requirement that both Houses and the President must agree on all legislation provides for more stable rule and protects individuals from government overreaching. He embraces the Madisonian perspective that Article I was intended to moderate legislative proposals, and that public debate during the deliberations in both Houses of Congress and the White House serves an educative function.[36] He notes that the Madisonian argument is supported by economic intuition that increasing the costs of legislation will prevent capture by special interest groups.[37]

Presidential control, according to Schoenbrod, is not the solution. Greater executive influence over delegated authority cannot substitute for the leavening effect of bicameralism and presentment. The electorate cannot hold the President responsible for every regulatory action pursued by NHTSA or OSHA given the vast array of criteria under which a President is judged (p. 95). In addition, Presidents may use delega-

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33. Members of Congress not infrequently pressure agencies off-the-record on behalf of interested constituents. The intervention by many Senators on behalf of failing thrifts provides an apt illustration. See The Keating Dive, Wash. Post, Mar. 1, 1991, at A14; see also Richard J. Pierce, Jr., Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from *Chevron* and *Mistretta*, 57 U. Chi. L. Rev. 481, 495–501 (1990) (addressing impropriety of ex parte contacts in enforcement context).

34. See, e.g., Harold J. Krent, Separating the Strands in Separation of Powers Controversies, 74 Va. L. Rev. 1253, 1258–60 (1988); Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 247–49 (1986). Moreover, academics relying on positive political theory agree that agencies will likely choose a policy option different than Congress would have done itself. See, e.g., John Ferejohn & Charles Shipan, Congressional Influence on Bureaucracy, 6 J.L. Econ. & Org. 1, 5–9 (Special Issue 1990).

35. U.S. Const. art. I, § 7, cl. 2.

36. See The Federalist No. 51, at 323–25 (James Madison) (Clinton Rossiter ed., 1961).

37. See Aranson et al., supra note 15, at 63–67; Macey, supra note 34, at 230–33. Nonetheless, making legislation more costly might perversely benefit organized interest groups who have more resources than others to devote to legislation. Cf. Elhauge, supra note 29, at 92–93.

tion—in the same manner as Congress—to distance themselves from unpopular measures and curry favor with particularly influential constituents (pp. 95–96). Permitting enhanced control privileges flexibility over accountability. Indeed, greater controls by the President pose the additional danger of gradual accumulations of power by the Executive, with insufficient safeguards against dictatorial rule.

Finally, delegation of lawmaking authority in Schoenbrod's view is not needed to preserve congressional resources. Distancing himself from the overwhelming majority who view delegation as a necessity,[38] Schoenbrod argues that Congress can protect the public with fewer and less complex rules than agencies now issue (pp. 135–36).[39] Schoenbrod suggests that Congress should rely to a greater extent both on state regulation and private arrangements (pp. 139–44). For instance, Schoenbrod ridicules the federal requirement that state and local governments remove asbestos (largely at their expense) from public schools (pp. 138–39). Local officials should have ample incentive to remove asbestos and possess greater ability to make the cost-benefit determination whether to remove trace amounts. Schoenbrod concludes that "[t]he reason for a federal law on asbestos in the schools is to enable our elected lawmakers to strike a pose in favor of children's health without having to take the blame for the great bulk of the cleanup cost" (p. 139).[40] Schoenbrod acknowledges that in cases in which externalities such as pollution exist, states may underregulate because those outside their borders reap the regulatory benefits of reduced pollution. Yet, he continues by stating that, because there are often harmful effects within the offending states as well, effective regulation can be expected at the state level (p. 136).[41] Much regulation of the environment, therefore, should be left to the

38. See supra text accompanying notes 5–9.

39. As Schoenbrod states, Congress can also marshal resources by not engaging in time consuming casework (pp. 94–95).

40. Schoenbrod does not suggest whether there is any reason to trust state regulation more than federal regulation. Indeed, according to Madison, there are greater checks against factional rule at the federal level because of the greater number of interests represented. Perhaps because of the greater risks at the state level, some state courts have enforced the nondelegation doctrine more vigorously than have their federal counterparts. See, e.g., People v. Tibbitts, 305 N.E.2d 152 (Ill. 1973); Allen v. California Bd. of Barber Examiners, 102 Cal. Rptr. 368 (Cal. Ct. App. 1972).

Schoenbrod suggests, however, that, because states are larger and more diverse than they were at the time of the founding, the danger of concentrated interests at the state level is no greater than it was at the federal level 200 years ago (pp. 137–39). His argument, however, provides no reason to believe that interest groups will be *less* successful at the state level than at the federal level. In any event, to the extent that states enforce a nondelegation doctrine, the result will be increasing reliance on private ordering.

41. Schoenbrod draws on a considerable body of law questioning the need for extensive regulation. See, e.g., Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law, 37 Stan. L. Rev. 1333 (1985) (criticizing extensive environmental statutory law that currently exists and proposing reform); Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. Chi. L. Rev. 681 (1973) (suggesting elimination of certain mandatory zoning controls); Matthew L.

states, and Congress could supplement local regulation by facilitating market-oriented approaches to controlling pollution (pp. 147–50).

Schoenbrod suggests other ways in which Congress could limit reliance on agencies. For instance, Congress could experiment more with penalties and taxes to improve private conduct, thereby avoiding labyrinthian codes of detailed directives.[42] Congress could adopt disclosure requirements and tax energy-inefficient products instead of directly regulating new vehicles or appliances (p. 18). Agricultural marketing orders, such as the one for navel oranges, could be rescinded entirely or could be replaced with a system of subsidies. With more reliance on state regulation and private arrangements, Congress would no longer need to oversee agency action as extensively, and that savings in resources might offset the time required for resolving the critical policy questions facing the nation (pp. 145–46).[43]

In short, Schoenbrod argues forcefully that

> [t]he traditional reasons for supposing that we are protected better by agencies than by elected lawmakers over whom we have more direct control sound like the various reasons that parents give for telling their children, "We know what is best for you": avoiding stalemate ("you can't make up your mind"), insulation from concentrated interests ("you hang out with bad kids"), and superior rationality ("you're not thinking straight").... In delegating, lawmakers usually do not deliver the paternalistic protection that they promise, but they do treat us like children. (p. 134).

Spitzer, The Constitutionality of Licensing Broadcasters, 64 N.Y.U. L. Rev. 990 (1989) (proposing more limited government regulation of broadcasting).

42. Schoenbrod concedes that, if Congress assumed all the rule-making duties currently exercised by agencies, Congress would soon be bogged down in detail, undermining a needed flexibility in government. See also Mashaw, supra note 2, at 95–97.

43. Indeed, Schoenbrod might have added that Congress need not expend greater resources in writing laws than in writing some complicated delegations. For instance, under Congress' initial version of the Gramm-Rudman-Hollings Act, Congress delegated to the Comptroller General the power to prescribe budget cuts in accordance with detailed procedures enacted by Congress. See Deficit Control Act of 1985, § 251, 99 Stat. 1063 (1985) (current version at 2 U.S.C. § 901 (1988)). Although the Supreme Court invalidated the Comptroller General's role in Bowsher v. Synar, 478 U.S. 714, 731–36 (1986), it upheld the statute's fallback mechanism, pursuant to which the Office of Management and Budget and the Congressional Budget Office discharge the identical duties assigned to the Comptroller General in the initial legislation, and report their findings to a Temporary Joint Committee on Deficit Reduction. See id. at 718–19, 735–36. That committee reports a joint resolution within five days to both Houses, which then must vote on the report under expedited rules. See id. at 719. In other words, Congress may expend no more resources in voting on rules than in delegating rule-making to agencies, and it can use agency expertise while still exercising direct responsibility for the final product. Whether the end result is more attractive is debatable, yet Schoenbrod plausibly argues that Congress will at least be more accountable for the product.

C. *The Potential for Public-Regarding Delegation*

Schoenbrod, however, does not fully explore the possibility that the desirability of delegation may turn on contextual factors such as the structure of a particular agency's decision-making, the composition of groups affected by the regulation, the need for flexibility, and the public awareness of the issues.[44] Particularly if legislators are not as venal, nor citizens as gullible, as Schoenbrod posits, then delegation at times might be public-regarding. The greater the visibility of the regulatory problem, for instance, the less likely that agencies can issue regulations benefitting only special interests.[45] Regulators are more likely to act according to electoral preference on health care reform than on the navel orange marketing order. Moreover, presidential review of agency action in some contexts, particularly through aggressive oversight on the part of the Office of Management and Budget,[46] may also help ensure that agency policymaking enhances welfare, given the President's national constituency.[47] Presidential determinations to close military bases, for instance,[48] may more likely be public-regarding than if Congress made the decision. Agency regulation, in other words, may be a welcome development if existing conditions deter rent-seeking.

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44. See Michael E. Levine & Jennifer L. Forrence, Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis, 6 J.L. Econ. & Org. 167, 185–94 (Special Issue 1990); see also Mashaw, supra note 2, at 91–99.

45. See Levine & Forrence, supra note 44, at 191–94.

46. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981) (imposing requirements on agencies to justify proposed regulations on the basis of cost-benefit analysis); Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985) (strengthening above requirement).

47. See Terry M. Moe, Political Institutions: The Neglected Side of the Story, 6 J.L. Econ. & Org. 213, 235–38 (Special Issue 1990). As mentioned previously, see supra pp. 719–20, Schoenbrod believes that the President may also cater to special interest groups and use delegation to extract favors from particular groups. Nonetheless, the President is less dependent on interest groups than is Congress and thus may intervene in agency exercise of delegated authority in order to protect the public interest.

48. See Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808 (1990). Schoenbrod suggests that the decision to delegate may have been successful because concentrated interests would not blame individual legislators for the ultimate decision to close particular bases (p. 91). Perhaps he is right because the delegation does not isolate particular geographic areas for disfavored treatment, but I doubt that those communities affected by the closings are unable to link the closures to the original congressional delegation. See Kelly McParland, Charleston Takes Direct Hit As Peace Breaks Out, Fin. Post, Sept. 18, 1993, at S16; Christi Parsons, It's Smooth Sailing Now for Great Lakes, Chi. Trib., Sept. 22, 1993, § 2, at 7. Indeed, military contractors and government employee unions are presumably sophisticated enough to oppose the delegation in the first instance. The very success of the delegation can be traced to the fact that the members of the Base Commission, unlike legislators, are less beholden to interest groups.

For favorable reviews of this delegation, see Michael A. Fitts, Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions, 88 Mich. L. Rev. 917, 952–53 & n.121 (1990); Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1511, 1542 (1992).

At a more general level, delegation should be beneficial from a policy standpoint whenever the potential for rent-seeking or abuse in Congress is greater than in agencies. When members of Congress cannot resist the temptation to vote based on self-interested reasons—as with decisions to close military bases or trim the budget[49]—agency delegation may be the preferred way to further the public interest, as long as sufficient checks exist on agency policymaking.[50] Though the need for Congress to tie itself to the mast is perhaps regrettable, Schoenbrod too quickly passes over the potential virtue of some delegation of lawmaking authority.

This is not to downplay Schoenbrod's insights, but only to suggest that a more nuanced approach is possible. Ultimately, the efficacy of delegation in various contexts hinges on comparing the exercise of delegated authority to what Congress would have done if delegation had not been an option. The hypothetical nature of the comparison makes it extremely difficult to reach any conclusion with confidence. Nonetheless, the possibility that delegation may prove beneficial in circumscribed contexts is certainly worth exploring further, though one might ultimately reject even such limited delegation on political[51] or constitutional[52] grounds, or because no judicially administered test would likely be effective in confining delegation to such contexts.

Thus, Schoenbrod makes a compelling, though not irrefutable, argument that, on policy grounds, congressional delegation of lawmaking authority should be prohibited. Under both Madisonian and public choice premises, Article I decision-making in many, if not all, contexts more

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49. See Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act), 2 U.S.C. §§ 901–908 (West Supp. 1993). Representative Brooks, for example, charged that Congress and the President agreed on Gramm-Rudman in part to avoid the tough budgetary decisions that they would otherwise have to make. See Jack Brooks, Gramm-Rudman: Can Congress and the President Pass this Buck?, 64 Tex. L. Rev. 131, 137 (1985). The Act straitjackets Congress by imposing automatic sequestration if Congress and the President cannot agree on a balanced budget. See id. at 141–42.

50. Another important factor is the comparative costs of decision-making. See Aranson et al., supra note 15, at 17–21. But the key criterion, and one that is too often missed, is the likely level of rent-seeking in Congress relative to that in the agency.

51. Schoenbrod might believe that the danger of alienating voters is too great to permit delegation in those areas, such as the budget, where pork-barrel politics are most rife. Or, he might believe that judges will not be able to distinguish beneficial from nonbeneficial delegation. Even if the distinction is not amenable to judicial enforcement, political reforms might provide Congress with greater incentive to delegate only in the favored contexts. However, Schoenbrod is pessimistic about the possibility of such reforms (pp. 171–73), primarily because Congress can always walk away from such reforms if political advantage beckons (p. 172). Yet Schoenbrod concedes that the Gramm-Rudman-Hollings Act has probably reined in the deficit (p. 171).

52. That delegation may be attractive in confined circumstances does not detract from Schoenbrod's constitutional arguments. The author's policy arguments, however, do in part conflict with his constitutional rationale because he apparently accepts delegation of subsidiary rule-making authority to the judiciary. See infra text accompanying notes 72–82.

likely results in public-regarding policy than does agency exercise of delegated authority.

II. SCHOENBROD'S PROPOSED NONDELEGATION DOCTRINE

Although most commentators share Schoenbrod's aversion to delegation as a policy matter, Schoenbrod's originality lies in his further conclusions that a judicially crafted limitation is possible and that such a limit is in fact compelled by the Constitution. Schoenbrod's discussion is unquestionably provocative, and his thesis is important. His arguments fail to persuade, however, for his proposed test is difficult to administer and, more problematically, responds only in part to the problem of unaccountable governance.

A. *Schoenbrod's Proposed Test*

The nondelegation doctrine today prohibits Congress from delegating policymaking authority unless it has established an intelligible principle to guide agencies in fleshing out the legislative directives.[53] According to the doctrine, if an intelligible principle exists, then judges can use that guide to cabin agency action.[54] The Supreme Court struck down three New Deal statutes on the grounds of excessive delegation[55] and, as Schoenbrod points out, in the previous two decades the Court had invalidated several statutes in less well-known cases (pp. 34–35).[56] Since the 1930s, however, courts have routinely determined in case after case that sufficient legislative direction existed, whether in the language

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53. See, e.g., Touby v. United States, 111 S. Ct. 1752, 1756 (1991) ("So long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'") (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

54. Kenneth C. Davis advocates aggressive application of a variant of this test, under which judges would ascertain whether Congress *or* agencies implementing the statute had developed sufficiently precise standards and safeguards to withstand review. See 1 Davis, supra note 4, § 3:15, at 206–16.

55. See Carter v. Carter Coal Co., 298 U.S. 238, 310–11 (1936) (disapproving of delegation to private groups under Bituminous Coal Conservation Act while invalidating delegation on Commerce Clause ground); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935) (invalidating delegation under National Recovery Act to establish codes of fair competition); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) (invalidating delegation to President under the National Recovery Act to prohibit interstate shipment of certain oil).

56. See United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921) (striking down statute making it a crime to charge unjust or unreasonable prices for necessities because Congress had not clearly fixed a standard of guilt, thereby improperly delegating legislative power to courts and juries to determine what acts were criminal). Schoenbrod also cites Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920), and Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924), as two instances in which the Court invalidated, on delegation grounds, congressional attempts to incorporate evolving state workmen's compensation law into admiralty law (p. 35).

of the statute or in its history and context. Thus, the Court has upheld delegation to government officials to set "fair and equitable" prices,[57] to award broadcast licenses according to "the public interest,"[58] and to proscribe designer drugs that threaten the public welfare.[59] In other words, the intelligible principle test, as employed by the Court, provides no constraint other than a "hint of reserved power."[60]

Schoenbrod is nonetheless correct that the Court may have abandoned enforcement of the nondelegation doctrine because of the exigencies of the New Deal and World War II, and not because of any inherent judicial incapacity (p. 178). The "switch in time" of the Supreme Court Justices supports that thesis,[61] as does the possibility that the Court became more lenient towards delegation because of its repudiation of other efforts to enforce limits on legislative power—the substantive due process review of economic regulation during the *Lochner* era and the exacting review of public welfare legislation under the Commerce Clause. As John Hart Ely has written, it may be "a case of death by association."[62] Schoenbrod urges, therefore, that we reexamine whether an effective test to control delegation of lawmaking authority is possible, even if the "intelligible principle" variant is unsuccessful (p. 181).

Schoenbrod proposes a reinvigorated test by focusing on the distinction between statutes that establish goals and those that formulate rules to govern private conduct (pp. 181–83). Establishing goals is not enough, even though it readily satisfies the intelligible principle test, for Congress must also specify the obligations needed to realize those objectives. When Congress merely enacts goals, courts and agencies become the primary lawmakers. Under Schoenbrod's proposal, therefore, only Congress can make laws regulating private conduct,[63] while courts and agencies are limited to interpreting and applying such laws (pp. 183–84). Congress should be the accountable entity making the tradeoff between rights and duties.

Critical to Schoenbrod's thesis is a distinction among lawmaking, law interpretation, and law application. Congressional enactment of goals permits agencies and courts to exercise lawmaking authority, while its en-

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57. See, e.g., Yakus v. United States, 321 U.S. 414, 423 (1944) (sustaining delegation to Office of Price Administrator to stabilize prices during wartime); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (upholding delegation to President "to issue such orders and regulations as he may deem appropriate to stabilize prices" as outlined in the Economic Stabilization Act of 1970).

58. See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 216–17 (1943).

59. See Touby v. United States, 111 S. Ct. 1752, 1753 (1991) (Attorney General could temporarily schedule controlled substances on an expedited basis "if necessary to avoid an imminent hazard to the public safety," as authorized under the Controlled Substances Act).

60. Jaffe, supra note 8, at 85.

61. See Ackerman, supra note 1, at 47–49.

62. Ely, supra note 2, at 133.

63. Schoenbrod recognizes two exceptions. See infra text accompanying notes 86–89.

actment of rules ensures that only Congress will exercise that function. Schoenbrod concedes that all laws and rules require interpretation, either because of ambiguity or changed circumstances, and that interpretation involves discretion (p. 182). Schoenbrod nonetheless explains that law interpretation need not include lawmaking: "a law interpreter looks backwards, to what a past legislature thought, while a lawmaker looks forward to how a proposed law would affect society" (p. 183). Courts and agencies interpreting statutes do not make law as much as ascertain the scope of laws previously enacted. Schoenbrod then suggests two guidelines to help courts distinguish law interpretation from lawmaking (p. 183). First, a person attempting to discern whether a statute prohibits conduct should derive a relatively clear answer from a statute that sets forth the law, but will not obtain any resolution from a statute that delegates. Second, a statute that sets forth the law reflects how Congress has accommodated conflicting social policies, while a statute that delegates leaves the accommodation to the law interpreter.[64] Thus, Schoenbrod concludes that law interpretation is consistent with democratic accountability because legislators are "accountable for at least the major outlines of the laws that they impose on society" (p. 183). Schoenbrod does not discuss law application as extensively as law interpretation, yet he evidently believes that law application similarly need not involve the making of rules of private conduct.

B. *Administrability of the Rules/Goals Distinction*

Distinguishing rules from goals is easier said than done. Most judges would probably agree that a fifty-five mile per hour speed limit qualifies as a rule, while considering a statute directing the Department of Labor to protect the workplace to express merely a goal. But unless Schoenbrod means to confine Congress only to the most discrete and unambiguous directives, which he recognizes would unduly hamper governmental activities (p. 18), there likely will be less agreement over whether statutes articulate rules or goals.

Schoenbrod concedes that a variety of contextual factors such as legislative intent and background norms must be discerned and evaluated before determining whether a given statute articulates a goal or rule (p. 182). A statute requiring the posting of reasonable speed limits may or may not qualify as a rule, depending on background understandings of what constitutes a reasonable speed, and a statute requiring frequent agency inspections of the workplace may again be either a rule or a goals statute, depending on the extent of the agency's exercise of discretion over what and when to inspect. There is simply no readily ascertainable

64. Schoenbrod notes as well that the relationship between court and agency differs when a statute states a law rather than when it delegates the power to make laws because courts have final say as to law interpretation. In addition, courts change their own laws, but cannot generally change their past interpretation of statutory laws (p. 183).

way to distinguish one from the other. What Justice Scalia has said of the Court's current nondelegation doctrine is just as pertinent to the distinction proposed by Schoenbrod:

> Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.[65]

By itself, the difficulty of administering the test should not be disqualifying. The Supreme Court has struggled in fashioning tests in a variety of other constitutional contexts, whether in assessing legislative incursions on speech,[66] or in evaluating legislative aggrandizements of authority at the expense of coordinate branches of government.[67] Indeed, although Schoenbrod relies upon judicial precedents for his rules/goals test only in passing,[68] courts have long employed a similar distinction, with mixed results, to distinguish substantive rules under the Administrative Procedure Act from interpretive rules,[69] which are exempt from notice-and-comment rule-making.[70]

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65. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting). In addition, as noted infra at text accompanying note 90, the task of distinguishing between rules of private conduct and rules affecting private conduct is somewhat daunting because there, too, the distinction is one of degree, not of kind.

66. See Wisconsin v. Mitchell, 113 S. Ct. 2194, 2199 (1993); R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543 (1992); Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2460 (1991).

67. Compare, e.g., Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 455 (1977) (accommodating congressional power to provide for orderly retention of presidential papers with presidential privilege) with Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2311 (1991) (Congress may not consent to state compact that permits role to be played by members of Congress in operating regional airports authority).

68. Schoenbrod discusses Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), and Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (p. 157), but neither case turned on a distinction between rules and goals. Schoenbrod is perhaps on firmer ground in relying on the prior writings of Professors Hart and Dworkin (p. 182 nn.9–10).

69. See 5 U.S.C. § 553(b)(A) (1988).

70. See, e.g., American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046–47 (D.C. Cir. 1987) (interpretive rule reminds parties of existing duties, while substantive rule adds new requirements); Cabais v. Egger, 690 F.2d 234, 237–39 (D.C. Cir. 1982) (directives issued by Secretary of Labor concerning unemployment insurance program were interpretive rules because they merely clarified relevant statute); see also Pierce, supra note 5, at 400 (also noting courts' use of rules/goals distinction to differentiate substantive from interpretive rules).

The difficult question may not be whether Schoenbrod's admittedly malleable test is workable, but whether the test is politically possible: its adoption would perhaps curtail one-half of all current agency activities, depending upon the scope of Schoenbrod's exceptions. See infra text accompanying notes 86–89. The social dislocation should not be underemphasized. Schoenbrod, however, would soften the impact of his proposal with a transition period, slowly phasing out existing statutes which state only goals (pp. 175–77).

C. *Sufficiency of Rules/Goals Distinction*

More importantly, aside from the difficulty of applying the rules/goals distinction, Schoenbrod's proposed test is inadequate if its purpose is to ensure that all rules of private conduct originate in Congress.[71] Even if rules were distinguishable from goals, rule-making would not remain the exclusive province of Congress. Courts and agencies also fashion rules in interpreting and applying rule-like legislative commands. The protections implicit in Article I are lost whenever rules are formulated outside of Congress, whether by judges interpreting laws or by enforcement agencies determining priorities and establishing safe harbors.

No matter how rule-like the legislation, questions of judgment almost always will arise in its interpretation and application, leading to formulation of subsidiary rules. Indeed, some rules are so open-ended, like Schoenbrod's hypothetical statute barring unreasonable pollution (p. 182), that subsequent rule-making seems inescapable. Schoenbrod is aware of the problem and argues that the prohibition of unreasonable pollution would nonetheless be constitutional "in a society with a clear understanding of what constituted unreasonable pollution, because that shared connotation would provide a basis for interpretation" (p. 182). Although Schoenbrod does not discuss the Sherman Antitrust Act,[72] Congress evidently based the ban on unreasonable restraints of trade on the "shared connotations" from common-law precedents to which Schoenbrod refers.[73] But time cannot be so easily frozen, and with changed economic understandings and circumstances, judges have fashioned new rules under the Act. As Justice Scalia has noted, Congress "adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static context that the common law had assigned to the term in 1890."[74] Interpretation of both rules and common-law precedents ineluctably converges with rule-making itself. Schoenbrod's evident conviction that interpretation can be divorced from rule-making is untenable.

Even with more circumscribed statutes, judges must still use discretion in fleshing out the statutory meaning when either the legislative intent, however understood, is unclear, or when unforeseen circumstances arise.[75] Judges frequently must create new rules of private conduct in

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71. The proposal's insufficiency is more pronounced if Schoenbrod means to prohibit delegation only of rules of private conduct. See infra notes 89–90 and accompanying text.

72. 15 U.S.C. § 1 (Supp. 1992).

73. See Chicago Bd. of Trade v. United States, 246 U.S. 231, 238–41 (1918) (antitrust laws to be construed in light of common-law prohibitions on unreasonable restraints of trade); Standard Oil Co. v. United States, 221 U.S. 1, 49–60 (1911) (same).

74. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988). Strangely, although Schoenbrod would prohibit delegation to courts to create rules of private conduct in a common-law fashion, he would permit judges to create common-law rules as long as no delegation is involved. See infra note 131.

75. The Congress, the President, agencies, and courts must all exercise policymaking

light of either changed economic or political realities.[76] To suggest that legislative intent or purpose controls the judicial determination is, at times, pure fiction.[77]

Schoenbrod's own illustration demonstrates this point. He uses Title VII as an example of a law which, though requiring interpretation, sets forth a sufficiently clear rule of conduct to withstand scrutiny under the nondelegation doctrine—namely, that companies cannot discriminate on the basis of race, gender, and other protected categories (p. 17). In enacting Title VII, however, Congress did not answer many of the critical policy questions arising under the anti-discrimination law, the most notable of which was whether Title VII permitted affirmative action.[78] Nor did the statute clarify what kind of intent standard Congress adopted, whether intent could be demonstrated from only disparate treatment or from disparate impact as well.[79] Rather, all of these issues, which unquestionably involve rules of private conduct accommodating employer prerogatives and individual rights, were left to the courts. Schoenbrod might respond that the policy underlying the no-discrimination rule is more important than the policy underlying either the intent standard or the application of the rule to affirmative action efforts. Perhaps, but at a minimum, substantial policymaking and subsidiary rule-making are inherent in interpretation and application of the no-discrimination rule.[80] The vigorous political debate over the recent Civil Rights Act of 1991 is

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discretion in interpreting the law. The Supreme Court has explicitly acknowledged the role of politics when agencies interpret law. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984).

76. See generally T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 37–41 (1988) (asserting that despite perception of statutory interpretation as an "archeological" exercise, court does use non-originalist statutory interpretation methods); William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479, 1481–82 (1987) (arguing the preferability of a dynamic approach to statutory interpretation over an originalist approach).

77. See generally Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 Geo. L.J. 353, 394–400 (1989) (suggesting that courts' reliance on legislative intent, even when unascertainable, is necessary fiction to preserve legitimacy).

78. Although some might disagree, see United Steelworkers of America v. Weber, 443 U.S. 193, 219, 226–30 (1979) (Rehnquist, J., dissenting), many believe that Congress never focused on the issue of the permissible ambit of affirmative action. See Eskridge, supra note 76, at 1490–91 (1987); Burt Neuborne, Essay, Observations on *Weber*, 54 N.Y.U. L. Rev. 546, 553–54 (1979).

79. See Griggs v. Duke Power Co., 401 U.S. 424, 428–36 (1971). The enacting Congress also failed to determine other policy issues such as the extent of an employer's duty to accommodate the religious beliefs of its employees. See Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68–69 (1986).

80. Schoenbrod also might retort that courts do not make rules of private conduct when "formulating remedies in particular cases" (p. 189). Yet even if Congress does not delegate when it leaves some remedial discretion intact in the courts, Congress delegates when it passes a statute without making clear the underlying rules of private conduct—which employment practices constitute discrimination, or which business practices constitute unreasonable restraints on trade. The reach of Title VII involves not remedial discretion, but the scope of permissible private conduct.

ample testament to the sensitive political nature of judicial lawmaking under Title VII.[81] Schoenbrod's choice of Title VII as an example of where Congress made the tough policy decisions reveals that his proposed dichotomy between goals and rules is untenable.

Thus, even when applying or interpreting rules made by Congress, courts and agencies must generally formulate subsidiary rules of private conduct. Whether Congress intends to delegate or not, it evades accountability for the subsidiary rules fashioned outside of Congress. Members of Congress can distance themselves from overprotective or underprotective rulings by the courts or agencies because citizens will not be able to trace certain policy decisions as readily to Congress when the policy is significantly shaped outside of Congress. Indeed, Congress might well respond to a reinvigorated nondelegation doctrine by vesting greater authority in both courts and agencies to fashion controversial policy through adjudication.

Moreover, lawmaking by judges may be just as prone to interest group influence as lawmaking by agencies. Concentrated interests possess a distinct advantage in the litigation process because of their access to the resources necessary to conduct skillful and frequent litigation.[82] In addition, the political insulation of judges, which may be less complete than once thought,[83] does not ensure the insulation of the litigation process from the influence of organized groups.[84] Private parties, not judges, determine which cases to bring and which arguments to raise. Schoenbrod's distinction between rules and goals is thus insufficient to confine all rules of private conduct to Congress.[85]

D. *Troubling Scope of Schoenbrod's Proposal*

Even if Schoenbrod's rules-goals test could confine all rule-making to Congress, the exceptions and limitations identified by Schoenbrod cast

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81. See, e.g., Richard L. Berke, Partisan Fights Erupt on Rights Bill, N.Y. Times, Mar. 13, 1991, at A22; Paul Greenberg, A Requiem for the Moral Majesty of Civil Rights, Chi. Trib., June 28, 1991, at 27; Senator Danforth and the Snipers, N.Y. Times, July 10, 1991, at A18; see also William N. Eskridge, Jr., Reneging on History? Playing the Court/Congress/President Civil Rights Game, 79 Cal. L. Rev. 613, 638–64 (1991) (describing political conflict generated by Supreme Court interpretations of Title VII that led to Civil Rights Act).

82. See Elhauge, supra note 29, at 68–69.

83. For instance, some judges must pass a political litmus test of sorts prior to appointment; judges who harbor the prospect of elevation might similarly be influenced by politics. See, e.g., David A. Strauss & Cass R. Sunstein, The Senate, the Constitution, and the Confirmation Process, 101 Yale L.J. 1491, 1506–09, 1516–17 (1992) (describing how ideological screening of potential judges by Executive has created incentive for judges to give, and Congress to seek, public commitments on specific issues).

84. See Elhauge, supra note 29, at 80.

85. Moreover, exempting subsidiary lawmaking by judges and agencies acting in an adjudicative capacity cannot be reconciled with Schoenbrod's *constitutional* argument that all rules of private conduct, or legislative power, is vested in Congress. See infra text accompanying notes 91–101.

doubt on the efficacy of his entire undertaking. In particular, his exception for executive rule-making under Article II and his exclusion of rules *affecting* private conduct allow delegation to continue unabated in areas of vital political import.

Schoenbrod recognizes two exceptions to his proposal. First, he exempts delegation that "leaves the courts with discretion within the scope of the powers granted to the judiciary by Article III of the Constitution" (p. 189). Schoenbrod reasonably asserts that Congress can vest the courts with the discretion to choose certain remedies without running afoul of his nondelegation doctrine. Selection of remedies is bounded by a prior finding of unlawful conduct (p. 189). In a sense, this exception is not an exception at all because a choice of remedies does not create rules of individual conduct, even though private conduct is undoubtedly affected by the remedies selected.

Schoenbrod similarly would permit Congress to delegate rulemaking authority to the Executive falling "within the scope of the powers granted to the Executive by Article II of the Constitution" (p. 186). Although Schoenbrod does not enter the debate over the breadth of the President's inherent powers under Article II, he includes questions of war, foreign affairs, and management of government property as uniquely executive interests under Article II (pp. 186–88).[86] Therefore, Congress might be able to delegate to agencies the power to restrict imports (and exports) in light of the Executive's enhanced interest in foreign affairs[87] as well as the power to create rules restricting access to federal lands.[88] Schoenbrod is not clear whether this exception covers entitlement programs, nor does he suggest whether it restricts delegation to agencies to distribute grants or disclose information to the public. Moreover, he then qualifies this exception by asserting that when the

86. As under the exception for judicial power, many exercises of executive authority, such as the power to commit U.S. troops abroad, purchase goods, or determine pay for agency personnel, do not involve rules of private conduct. Some exercises of executive authority, however, like the draft, fall within the exception.

87. The same risk of rent-seeking in the navel orange marketing example, however, plainly exists in fashioning import restrictions. Domestic commodity producers have apparently attempted to fashion marketing regulations in ways that fence out competing imports. See, e.g., Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1013–15 (D.C. Cir. 1971) (regulation requiring larger tomatoes, unless of "mature green" category, allegedly placed disproportionate burden on importers); Harry H. Price & Son, Inc. v. Hardin, 299 F. Supp. 557, 558–59 (N.D. Tex. 1969) (involving same tomato import regulation). Schoenbrod does not take a firm stand on whether Congress can delegate to the President the authority to limit imports and exports (pp. 34–35).

88. The Clinton administration's proposal to raise grazing fees on public lands generated a storm of controversy which caused President Clinton to withdraw the proposal, at least temporarily. See Dave Juday, Grazing Fees, Enviros, and the Hogs, Wash. Times, Sept. 12, 1993, at B4; Reform for the Public Lands, N.Y. Times, Aug. 11, 1993, at A14. To date, the administration has not backed off its goal. See Western Senators Foil Hike in Grazing Fees, Chi. Trib., Nov. 10, 1993, at 8. The Executive's disposition of public property can affect private conduct extensively.

"government [uses] property to induce changes in private conduct," delegation should be proscribed (p. 188).[89] Uncertainty remains because it is hard to conceive of a government grant, entitlement, or user fee that does not induce change—and probably was intended to induce change—in private conduct. At a minimum, Schoenbrod's test permits substantial delegation of rule-making authority concerning governmental allocation of public resources.

The ambiguity of this exception highlights a far more problematic aspect of Schoenbrod's overall proposal. Schoenbrod never clarifies what he means by delegation of rules of private conduct as compared to delegation of other rules. The navel orange marketing order and the Clean Air Act plainly qualify as rules of private conduct. But Schoenbrod addresses many delegations that do not involve what are commonly considered to be rules of private conduct: delegation of the power to set legislators' salaries (p. 10); to close military bases (p. 91); to set sentencing guidelines (p. 45). There is a gap, in other words, between Schoenbrod's test as articulated and illustrated.

Assuming, however, that Schoenbrod would proscribe only delegation of rules of private conduct, three substantial difficulties arise. The first difficulty is devising a test to distinguish rules of private conduct from those merely affecting or encouraging private conduct. Consider whether delegation of the authority to determine eligibility criteria for Medicare reimbursement or to ascertain tax exemptions would involve rules of private conduct. Further, what of delegation of the power to set interest rates or to approve redistricting under the Voting Rights Act? All these delegations vitally affect private conduct even if not constituting rules of private conduct themselves. The characterization issue is thus quite vexing.

Second, accountability in governance should be just as important for decisions affecting private conduct as it is for rules of private conduct. Schoenbrod argues that proscribing delegation of rules of private conduct preserves liberty more than prohibiting delegation of policymaking in general because such rules more directly threaten freedom of action—they "tell people in general what they cannot do" (p. 188). Other government action, such as federal grants or subsidies, preserves a larger domain of action for the individual. Yet from a political perspective, decisions concerning the structure and scope of welfare or the growth of our economy reflect more critical policy choices than do restrictions on

89. Schoenbrod notes, for instance, that when the Department of Health and Human Services (HHS) conditioned grants to family planning clinics on not providing abortion counseling, it used government property "for essentially regulatory ends" (p. 189). Delegation of such authority, in his view, should be proscribed even though distribution of government property is at stake. Schoenbrod does not suggest how to distinguish regulatory from proprietary or other ends. Indeed, from HHS's perspective, funds may have been withheld from family planning clinics not so much to regulate behavior but to ensure that the government would not support conduct of which it did not approve.

automobile emissions or marketing of oranges. Further, from an economic perspective, there is likely to be at least as much rent-seeking in disbursement of federal funds as there is in regulating the workplace. Communities vie to attract government spending projects, whether for military research, internal improvements, or mammoth scientific projects like the Super Collider.[90] Indeed, government funds can do far more to redirect the lives of citizens than can many rules of private conduct, and the strength of the economy may prove more important to individuals in the long run than rules imposing orange quotas. Schoenbrod's conception of liberty has a distinct common-law cast, protecting individuals from government regulation, but not from arbitrary administration of spending or social welfare programs.

Finally, if Schoenbrod's proposal proscribes only delegation of rules of private conduct, there would exist a category of delegations for which there apparently would be no constitutional limitation whatsoever. Congress therefore could pass a law empowering agencies to prescribe reasonable punishment for criminals (as long as the criminal rule is itself set by Congress), determine appropriate redistricting, or allocate welfare monies however they deem appropriate. If Schoenbrod's test permits unfettered delegation of rules governing government spending programs, government information flow, and regulation of the economy through market transactions, then it addresses at most a fraction of the problems wrought by delegation. That consequence may not be surprising given the open-ended delegation occurring today, but it is somewhat startling in light of Schoenbrod's vehemence and eloquence in previously attacking all delegation.

Thus, the contours of Schoenbrod's proposal remain undefined. As illustrated in the book, the scope of Schoenbrod's nondelegation doctrine is quite broad, preventing delegation of all rule-making authority except in a narrow range of circumstances involving judicial remedies and enhanced executive interest in management of the executive branch and foreign affairs. But, as articulated, the test is more circumscribed, prohibiting only delegation of private rules of conduct and thus exempting a wide range of delegation of policymaking authority. If delegation is as prone to abuse as Schoenbrod suggests, then delegation of the power to draft welfare rules should be prohibited as well as the authority to issue marketing orders. Schoenbrod's proposal protects one aspect of liberty from bureaucratic control, leaving others, such as the liberty to be treated justly within the welfare state, to the vagaries of the bureaucratic process he derides.

90. See Robert Reno, Supercollider is $4.4B Testament to Misdirection, N.Y. Newsday, Nov. 11, 1988, at 49. Congress has recently shelved the project.

III. The Constitutional Dimension of Delegation

The rules/goals dichotomy, despite its shortcomings, might be acceptable if there were no other way to preserve the constitutional structure. As Schoenbrod rightly points out (p. 190), an imperfect test may be better than none, and nearly every constitutional law doctrine can be attacked as vague. Although Schoenbrod's constitutional argument is plausible, it is by no means compelling, and constitutionalizing the policy concerns could undermine the goal of a flexible and yet administrable separation of powers doctrine.

A. *Constitutional Necessity for Nondelegation Doctrine*

In presenting the constitutional argument, Schoenbrod argues that Article I requires Congress exclusively to formulate all rules of private conduct, subject to the textual exceptions in the Constitution, such as the President's veto power (pp. 155–57).[91] He acknowledges that the Constitution nowhere explicitly imposes that requirement, yet he derives the nondelegation rule from Article I's opening sentence: "All legislative powers herein granted shall be vested in a Congress."[92] Schoenbrod reads "legislative powers" to refer to rules of private conduct and then concludes that no such rule-making can be delegated by Congress (pp. 156–57). Although Schoenbrod's methodology of constitutional interpretation is unclear, support for his view certainly exists in the writings of John Locke, who wrote that the legislature "cannot transfer the power of making laws to any other hands."[93] From a contractarian perspective, citizens have agreed only to be ruled by their representatives, not their representatives' delegates. Otherwise, Schoenbrod notes, the structural protections afforded by Article I—deliberation and leavening through bicameralism and presentment—would be lost (pp. 156–57).

To buttress that reading of the Constitution, Schoenbrod implicitly argues that separating functions or powers is critical to preserving liberty (pp. 110–11). According to separation of powers theorists such as Montesquieu, governmental tyranny can too easily result if the legislature can both make law and then interpret it, or if the executive can make as well as enforce laws.[94] One of the constraints on lawmakers, after all, is

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91. As noted previously, see supra notes 86–89 and accompanying text, Schoenbrod also recognizes that Congress need not be the exclusive lawmaker in areas of enhanced judicial or executive interest, such as in conducting foreign affairs.

92. U.S. Const. art. I, § 1.

93. John Locke, Of Civil Government: Second Treatise § 141, at 118 (Gateway ed., Henry Regnery Co. 1968) (1689) ("And when the people have said we will . . . be governed by laws made by such men . . . nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized . . . ."). Support for Schoenbrod's distinction between rules of private conduct and other rules is more sparse.

94. Schoenbrod might have cited this famous passage of Montesquieu:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may

that a law may ultimately be applied to the lawmakers themselves.[95] Moreover, Schoenbrod notes that preventing legislators from enforcing the law limits their ability to exempt contributors from laws of general applicability (p. 111). To Schoenbrod, therefore, a system of separated powers apparently depends upon ascribing different functions or powers to each branch.

At times, academics[96] and the Supreme Court have viewed the allocation of powers in the Constitution as vesting each branch with exclusive powers, as Schoenbrod urges. Under that view, each branch has unique authority: Congress, for instance, makes the laws, the executive implements them, and the judiciary interprets them. In *Springer v. Government of the Philippine Islands*,[97] the Supreme Court explained that

> [i]t may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power.[98]

In accordance with that reasoning, Congress cannot transfer its own lawmaking power without threatening that allocation of powers.[99] In *Touby v. United States*,[100] the Court recently commented that "[f]rom this language [of 'legislative powers'] the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its [lawmaking] power to another Branch of government."[101]

> arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Montesquieu, The Spirit of Laws, bk. XI, ch. 6, at 174 (Cincinnati, Thomas Nugent trans., Robert Clarke & Co. rev. ed. 1873).

95. Congress, however, perhaps not surprisingly, exempts itself from rules governing other actors, such as Title VII or the Ethics in Government Act.

96. See, e.g., Aranson et al., supra note 15, at 3–4; Greene, supra note 2, at 144–46.

97. 277 U.S. 189 (1928).

98. Id. at 201–02. Justice Powell manifested a similar analysis in asserting that Congress' exercise of the legislative veto reviewed in INS v. Chadha, 462 U.S. 919 (1983), was invalid because "[o]n its face, the House's action appears clearly adjudicatory. The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. . . . The impropriety of the House's assumption of this *function* is [clear]." Id. at 964–66 (Powell, J., concurring) (emphasis added).

99. Thus, the Supreme Court has stated, "That the legislative power of Congress cannot be delegated is, of course, clear." United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).

100. 111 S. Ct. 1752 (1991).

101. Id. at 1755.

Neither the Constitution's text, however, nor the practice of early Congresses, mandates that view. The text refers to legislative powers, but it nowhere defines that term. Few would dispute that the legislature in exercising its authority must fashion rules of private conduct. But that is not to suggest that the term "legislative powers" necessarily refers to making such rules.[102] More plausibly, the legislative powers addressed in Article I denote the authority to pass laws for the purposes specified in Article I, section 8, such as the power to regulate commerce or to provide uniform laws for bankruptcy. Although Congress may not be able to delegate the power to enact formal laws, delegation of rule-making authority involves different concerns. Indeed, as a textual matter, the constitutional authorization for Congress to make all laws "necessary and proper for carrying into Execution the foregoing Powers"[103] could readily include delegating policymaking authority,[104] whether in authorizing some other entity to fashion new rules, interpret preexisting rules, or apply rules to different factual situations. The weakness of Schoenbrod's argument arises from his premise that "the legislative powers herein granted" must refer to the power of creating rules of private conduct as opposed to the authority to pass laws for the purposes stated in Article I.[105]

Examining the provisions surrounding Article I similarly does not provide a definitive resolution of whether legislative powers refer to rule-making. Yet, if the vesting of legislative power is to be read as exclusively lodging such powers in Congress, then it seems strange that the Constitution commands the President to "take care that the laws be faithfully enforced."[106] This mandate to the Executive plausibly includes at least interstitial rule-making authority. Judgments as to what, when, and how to enforce the laws reflect significant public policy which unquestionably influences future private conduct as well as the public fisc. The Department of Justice, by issuing merger guidelines, for instance, shapes private

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102. The Constitution does not reflect a pure application of Montesquieu's theory of separated powers. See David F. Epstein, The Political Theory of *The Federalist* 126–31 (1984); W.B. Gwyn, The Meaning of the Separation of Powers: An Analysis of the Doctrine From Its Origin to the Adoption of the United States Constitution, *in* 9 Tulane Studies in Political Science 117–28 (1965); see also Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 151–54, 449–51, 547–53 (1969).

103. U.S. Const. art. I, § 8, cl. 18.

104. See Peter M. Shane, Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies, 36 Am. U. L. Rev. 573, 581–93 (1987) (addressing advantages and disadvantages of "conventionalist" construction of Articles I and II). For an argument that the "necessary and proper" clause must be construed more narrowly to prohibit laws that are not "proper" given the basic allocation of powers in the Constitution, see Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L. J. 267, 334 (1993).

105. See also William B. Gwyn, The Indeterminacy of the Separation of Powers in the Age of the Framers, 30 Wm. & Mary L. Rev. 263, 265–68 (1989) (arguing that the Framers never intended to segregate the branches by functions).

106. U.S. Const. art. II, § 3.

conduct.[107] In addition, the implicit Article III power of judicial review encompasses a type of rule-making, as does the traditional process of interpreting and applying statutes in nonconstitutional controversies.

The definitions of "executive" and "judicial" powers in the Constitution are also obscure, and the Supreme Court, despite assertions in *Springer* and other cases, has never confined one branch to a particular function or power.[108] For instance, the Court has routinely sanctioned exercise of what appears to be judicial powers by Article I courts[109] and administrative agencies,[110] and Congress has itself passed upon private bills. With respect to "executive" powers, the Court in *Morrison v. Olson*[111] rejected the claim that there was a power—law enforcement—that was lodged exclusively with the President, much as it had ruled previously in *Young v. United States ex rel. Vuitton et Fils S.A.*[112] that private attorneys may act as special prosecutors in contempt cases. Congress on numerous occasions has acted in an executive-type capacity by creating rules of conduct applicable to one particular factual circumstance. For instance, Congress has directed that certain defense bases be closed,[113] that certain individuals injured by the government receive compensation,[114] and even

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107. United States Dep't of Justice Merger Guidelines (1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,569–20,574 (Apr. 7, 1992). The guidelines provide that mergers resulting in unconcentrated markets (as measured in the guidelines) are unlikely to have adverse competitive effects and "ordinarily require no further analysis." Id. at 20,571. Similarly, mergers resulting in specified concentrated markets are considered likely "to create or enhance [excessive] market power or to facilitate its exercise," though this presumption is rebuttable. Id. For another example, the Food and Drug Administration has determined that a certain amount of contamination of corn and peanuts by unavoidable carcinogens is permissible. See Aflatoxins in Cottonseed Meal, Revised Action Level, 47 Fed. Reg. 330,091 (1982) (sets action level for aflatoxins in cottonseed meal for animal seed at 300 ppb).

108. I suppose one could define legislative powers by reference to one function without mandating that executive and judicial powers similarly be defined by functions. Schoenbrod, however, also provides definitions of executive power, e.g., executing the law and addressing foreign affairs (pp. 186–88), and judicial power, e.g., interpreting the laws and choosing among remedial options (p. 189). Schoenbrod further notes that "Congress would not have to assume *judicial* or *executive* power to stop delegating *legislative* power" (p. 16).

109. See Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631, 2644–45 (1991) (finding that Tax Court is a court established under Article I that nonetheless "exercises the judicial power of the United States").

110. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (administrative agency may adjudicate common-law counterclaims).

111. 487 U.S. 654 (1988) (upholding ability of courts to appoint independent counsel under Ethics in Government Act).

112. 481 U.S. 787 (1987).

113. Congress, for instance, decided to close an Air Force base in Michigan in 1977. See Mike Brown, Vocal Defenders Pop Up Wherever Bases Are in Peril, Courier-Journal, Feb. 4, 1990, at A1. Particular veterans' hospitals have also faced the threat of closure. See We've Been Asked: A Death Knell for Veterans' Hospitals? U.S. News & World Rep., Aug. 1, 1977, at 53 (discussing vigorous but unsuccessful efforts of Johnson administration to close eleven veterans' hospitals).

114. For a history of Congress' passage of private bills, see generally Floyd D.

on occasion that certain individuals not be prosecuted for arguable violations of the law.[115] Understanding the Constitution to vest unique functions or powers in the three branches is, therefore, quite problematic.[116]

In addition, the early history of the republic furnishes scant support for vigorous enforcement of a nondelegation doctrine. Schoenbrod correctly notes that individuals at times criticized congressional delegation, and that the Supreme Court asserted the right to strike down any law that delegated too much authority (pp. 155–56). But early Congresses did delegate,[117] and the courts upheld such delegations, even if they were uncomfortable in so doing. For instance, the first Congress provided for military pensions "under such regulations as the President of the United States may direct,"[118] and it authorized executive officers to license "any proper person" to engage in trade with Indian Tribes under "such rules and regulations as the President shall prescribe."[119] While the first dele-

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Shimomura, The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment, 45 La. L. Rev. 625, 637–82 (1985).

115. See, e.g., Section 309 of the Appropriation Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329–126 (prohibiting Departments of Energy and Justice from using appropriated funds to prosecute or enforce judgment against specified individuals involved in oil and gas overcharges, except for actual dollar amount personally received by such individuals from violations).

Congress' power to provide for amnesties serves as another example, being functionally analogous to the President's constitutional pardon power in Article II, § 2. See Brown v. Walker, 161 U.S. 591, 601 (1896) (stating that constitutional grant of President's power to pardon "has never been held to take from Congress the power to pass acts of general amnesty"); United States v. Tynen, 78 U.S. (11 Wall.) 88, 95 (1870) (stating that where Congress passes a new act wholly covering offenses defined under an old act, the old act is repealed and all criminal proceedings under it cease).

116. Although confining each branch to different functions might prevent one branch from both making and enforcing the law, such restriction could not eliminate inherent conflicts of interest. Congress could exempt itself from generally applicable rules; the executive branch could refuse to enforce laws respecting its own officials; and judges could be biased in resolving claims involving judicial officials or judicial power. Moreover, even if the functions of lawmaking, law interpretation, and law enforcement are combined, checks on the arbitrary exercise of power remain. See infra text accompanying notes 159–163.

117. Evidence of delegation also exists in the colonial governments. See 1 Davis, supra note 4, § 3:4, at 158.

118. Act of Sept. 29, 1789, 1 Stat. 95, 95; see also Act of Mar. 3, 1791, 1 Stat. 218, 218 (reauthorizing pensions to be paid out of the treasury "under such regulations as the President of the United States may direct"). Congress was far more specific at other times, legislating that lieutenant-colonel commandants receive sixty dollars per month in pay, see Act of Apr. 30, 1790, 1 Stat. 119, 120 (1790), and that every noncommissioned officer receive daily rations of "one pound of beef, or three quarters of a pound of pork, one pound of bread or flour, half a gill of rum, brandy, or whiskey or the value thereof." Id.

119. Act of July 22, 1790, 1 Stat. 137, 137. In order to prepare a new seat of government, Congress also delegated to presidentially appointed commissioners the power to "purchase or accept such quantity of land on the eastern side of the [Potomac] as the President shall deem proper . . . and according to such plans as the President shall approve, the said commissioners . . . shall . . . provide suitable buildings for the accommodation of Congress, and . . . for the public offices of the government of the

gation may only affect private conduct by encouraging (or discouraging) military service, the second delegation directly regulates private conduct by prohibiting trade. Congress further directed the Secretary of State, the Secretary of War, and the Attorney General to issue patents "if they shall deem the invention or discovery sufficiently useful and important,"[120] and the patent system establishes rules of private conduct. In the Judiciary Act of 1789, Congress authorized the courts 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."[121] This Act gave the courts the widest possible discretion to set rules governing litigants' conduct in court. Moreover, the first Congress created a National Bank without explicitly describing its duties in rule-like fashion.[122] Some of these delegations, Schoenbrod might argue, stem from enhanced executive interest in foreign affairs or in control over the military, or in judicial interest in self-management.[123] But the delegations of authority to issue patents,[124] to license individuals to engage in trade, and to administer the Bank of the United States cannot be so easily dismissed.

In 1813, the Supreme Court upheld the delegation of fact-finding powers to the President in *The Brig Aurora*.[125] There, Congress had delegated to the President the power to determine whether Great Britain or France complied with its international obligation to respect the United States' right of commerce; the President's finding of compliance led to a ban on trade with the other country. The Court tersely rejected the delegation challenge, albeit in the foreign affairs arena.[126] More significantly, the Court in *Wayman v. Southard*[127] sustained the delegation of rulemaking powers to the judiciary to enable it to control practice before its courts. Chief Justice Marshall explained:

United States." Act of July 16, 1790, 1 Stat. 130, 130. Schoenbrod might accept this delegation because of the Executive's enhanced interest in managing government property.

120. Act of Apr. 10, 1790, 1 Stat. 110.

121. Act of Sept. 24, 1789, 1 Stat. 73, 83.

122. See Act of Feb. 25, 1791, 1 Stat. 191, 191–96. In establishing the office of Postmaster General several years later, Congress enacted what Schoenbrod would term a classic "goals" statute, directing the Postmaster to "provide for carrying the mail of the United States . . . as often as he, having regard to the productiveness thereof, as well as other circumstances, shall think proper." Act of May 8, 1794, 1 Stat. 354, 357.

123. See supra text accompanying notes 86–89.

124. Indeed, Article I vests Congress with the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8.

125. 11 U.S. (7 Cranch) 382 (1813).

126. See id. at 388 ("[W]e can see no sufficient reason, why the legislature should not exercise its discretion . . . either expressly or conditionally, as their judgment should direct.").

127. 23 U.S. (10 Wheat.) 1, 42 (1825).

> It will not be contended that [C]ongress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . . The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from 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.[128]

Chief Justice Marshall's distinction between delegation in important and unimportant areas did not hold much promise for easy applicability, and later cases did not discuss this distinction in determining the constitutionality of congressional delegation.[129] Indeed, Schoenbrod's proposed test is itself indifferent to the importance of the issues delegated.[130]

More importantly, Schoenbrod ignores that there is no historical

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128. Id. at 41.

129. See Cary v. Curtis, 44 U.S. (3 How.) 236 (1845). There, the Court upheld Congress' delegation to the Secretary of the Treasury of the power to determine whether customs officials under his authority assessed excessive duties. The delegation to the Secretary enabled him to determine the rights of private parties. The Court construed the Act of Mar. 3, 1839, 5 Stat. 339, to abrogate a merchant's right to sue customs officials for overpayment. Instead, the Court held that the Act substituted a political remedy: "[W]henever it shall be shown to the satisfaction of the secretary of the Treasury, that . . . more money has been paid to the collector . . . than the law requires should have been paid, it shall be his duty . . . to refund [the amount wrongfully assessed] . . . ." 44 U.S. at 240–41. Congress failed to provide any guidance as to what proof or evidence the Secretary could rely on in making that determination.

In dissent, Justice Story railed against the unfettered delegation, explaining,

> I know of no power, indeed, of which a free people ought to be more jealous, than that of levying taxes and duties; and yet if it is to rest with a mere executive functionary of the government absolutely and finally to decide what taxes and duties are leviable . . . it seems to me that we have no security whatsoever for the rights of the citizens.

Id. at 253 (Story, J., dissenting). Justice Story emphatically

> den[ied] the constitutional authority of Congress to delegate such functions to any executive officer, [for] if Congress possess[es] a constitutional authority to vest such summary and final power of interpretation in an executive functionary; I know no other subject within the reach of legislation which may not be exclusively confided in the same way to an executive functionary; nay, to the executive himself.

Id. Schoenbrod's concern for delegation of rules of private conduct mirrors Justice Story's concern with delegation of the judicial power of making final determinations of individual rights.

130. As a fallback to his position, Schoenbrod suggests that courts could permit continued delegation of "details," as long as they are not controversial (p. 151). But, there is reason to believe that the more an issue is on the public agenda, the less the chance that legislators can cater to interest groups at the expense of concentrated interests. It is the details, as in the navel orange marketing order, that may cause the greatest damage. Nor does Schoenbrod suggest how courts are to distinguish significant policy or rules from uncontroversial rules of detail.

support for applying the nondelegation test to delegation to courts.[131] There has never been any judicial determination, even during the New Deal, explicitly restricting delegation to courts[132] or, for that matter, to

131. Schoenbrod faces a dilemma in arguing that delegation of rule-making authority to courts is unconstitutional. He must either argue that the Constitution prohibits courts from exercising common-law rule-making powers in contract or tort, or he must in some way distinguish these forms of common-law rule-making. Given the Founders' evident acceptance of common-law rule-making by federal judges (p. 157), and given the courts' unchallenged powers to create federal common law under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), he chooses the latter course, arguing that common-law rule-making is different from interstitial lawmaking by courts.

Schoenbrod defends judicial common-law rule-making, which only exists in pure form at the federal level in admiralty cases, on three grounds. First, he argues that because of their isolation from politics, judges can be trusted to make rules of private conduct (p. 113). Second, he argues that common-law rule-making is circumscribed because of the force of precedents and the need for judges to explain their opinions (p. 113). Finally, he argues that judicial common-law rule-making is consistent with accountability because common-law rule-making reflects democratic values by incorporating community standards (p. 157).

The first two justifications, however, do not distinguish common-law rule-making from any lawmaking by Article III judges, whether under the Sherman Antitrust Act or under Section 301 of the Labor Management Relations Act (see Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)). The third justification is unconvincing. All common-law rule-making does not turn on interpretation of community customs, and judges may not in any event ascertain consensus correctly. Moreover, there are no safeguards, such as bicameralism and presentment, to filter majoritarian custom or policy, even if that policy could be discerned. After all, a majority of firms may discriminate or pollute. Schoenbrod's defense of common-law rule-making is thus inconsistent with his earlier stated premises.

132. I recall that some years ago, when I was in the Justice Department, Judge Silberman of the D.C. Circuit questioned one of my colleagues at oral argument whether Congress violated the nondelegation doctrine when failing to provide sufficient guidelines for judges confronting vague statutory language. The case being argued, Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730 (D.C. Cir. 1987), rev'd, 489 U.S. 749 (1989), turned on construction of Exemption 7 of the Freedom of Information Act (FOIA), which directs the government to exempt from disclosure "investigatory records compiled for law enforcement purposes, . . . but only to the extent that the production of such records . . . would . . . (C) constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552b(c)(7)(1988). Judge Silberman's point was that Congress had not made the critical policy judgment as to what constituted an "unwarranted invasion of personal privacy," even though it had enacted a rule. Courts stepped in to develop FOIA law in a conventional common-law fashion.

From a doctrinal perspective, however, Judge Silberman's question was easily answered, for the Supreme Court has never applied the nondelegation doctrine to judicial lawmaking, and indeed, Judge Silberman only tangentially addressed the issue in resolving the FOIA dispute: "We observe at the outset the awkwardness of the federal judiciary appraising the public interest in the release of government records. Normally an administrative agency would make a decision of that sort in the first instance . . . ." 816 F.2d at 740. Judge Starr concurred, noting that while he "share[d] the majority's concern that the judiciary is ill-equipped to make value-laden judgment calls such as assessing the extent of the 'public interest,' [he was] nonetheless persuaded that Congress ha[d], in essence, put us in the business of doing just that." Id. at 744 (Starr, J., concurring). The Supreme Court reversed, finding sufficient legislative direction. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776–80 (1989).

agencies acting in an adjudicative capacity.[133]

The early practice therefore suggests that there was no consensus as to the extent to which Congress could delegate policymaking responsibility in general or rules of private conduct in particular. There has never been any prohibition against delegation to courts, and whatever prohibition there has been against delegation to the executive branch has been largely ignored in practice, except during the 1920s and 1930s.[134]

Shorn of textual and historical support, Schoenbrod can rely only on the structural argument that Congress must be the exclusive lawmaker because the Article I checks of bicameralism and presentment do not apply to any other branch. Liberty is protected by confining all rules of private conduct to Congress. Given the inevitable rule-making of courts hearing cases and controversies, agencies resolving disputes, and the President enforcing the laws, however, some rule-making of private conduct outside Congress seems unavoidable. Moreover, even though Article I does not constrain exercise of rule-making authority outside of Congress, other checks exist. For instance, judges cannot act in the absence of a case or controversy, and the Executive, who is electorally accountable, is subject to Congress' power of the purse as well as to its latent power to modify all delegation. The question for resolution thus is not whether the Constitution prohibits all delegation of rule-making authority, but the far more cabined one of how much, and under what conditions, Congress may delegate while still being faithful to the constitutional structure.

At some point, congressional delegation may well undermine the system of checks and balances immanent in the constitutional scheme. Congressional transfer of Congress' own contempt power[135] to executive officers or delegation of the Senate's power to approve treaties[136] to the Secretary of State would compromise the balance of powers in the Consti-

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133. In SEC v. Chenery Corp., 332 U.S. 194, 206–08 (1947), for instance, the Court upheld the SEC's determination of criteria for approving reorganization of public utility holding companies. Also, the NLRB has been notorious in fashioning policy through adjudication. See generally Samuel Estreicher, Policy Oscillation at the Labor Board: A Plea for Rulemaking, 37 Admin. L. Rev. 163, 170 (1985) (stating that NLRB's policy oscillation turns on "Board's virtual exclusive reliance on adjudication as the vehicle for policy formation"); David L. Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 922 (1965) (NLRB "remains firmly wedded to adjudication as virtually the sole means of formulating policy").

Courts on occasion have limited or invalidated delegation to other adjudicatory bodies because of due process or ex post facto concerns. See, e.g., Bouie v. City of Columbia, 378 U.S. 347, 353 (1964) (unforeseeable judicial construction defining elements of crime may violate Ex Post Facto Clause); United States v. L. Cohen Grocery Co., 255 U.S. 81, 86, 92–93 (1921) (in effect invalidating delegation to court proscribing "unreasonable" prices for necessities).

134. See supra text accompanying notes 55–56.

135. See generally Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821) (upholding Congress' exercise of an implied contempt power).

136. See U.S. Const. art. II, § 2.

tution. Similarly, if Congress transfers too much of its power to judges, the judiciary's ability to resolve cases and controversies might be compromised. The line that Schoenbrod draws between rules and goals represents just one possible way to preserve the constitutional structure,[137] but it is by no means mandated by text or history.

Viewed another way, the nondelegation doctrine proposed by Schoenbrod makes little sense in a world in which lawmaking and law interpretation, as well as law application, are so closely connected. The fall of the nondelegation doctrine may in no small part be attributed to that realization. Even if the founders did not themselves so understand the world, we should now (if possible) construe the Constitution to avoid their mistake. Just as the Supreme Court abandoned enforcement of restraints on Congress' Commerce Clause authority after repeatedly confronting the realities of an integrated national economy,[138] so it arguably stopped enforcing the nondelegation doctrine when it became apparent that both lawmaking and law interpreting involve rule-making and implicate important public policy.[139] The Article I checks of bicameralism and presentment apply only to rule-making by Congress itself.

B. *Alternative Explanation of Constitutional Structure*

1. *Nonexclusivity of Constitutional Powers.* — Instead of allocating functions, the Constitution may prescribe a relational arrangement among the branches.[140] For instance, in vesting "legislative powers" in Congress,[141] the Constitution plausibly refers to the power to initiate policy by passing laws to regulate commerce, raise and support armies, or establish post roads.[142] In this light, the Constitution does not claim for Congress the exclusive function of rule-making, but merely the authority to start the ball rolling by passing a law. It is up to Congress to enact a no-discrimination rule, and then various agencies or the courts can exercise further rule-making through enforcement and interpretation. Absent the Civil Rights Act, however, the President presumably could not issue an Executive Order establishing the no-discrimination principle in the

137. The intelligible principle test represents another possibility, as does the more refined approach suggested by Professor Davis. See supra note 54.

138. See, e.g., Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) (adopting aggregate effects test to uphold imposition of quota on wheat production); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41–43 (1937) (upholding regulation of corporation's manufacturing operations because of potential that labor strife would affect interstate commerce).

139. See Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 38–42 (1994) (analogously arguing that Framers, in contrast to most today, did not perceive the political content of implementation efforts by administrators).

140. See Krent, supra note 34, at 1259–71. Professor Thomas Merrill has articulated a similar view of the allocation of powers. See Thomas W. Merrill, The Constitutional Principle of Separation of Powers, 1991 Sup. Ct. Rev. 225.

141. See U.S. Const. art. I, § 1.

142. See id. § 8.

first place, at least to govern conduct in the private sector.[143] Although Congress has the exclusive power to initiate policy through legislation, the executive branch has a role in fleshing out that policy, and the judiciary has a role in resolving challenges to that policy as enacted by Congress[144] and applied by the agencies.[145] Congress in turn retains ultimate authority to change the evolving policy, subject to presidential veto.[146] Thus, rather than relegating distinct powers to each branch, the Constitution may instead provide a framework of interdependent responsibilities.

Evidence of original intent, to the extent it is relevant, is consistent with the view that the Constitution fixes a relational scheme for the branches. Although the evidence is far from conclusive, James Madison noted in defense of the constitutional structure, prior to its ratification, that:

> *Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces — the legislative, executive and judiciary*; . . . Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.[147]

Hamilton similarly warned of the "insufficiency of a mere parchment delineation of the boundaries of each [branch of government]."[148] Instead, Madison argued that the desirable checks and balances could be maintained by "so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[149] The founders would undoubtedly be shocked by the extent of delegation today, but they

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143. The President can, and has, established such principles binding on the federal work force and government contractors. See, e.g., Exec. Order No. 10,925, 3 C.F.R. 448 (1959–1963) (prohibiting federal contractors from discriminating on the basis of race); Exec. Order No. 11,141, 3 C.F.R. 179 (1964–1965) (prohibiting federal contractors from discriminating on the basis of age); cf. United States v. East Texas Motor Freight Sys., 564 F.2d 179, 185 (5th Cir. 1977) (executive orders inconsistent with congressional policy cannot be enforced).

144. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

145. See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–45 (1984) (framing judicial role in reviewing agency policymaking). In construing statutes, courts must also exercise a subsidiary policymaking role, particularly under the dynamic theory of statutory interpretation expounded by Professor Eskridge, see supra note 76. Even if not overtly dynamic, interpretation by necessity requires translation which, because of inexorably changing conditions, inevitably includes significant policymaking. See Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1189–1206 (1993) (justifying need for creativity in effective translation).

146. For an argument that the President's power to veto any changes to administrative policy should be curtailed, see Greene, supra note 2, at 179–95.

147. The Federalist No. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

148. Id. No. 73, at 442 (Alexander Hamilton).

149. Id. No. 51, at 320 (James Madison).

might well attribute such delegation to a defect in politics rather than to a breach of the constitutional structure.

Understanding Articles I, II, and III as a relational blueprint for the three branches of government has numerous advantages. First, the framework suggested here—as opposed to the approach advocated by Schoenbrod—makes sense of much of the contemporary Supreme Court's jurisprudence. The Court construes the Constitution not so much to separate the branches according to different powers, i.e., law applying and law interpreting, as to impose different structural or procedural constraints on each branch. For instance, contemporary decisions recognize that all three branches must interpret prior laws, and all three branches in some sense make the law. In *Bowsher v. Synar*,[150] the budget-cutting duties delegated to the Comptroller General could have been discharged by Congress itself, by the President, or in part by the courts had the law authorized any aggrieved individual to challenge unreasonable deficit-cutting decisions. Similarly, in *INS v. Chadha*,[151] the function challenged—determining whether to suspend deportation of an alien—probably could have been exercised by any branch,[152] and was described by Justice Burger as both legislative and executive,[153] and by Justice Powell as judicial.[154] As Justice Stevens commented in *Bowsher*, "a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned."[155]

In contrast, the Supreme Court has been much more rigorous in requiring each branch to comply with constitutionally prescribed constraints on its action. The Court has on three recent occasions struck down legislative efforts to permit Congress to effect policy other than through bicameralism and presentment.[156] The Court has also rejected, at least in the domestic arena, claims that executive authority exists apart from that delegated by Congress.[157] At the same time, the Court has

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150. 478 U.S. 714 (1986).

151. 462 U.S. 919 (1983).

152. There is some question as to whether Congress' decision to deport individual aliens could be considered a violation of the bill of attainder clause, U.S. Const. art. I, § 9, cl. 3, which prohibits Congress from punishing individuals or specified groups. (Deportation, however, is generally not considered punitive.) Congress certainly enjoys the power to make all individuals in Chadha's position deportable and then authorize itself, on a case-by-case basis, to allow individuals to remain in this country.

153. See 462 U.S. at 952, 953 n.16, 958.

154. See id. at 960 (Powell, J., concurring).

155. Bowsher v. Synar, 478 U.S. 714, 749 (1986) (Stevens, J., concurring).

156. See Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2311–12 (1991) (invalidating role of members of Congress on Board of Review of Airports Authority); *Bowsher*, 478 U.S. at 732–34 (invalidating congressional delegation of executive authority to Comptroller General, an officer removable at Congress' initiative and hence subject in part to its control); *Chadha*, 462 U.S. at 956–59 (invalidating one-house legislative veto).

157. See Morrison v. Olson, 487 U.S. 654, 675–77 (1988) (rejecting claim that executive branch has exclusive control over prosecutions); Youngstown Sheet & Tube Co.

made the case or controversy restriction on its own authority more demanding.[158]

Second, approaching the separation of powers as a relational framework serves many of the same purposes that Schoenbrod ascribes to the nondelegation doctrine. It promotes accountability by mandating that each branch act within a defined sphere and according to particular procedures.[159] The greater visibility should enhance accountability, and help expose (to at least some extent) the ongoing shell game of delegation.[160] And, mandating that each branch observe the constitutional constraints on its actions in the Constitution (e.g., Congress must comply with the formal requirements of bicameralism and presentment) also discourages Congress from delegating in the first place by placing a price tag on such delegations. All delegation must be outside Congress' control[161] and subject to the executive branch's general supervision.[162] In light of greater executive branch accountability, the delegation that still exists will less likely result in rent-seeking.[163]

Third, the relational framework avoids the inflexibility inherent in any constitutional scheme that separates branches according to functions or powers. Justice Scalia's dissent in *Morrison v. Olson*[164] and that of Justice Brennan in *Commodity Futures Trading Comm'n v. Schor*[165] illustrate the risk. Justice Scalia would have invalidated the independent counsel statute reviewed in *Morrison* because the congressional arrangement robbed the President of a "quintessentially executive function"—the exclusive authority to control all criminal law prosecutions.[166] Based on any effort to define executive functions, Scalia's analysis makes eminent sense—most people would describe criminal law prosecution as one of the core executive functions. But there is little in history to support Justice Scalia's assertion of exclusive executive control over criminal law enforcement,[167]

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v. Sawyer, 343 U.S. 579, 585–89 (1952) (rejecting claim of inherent executive authority to exceed bounds of congressional delegation in an emergency).

158. See, e.g., Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2137–2146 (1992) (rejecting claim of citizen standing and limiting ability of individuals to satisfy injury-in-fact test); Allen v. Wright, 468 U.S. 737, 751–61 (1984) (imposing stringent requirements to meet injury-in-fact test).

159. See Merrill, supra note 140, at 251–55.

160. See David A. Martin, The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253, 279 (1982) (arguing that Constitutional Convention recognized that accountability depends largely upon public ability to pin responsibility for actions on government entities).

161. See Bowsher v. Synar, 478 U.S. 714, 733–34 (1986) (stating that Congress cannot constitutionally reserve removal power over officer performing executive function).

162. See Krent, supra note 34, at 1282.

163. See supra text accompanying notes 46–48.

164. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

165. 478 U.S. 833, 859 (1986) (Brennan, J., dissenting).

166. See *Morrison*, 487 U.S. at 706–15 (Scalia, J., dissenting).

167. See Susan L. Bloch, The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There was Pragmatism, 1989 Duke L.J. 561, 566–618; Stephanie

and there has never been a consensus that executive powers in general are exclusive.[168] Congress routinely exercises what most consider executive power in singling out particular parties for regulation.[169]

Similarly, Justice Brennan in *Schor* would have invalidated the Commodity Futures Trading Commission's (CFTC) exercise of jurisdiction over counterclaims based on common law because adjudication of such common-law counterclaims involved the essential attributes of judicial power.[170] Yet, almost all agency adjudication similarly reflects exercise of a judicial function. Indeed, the reparations claims routinely adjudicated by the CFTC—whose general authority was not challenged in *Schor*—closely resemble common-law fraud suits. Understanding judicial power to be exclusive might needlessly straitjacket the adjudicative duties of administrative agencies, magistrates, and masters, as well as those of Congress itself.

Separating the branches by function or powers simply does not lead to a workable government. The relational approach thus has the benefit of greater flexibility—instead of defining and enforcing powers unique to each branch, the judiciary must determine whether each branch acts consistently with the constitutional restraints upon its action as well as with the other constraints—such as the Appointments[171] or Ex Post Facto Clauses[172]—prescribed in the constitutional text.[173]

In short, Schoenbrod's constitutional argument is not compelling. The text nowhere demands that Congress be the exclusive organ to make rules of private conduct, and every Congress including the first has delegated significant authority. The test Schoenbrod proposes is not, moreover, congruent with the logical underpinnings of his constitutional view, because his test permits significant rule-making by both agencies and courts. There are other ways to read the constitutional structure consistently with the concerns of the founders, and the reading sketched above (though there are other plausible interpretations) leads to a more flexible approach to separation of powers controversies.

A. J. Dangel, Note, Is Prosecution a Core Executive Function? *Morrison v. Olson* and the Framers' Intent, 99 Yale L.J. 1069, 1082–87 (1990).

168. See Lessig & Sunstein, supra note 139, at 12–38 (examining history of limited presidential control over authority delegated outside Congress).

169. See supra text accompanying notes 111–115.

170. See CFTC v. Schor, 478 U.S. 833, 865–66 (1986) (Brennan, J., dissenting).

171. U.S. Const. art. II, § 2, cl. 2. See, e.g., Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993) (invalidating President Bush's recess appointment of member of Postal Service Board of Governors).

172. U.S. Const. art. I, § 10, cl. 1. See, e.g., United States v. Wilson, 962 F.2d 621 (7th Cir. 1992) (striking down retroactive application of sentencing guidelines amendment); United States v. Morrow, 925 F.2d 779 (4th Cir. 1991) (same).

173. The relational approach also avoids the awkwardness of the value hierarchy latent in Schoenbrod's proposal because it would treat rules of private conduct the same as rules affecting private conduct. See supra pp. 732–33.

2. *Confining Delegation Under a Relational Framework.* — Finally, although Schoenbrod's concern about untethered delegation is valid, the nondelegation doctrine is not essential in preserving the checks and balances designed to limit government and preserve liberty. Even if Congress does not pursue the alternative forms of regulation that Schoenbrod and others have encouraged, there are various judicial responses available to discourage delegation.

First, as mentioned previously, courts can reaffirm that there are not four branches of government, and that delegation to agencies entails a significant loss of legislative control. Presumably, the more that courts require the President to exercise control over all agencies, the less attractive that delegation becomes from Congress' standpoint. Congress would be less able to influence the exercise of delegated authority and thereby earn the gratitude of constituents. Moreover, it would be easier for constituents to identify the appropriate entity responsible for wasteful policies, either the Congress that set the regulatory apparatus in motion, or the President who supervised administration of the scheme.[174]

Second, even if the nondelegation doctrine is discarded, courts can still read delegation of policymaking authority narrowly to avoid the necessity of reaching constitutional questions.[175] Constitutional difficulties arising from interpretation or implementation by Congress' delegates may not properly be attributable to Congress, but rather to an administrator who may be less sensitive to, or institutionally concerned with, the individual or structural rights at stake. The Court may therefore wait for a clear statement from Congress adopting the agency's contested position before reaching the merits of that position. The Court has used this clear statement approach on numerous occasions, albeit not consistently, and not always explicitly.[176]

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174. See, e.g., Pierce, supra note 5, at 407–18 (asserting that proper executive and judicial response can prevent Congress from committing "legiscide" through "broad delegations of power" to agencies); Moe, supra note 47, at 237 ("Unlike legislators, Presidents are held responsible by the public for virtually every aspect of national governmental performance . . . All Presidents are acutely aware of this, and they respond by trying to build and deploy an institutional capacity for effective governance.").

175. Courts at times require a clear statement of Congress' intent before reaching a serious constitutional question. See Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 465–66 (1989) (construing Federal Advisory Committee Act narrowly to avoid Appointments Clause issue). Moreover, the Court has narrowly read delegations to avoid infringing state autonomy, see Gregory v. Ashcroft, 111 S. Ct. 2395, 2403 (1991), and has also required a clear statement by Congress prior to abrogating the states' Eleventh Amendment immunity. See, e.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985). For general discussion of the clear statement rule, see William N. Eskridge, Jr. and Philip P. Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593 (1992).

176. See, e.g., Reno v. Catholic Social Servs., 113 S. Ct. 2485, 2494 (1993) (construing delegation to INS to include judicial review provision); Touby v. United States, 111 S. Ct. 1752, 1758 (1991) (construing delegation to Attorney General to include judicial review provision); United States v. Bozarov, 974 F.2d 1037, 1041–45 (9th Cir. 1992) (finding that, although delegation to Secretary of Commerce explicitly excluded from judicial review,

For instance, in *Kent v. Dulles*,[177] the Court construed Congress' delegation of the authority to issue passports to the Secretary of State narrowly to prevent him from denying passports because of the applicant's Communist sympathies. The Court chose not to address the constitutional questions raised, indicating instead that it would wait for a clearer signal from Congress: "Freedom to travel is, indeed, an important aspect of the citizen's 'liberty.' We need not decide the extent to which it can be curtailed. We are first concerned with the extent, if any, to which Congress has authorized its curtailment."[178] When Congress refuses to adopt the policy pursued by the administrative agency, as it did in *Kent v. Dulles*, the Court successfully avoids the necessity of making a constitutional judgment. On the other hand, when Congress adopts the challenged policy explicitly,[179] at least there has been greater congressional attention to the issue.[180] The clear statement rule can play a role in encouraging more thorough congressional deliberation whenever sensitive policy issues are at stake,[181] and the public benefits from greater ventilation of such policy judgments.[182]

For another example, consider the Supreme Court's decision in

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statute constitutional because courts may still review colorable constitutional claims and claims that Secretary acted in excess of authority), cert. denied, 113 S. Ct. 1273 (1993).

177. 357 U.S. 116 (1958). The pedigree of the clear statement approach can be traced much further back. Justice Story, in his dissent in Cary v. Curtis, 44 U.S. (1 How.) 236, 252–60 (1845), reveals that he would have required clear language from Congress before upholding delegation of the nonreviewable power to interpret and apply a law to an executive functionary. See supra note 129.

178. 357 U.S. at 127.

179. For instance, in Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973), the Court avoided deciding the constitutionality of the Fair Labor Standards Act by refusing to allow employees to sue the state in federal court to enforce the statute because the statute failed to indicate "by clear language that the constitutional immunity [of the Eleventh Amendment] was swept away." Id. at 285. Congress provided a clear statement of that intent the next year, 29 U.S.C. § 216(b) (West Supp. 1993).

180. If Congress provides a clear statement and in effect ratifies the agency position, then, despite Schoenbrod's suggestion to the contrary (p. 177), there is much less fear of unchecked governance. The end result is not delegation, but specific ratification, which after all must comply with the Article I steps of bicameralism and presentment.

181. In Hampton v. Mow Sun Wong, 426 U.S. 88, 112 (1976), the Court held that Congress had not conferred upon the Civil Service Commission the power to exclude resident aliens from working for the government. In Thompson v. Oklahoma, 487 U.S. 815 (1988), Justice O'Connor wrote that she would only sanction death penalties for minors, assuming the age chosen was not part of a national consensus, if the state legislature enacted a minimum age explicitly. See id. at 857–58 (O'Connor, J., concurring); see also Bowers v. Hardwick, 478 U.S. 186, 219 (1986) (Stevens, J., dissenting) (arguing that court should not uphold Georgia's application of anti-sodomy ordinance only to gays until state legislature articulated a neutral and legitimate state interest supporting it).

182. The clear statement rule can be used to protect both individual liberties, as in *Kent v. Dulles*, as well as structural norms. The approach has in fact more recently been used to protect structural constitutional norms, see Eskridge & Frickey, supra note 175, at 611–45.

NLRB v. Catholic Bishop of Chicago.[183] Congress delegated to the NLRB the power to regulate labor relations between employees and any employer whose operations affect interstate commerce, with limited delineated exceptions, such as the United States or any employer subject to the Railway Labor Act.[184] The Court nonetheless rejected the NLRB's exercise of jurisdiction over private, church-operated schools on the ground that, given the serious First Amendment issues that would otherwise be raised, Congress had not manifested the requisite explicit intent to include such employers under the Act, despite the enumeration of exceptions in the statute.[185] The Court's clear statement decision signals that, prior to judicial review, only politically accountable actors should resolve the tension between religious freedom and labor policy.[186] The concern for accountability underlying the clear statement approach should outweigh the canon of deference to agency policymaking articulated in *Chevron.*[187]

Although the clear statement approach is admittedly malleable, as Schoenbrod suggests (pp. 169–70),[188] it permits greater predictability than Schoenbrod's proposal. Almost every piece of legislation, under Schoenbrod's approach, could be invalidated for failure to establish sufficiently clear rules of conduct. That prospect may well foster significant social and political instability as well as excessive litigation. In contrast, a clear statement approach would only lead to invalidation in the more infrequent context when agency exercise of delegated authority threatens some constitutional (or other) norm. Judges concededly will not agree when invocation of the clear statement rule is appropriate, but the very disagreement will spark a dialogue on the importance of the rights at

183. 440 U.S. 490 (1979).

184. 29 U.S.C. § 152(2) (1988).

185. See 440 U.S. at 504. For an argument that Congress had considered and rejected an exclusion for lay teachers at church-operated schools, see id. at 515–16 (Brennan, J., dissenting).

186. A clear statement ruling from the Court, however, provides admittedly little guidance to lower courts and agencies for future cases. See Harold J. Krent, Avoidance and Its Costs: Application of the Clear Statement Rule to Supreme Court Review of NLRB Cases, 15 Conn. L. Rev. 209, 221, 226 n.71 (1983).

187. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 864–66 (1984); see also Cass R. Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2111–14 (1990) (making much the same point in arguing for expanded role of canons of statutory interpretation).

188. See also Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2295 (1993) (Thomas, J., concurring) (the clear statement approach "does not provide authority to construe the statute in a way that 'is plainly contrary to the intent of Congress'") (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)); Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 481 (1989) (Kennedy, J., concurring) (clear statement rule "should not be given too broad a scope lest a whole new range of Government action be proscribed by interpretive shadows cast by constitutional provisions that might or might not invalidate it").

stake.[189]

Moreover, by minimizing the occasions that courts will hold an act of Congress unconstitutional, the clear statement approach better preserves judicial legitimacy than Schoenbrod's proposal. Courts would only refuse to enforce acts of administrative agencies, not legislatures, to signal concern for protection of constitutional (and possibly some other) rights. The clear statement approach avoids the necessity for a full-fledged conflict with the majoritarian Congress.[190] Thus, concern for deliberation can be promoted without a full-scale conflict among the branches.

Indeed, a clear statement approach would be consistent with the emerging trend in statutory construction. Academics have argued that judges have relied, and must continue to rely, on background norms in construing legislation.[191] Judges must resolve ambiguity in statutory language and fill gaps in statutes by resorting to norms external to the legislation, and they respond to changing circumstances with an eye to public policy. The clear statement approach similarly requires judges to rely upon background constitutional values in determining the reach of delegated authority. At the same time, narrow construction of delegated authority serves to encourage dialogue with Congress over the constitutional values and to protect the public from the consequences of possibly ill-considered agency policymaking.[192] In some contexts, utilization of a clear statement approach may accurately reflect legislative intent because Congress may not have anticipated agency action impinging on

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189. Thus, the Court should have invoked the clear statement doctrine in Rust v. Sullivan, 111 S. Ct. 1759 (1991), to avoid reaching the constitutional challenge to the Department of Health and Human Services' abortion gag rule on Title X grantees and physicians who supervise Title X funds. See id. at 1789 (O'Connor, J., dissenting) (asserting that regulations should be invalidated because Secretary's interpretation of federal statute was unreasonable and raised serious First Amendment questions). But the judicial debate may have had a salutary effect on Congress, which itself subsequently debated the issue. See 137 Cong. Rec. H5069, H5070 (daily ed. June 26, 1991); 137 Cong. Rec. H9418 (daily ed. Nov. 6, 1991) (debates on proposed bill to provide federal funds to family planning programs). This bill was vetoed by President Bush. See 137 Cong. Rec. H10491 (daily ed. Nov. 19, 1991); see also 138 Cong. Rec. H2817 (daily ed. Apr. 30, 1992) (debate on proposed bill, incorporating abortion gag rule as basis for federal funds disbursement). This second proposed bill was later mooted by the new administration's policy. See Standards of Compliance for Abortion-Related Services in Family Planning Service Projects, 58 Fed. Reg. 7464 (1993) (to be codified at 42 C.F.R. pt. 59) (proposed Feb. 5, 1993). Although I agree with Schoenbrod therefore that the *Rust* decision was incorrect, the Court could have invalidated the regulation without striking down the legislation itself as Schoenbrod recommends (pp. 15–16).

190. Use of the clear statement approach nonetheless is not fully consistent with majoritarian concerns. See generally Eskridge & Frickey, supra note 175, at 636–40 (addressing tension between clear statement approach and majority values).

191. See generally id. at 595–96; Sunstein, supra note 1, at 160–92.

192. See Sunstein, supra note 1, at 165–80 (advocating clear statement approach to promote accountability); Paul Gewirtz, The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines, 40 Law & Contemp. Probs. 46, 65 (Summer 1976) (similarly arguing for clear statement approach).

constitutional or other sensitive norms. Even when the clear statement approach is inconsistent with legislative intent, it serves the desired function of promoting accountability. Schoenbrod is thus correct that judges should play a role in combatting excessive delegation, but the role of courts is secondary at best. The principal goal should be to reform Congress itself.

CONCLUSION

Schoenbrod presents strong policy arguments against delegation, and riveting portrayals of government waste and inefficiency. Yet broad delegation of authority to agencies represents at most a failure of politics, not of law. The prohibition today against delegation does not represent an underenforced constitutional norm as much as a neglected norm of good government. Such neglect in part may be warranted, given that agency policymaking may be more responsive to majoritarian concerns in some contexts than direct congressional rule. Schoenbrod's book is nonetheless vitally important, for even if the nondelegation doctrine is discarded, vigorous steps should be taken to restore greater faith in government by discouraging routinized delegation and selectively encouraging in its stead alternative forms of regulation and innovative new strategies to influence conduct in the private sector.