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Nondelegation After *Mistretta*: Phoenix or Phaethon?

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NOTE

NONDELEGATION AFTER *MISTRETTA*: PHOENIX OR PHAËTHON?

Even as the media and academicians alike acknowledge the ascent of the conservative wing to majority status on the United States Supreme Court,¹ a puzzling anomaly exists. Decisions during the last three terms² reveal a retreat from the formalist approach³ that had governed the Court's separation of powers jurisprudence from approximately 1976 to 1988. The Court's seeming departure from this approach, once considered *de rigueur* among conservative jurists, is perplexing as it has coincided with the ascendancy of the court's conservative wing. Since the appointments

1. The conservative coalition includes Chief Justice William H. Rehnquist, Justice Byron R. White and the three Reagan appointees: Justices Anthony M. Kennedy, Antonin Scalia and Sandra Day O'Connor. See, e.g., Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 44, 44-45 (1989) ("Joining Chief Justice Rehnquist and Justices White, O'Connor, and Scalia, Justice Kennedy supplied the critical fifth vote in a series of conservative 5-4 decisions . . ."); L. Powell, Jr., *Stare Decisis and Judicial Restraint*, Remarks at the Leslie H. Arps Lecture Before The Association of the Bar of the City of New York 2 (October 17, 1989) ("At the close of the 1988 Term, commentators who agreed on little else unanimously proclaimed a 'shift in direction' on the Court."). But cf. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 563 (1988) ("Sandra Day O'Connor was supposed to be a right wing ideologue; now the news media and many commentators regard her as a moderate.") (footnote omitted).

2. See *Mistretta v. United States*, 109 S. Ct. 647 (1989) (an 8-1 decision upholding the constitutionality of sentencing guidelines); *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (a 7-1 decision upholding the constitutionality of the independent counsel provisions of the Ethics in Government Act).

3. Formalism seeks to keep one branch from exercising or controlling another branch's power. It employs a two-step inquiry, asking first which branch exercises the power in question and second, what kind of power is being exercised, executive, legislative or judicial. If the answers to both questions are not the same, the separation of powers doctrine has been violated. See *infra* notes 20-23 and accompanying text.

of Justices Antonin Scalia⁴ and Anthony M. Kennedy, this more conservative Court has released two major separation of powers decisions, *Morrison v. Olson*⁵ and *Mistretta v. United States*,⁶ each fervently espousing a more flexible, so-called "functionalist" approach.⁷

If the decisions mark the demise of the formalist school under the ironic circumstances described above, they also signal the end of the nondelegation doctrine's⁸ period of "renewed respectabil-

4. The Court decided *Bowsher v. Synar*, 478 U.S. 714 (1986), the last major case reflecting the strict formalist or separation view, in June 1986, two and a half months before Scalia joined the Court.

5. 108 S. Ct. 2597 (1988). Justice Kennedy did not participate in the *Morrison* decision.

6. 109 S. Ct. 647 (1989).

7. Functionalism is a more pragmatic approach than formalism. It employs a two-step analysis that focuses on whether the power of one branch has been encroached upon, and if so, whether that power has been aggrandized by another branch. See *infra* notes 24-25, 121 and accompanying text.

The Court's apparent shift from a formalist to a functionalist approach did not go unnoticed. See, e.g., Greenhouse, *Justices Uphold Disputed System of U.S. Sentencing*, N.Y. Times, Jan. 19, 1989, at A1, col. 4.

The [*Mistretta*] decision was in the spirit of the Court's ruling last summer [in *Morrison*] that Congress did not violate the separation of powers by creating the office of special prosecutor to investigate executive branch wrongdoing. Taken together, the two decisions appear to mark a shift away from the formal approach to the issue that had earlier led the Court to strike down the initial version of the budget-balancing law [in *Bowsher*] in 1986.

Id. (emphasis added); see also *Mistretta*, 109 S. Ct. at 682 (Scalia, J., dissenting) (citations omitted):

Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court.

Some commentators did not see such a clear shift to a functionalist approach. See Werhan, *Toward an Eclectic Approach to Separation of Powers*; *Morrison v. Olson Examined*, 16 HASTINGS CONST. L.Q. 393 (1989) (arguing that in *Morrison*, the Court applied an eclectic merger of the formalist and functionalist approaches); Comment, *Separation Of Powers and the Independent Governmental Entity After Mistretta v. United States*, 50 LA. L. REV. 117 (1989) (arguing that in *Mistretta*, the Court actually employed a combination of the formalist and functionalist approaches).

8. The nondelegation doctrine postulates that Congress cannot delegate its legislative powers to the other branches. Congress may make exceptions, however, when it needs the assistance of other branches to perform its own duties. See *infra* notes 33-51 and accompanying text.

The Supreme Court intended the doctrine to serve three important functions:

ity.”⁹ Although fifty-five years have passed since the nondelegation doctrine commanded a majority of the Court,¹⁰ and the institutionalization of administrative agencies over that period suggested that the doctrine had become a dead letter,¹¹ the landmark nondelegation case, *Schechter Poultry Corp. v. United States*,¹² remains good law. Indeed, signs from the Supreme Court just prior to *Morrison* and *Mistretta* suggested that the doctrine was not quite as “moribund”¹³ as some believed. Both Chief Justice Rehnquist and Justice Scalia had indicated receptiveness to the doctrine’s revival,¹⁴ as had numerous legal commentators.¹⁵ Such interest, along

First, . . . it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an “intelligible principle” to guide the exercise of the delegated discretion. Third . . . the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Industrial Union Dep’t v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring) (citations omitted).

9. Scalia, *A Note on the Benzene Case*, REG., July-Aug. 1980, at 25, 27; see Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 67 (1982) (“[T]he idea of a change in constitutional rules governing legislative delegations has acquired a fresh dignity.”); see also *infra* text accompanying notes 65-97.

10. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). But cf. *infra* note 51 and accompanying text.

11. In a 1974 concurrence joined by Justice Brennan in *Federal Power Comm’n v. New England Power Co.*, 415 U.S. 345 (1974), Justice Marshall maintained that the doctrine “has been virtually abandoned by the Court for all practical purposes This doctrine is surely as moribund as the substantive due process approach of the same era . . . if not more so.” *Id.* at 352-53 (Marshall, J., concurring) (citation omitted). In 1982, commentators described the nondelegation doctrine as “continu[ing] to live a fugitive existence at the edge of constitutional jurisprudence,” Aranson, Gellhorn & Robinson, *supra* note 9, at 17, and as being “abandoned and . . . a failure.” K. DAVIS, SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE 18 (1982).

12. 295 U.S. 495 (1935).

13. See *supra* note 11.

14. For Chief Justice Rehnquist’s views, see *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 547-48 (1981) (Rehnquist, J. and Burger, C.J., dissenting) and *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607, 686-87 (1980) (Rehnquist, J., concurring). For Justice Scalia’s views, see *Mistretta v. United States*, 109 S. Ct. 647, 675-83 (1989) (Scalia, J., dissenting); *Morrison v. Olson*, 108 S. Ct. 2597, 2622-41 (1988) (Scalia, J., dissenting); *Synar v. United States*, 626 F. Supp. 1374, 1384 (D.D.C.), *aff’d sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986); Scalia, *supra* note 9; Scalia, *The Legislative Veto: A False Remedy for System Overload*, REG., Nov.-Dec. 1979, at 19 [hereinafter Scalia, *Legislative Veto*].

with growing frustration with administrative agencies,¹⁶ and the apparent vigor of a strict separation approach suggested that the doctrine's revival might not prompt "[t]he biggest horse laugh"¹⁷ after all.

Mistretta and *Morrison* signal an abrupt end to this recent rise in the doctrine's credibility.¹⁸ That the fall of the formalist ap-

15. For commentaries arguing the merits of revival, see T. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 297-99 (1st ed. 1969); Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307 (1976); Gewirtz, *The Courts, Congress and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS., Summer 1976, at 46, 49-65; Jaffe, *An Essay on Delegation of Legislative Power* (pts. 1&2), 47 COLUM. L. REV. 359, 561-93 (1947); Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U.L. REV. 295 (1987); Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968); Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U.L. REV. 355 (1987) [hereinafter Schoenbrod, *Separation of Powers*]; Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985) [hereinafter Schoenbrod, *The Delegation Doctrine*]; Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582-87 (1972). But cf. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3:2-3 (2d ed. 1978); B. SCHWARTZ, *ADMINISTRATIVE LAW* § 2.8 (2d ed. 1984); Aranson, Gellhorn & Robinson, *supra* note 9, at 65-67; Fuchs, *Introduction: Administrative Agencies and the Energy Problem*, 47 IND. L.J. 606, 622-23 (1972); Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064, 1064-78 (1981); Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U.L. REV. 391 (1987); Stewart, *Beyond Delegation Doctrine*, 36 AM. U.L. REV. 323 (1987) [hereinafter Stewart, *Beyond Delegation*]; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1693-97 (1975) [hereinafter Stewart, *American Administrative Law*].

16. See Goldsmith, *INS v. Chadha and the Nondelegation Doctrine: A Speculation*, 35 SYRACUSE L. REV. 749, 757 (1984); Lowi, *supra* note 15, at 304-06; Scalia, *Legislative Veto*, *supra* note 14, at 26; Schoenbrod, *The Delegation Doctrine*, *supra* note 15, at 1226, 1244-45; Stewart, *Beyond Delegation*, *supra* note 15, at 324, 328-29; Taylor, Jr., *A Question of Power, a Powerful Questioner*, N.Y. Times, Nov. 6, 1985, at B8, col. 3 (discussing then-Attorney General Meese's view that the entire system of independent agencies might be unconstitutional); see *infra* text accompanying notes 70-73.

17. Lowi, *supra* note 15, at 298 ("The biggest horse laugh was given to the idea of considering the revival of the *Schechter* rule."). One commentator went so far as to say that "[i]n urging the delegation doctrine, I fear being perceived as antisocial, if not lacking in practical sense" Schoenbrod, *Separation of Powers*, *supra* note 15, at 357.

18. The Court's most recent nondelegation decision, *Skinner v. Mid-America Pipeline Co.*, 109 S. Ct 1726 (1989), confirms this finding. Significantly, a unanimous Court was unmoved by the fact that the delegation to the executive branch was allegedly of Congress' taxing power. Article I, § 8 of the Constitution explicitly grants this power to Congress, and presumably to Congress alone. Yet the Court held that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." *Id.* at 1733. In its unanimous rebuke of a seemingly strong nondelegation argument, given explicit textual commitment of

proach would have a corresponding impact on the nondelegation doctrine should come as no surprise. If one understands the formalist approach as arguing for a strict separation of the three branches, with intermingling only as prescribed by the Constitution,¹⁹ the nondelegation doctrine and its admonitions against shared powers is consistent with that view.

This Note argues that the resulting set-back for the nondelegation doctrine is ill-advised. It reviews the history of the doctrine and focuses on plausible explanations for the Court's current shift. The Note then explains the need for the doctrine's revival and offers a practically and philosophically sound version of nondelegation to guide the courts. Specifically, the Note proposes a limited invocation of the doctrine's intelligible principle standard and the use of strict scrutiny review in cases involving fundamental liberty interests.

FORMALISM AND FUNCTIONALISM DEFINED

The formalist approach to separation of powers is characterized by adherence to a strict interpretation of the Constitution and the intent of the framers²⁰ and a concomitant disdain for perceived extra-constitutional improvements.²¹ This view of separation of powers was predominant in the Supreme Court from 1976 to 1988.²²

the taxing power to Congress, *Mid-America* substantiates claims of the doctrine's fall from grace.

19. See Bruff, *On the Constitutional Status of Administrative Agencies*, 36 AM. U.L. REV. 491, 505 (1987) ("Formalism minimizes the sharing of power by the branches When the Court perceives aggrandizement, it issues a formalist opinion insisting on the separation of powers.").

20. See, e.g., *Morrison*, 108 S. Ct. at 2641 (Scalia, J., dissenting) ("I prefer to rely upon the judgment of the wise men who constructed our system, and of the people who approved it, and of two centuries of history that have shown it to be sound.").

21. See, e.g., *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."); see also Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 493 (1987) ("Formalist decisions are premised on the beliefs that the text of the Constitution and the intent of its drafters are controlling and sometimes dispositive, that changed circumstances are irrelevant to constitutional outcomes, and that broader 'policy' concerns should not play a role in legal decisions.").

22. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress may not exercise removal power over officers performing executive functions.); *Chadha*, 462 U.S. at 919 (Congress may not control the execution of laws except through strict adherence to Article I procedures.);

The decisions during that period relied on constitutional text and framers' intent as polestars. One commentator has argued that "[c]hanged circumstances and even underlying considerations of constitutional structure were largely ignored."²³

Viewed as "[t]he alternative to formalism,"²⁴ functionalism rejects precedent and rules as guides to judicial decisions, relying instead on the facts of each case to determine the outcome. In the separation of powers context, "[b]ecause a functional analysis is a fact intensive examination of the system of checks controlling an individual entity made with little regard for the three part delineation of power provided in the Constitution, the approach is necessarily *ad hoc* to a certain extent."²⁵

Professor Sargentich has further demarcated the parameters of the formalist/functionalist debate, identifying three competing ideals most often employed by the two schools of thought.²⁶ The primary ideal advanced by formalists is the "Rule of Law." The basic tenet of the Rule of Law ideal is that governmental power is granted and constrained by legal norms articulated in the Constitution and statutes. Functionalists assail this ideal as impractical and unrealistic.²⁷

Northern Pipe Line Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (Congress may not confer Article III powers on Article I judges.); Buckley v. Valeo, 424 U.S. 1 (1976) (Because appointment of Federal Election Commission members did not follow the guidelines of the appointments clause, the Commission could not constitutionally exercise those powers reserved for "Officers of the United States" appointed in conformity with the clause.).

23. Sunstein, *supra* note 21, at 493. For a discussion of the formalist evolution during this period, see *id.* ("The last few years have seen a sharp rise of 'constitutional formalism' in cases involving the separation of powers."); Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1775 (1985) ("In recent cases, the Supreme Court has espoused a new formalism that rejects the functionalist tenets of flexibility, practicality, and reluctance to enforce the doctrine of separation of powers based on isolated parts of the Constitution.").

24. Sunstein, *supra* note 21, at 495.

25. Comment, *supra* note 7, at 136; see Bruff, *supra* note 19, at 495-96 ("Functionalism therefore tends to roam further from the constitutional text than does formalism.").

26. See Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U.L. REV. 419 (1987).

27. Sargentich explains:

For many functionalist critics, the chief problems with the legal formalism in forming a rule of law vision derive from the fact that it is awfully abstract and removed from the actual operation of law in everyday institutional life. The

According to Sargentich, the functionalist relies instead on one or both of the major alternative ideals of administration: the Public Purposes ideal or the Democratic Process ideal. The thrust of the former "is to view agencies, not in terms of any particular policy framework, but generally as rational managers in pursuit of public values encoded in statutes."²⁸ This theory underlies economic analysis, especially cost-benefit analysis. The Democratic Process ideal views the governmental system not as an efficient system, but as a system of inherent competing interests that, "at its best, can lead to democratically responsive decisions."²⁹

The functionalist, by focusing solely on practicalities, "gradually narrows the debate to one about the method of decisionmaking by legal actors" and claims the pragmatic high ground, avoiding formalism's most important point, the focus on values rather than methods.³⁰ Formalism's value choice is this: "[A]s a matter of legitimacy in a liberal state, one cannot escape the rule of law no matter how problematical its embrace may be."³¹ Functionalism implicitly recognizes this value, but views it as limited by certain practicalities.³²

THE HISTORY OF THE NONDELEGATION DOCTRINE

Phase 1—The Rise and the Fall

Originally, the nondelegation doctrine was a pure manifestation of the Lockean social contract theory:

The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, *the Legislative can have no*

difficulty is not that a rule of law approach has no theoretical appeal. Rather, it is that, as a pure notion, the formalist program is not seen to be practical.

Id. at 428.

28. *Id.* at 433.

29. *Id.* at 436.

30. *Id.* at 439-40.

31. *Id.* at 440.

32. *Id.* at 428.

*power to transfer their Authority of making Laws, and place it in other hands.*³³

The courts embraced this traditional notion from the late nineteenth through the early twentieth century. Typical of nondelegation decisions was *Field v. Clark*,³⁴ in which the first Justice Harlan maintained, "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."³⁵ Surprisingly, however, even as far removed as the American Government of 1892 was from the myriad complexities of modern legislation, courts were sympathetic to the legislature's need to delegate some of its workload to other branches. In *Clark*, Justice Harlan acknowledged that "[t]here are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation."³⁶ The courts thus revealed an initial willingness to permit some degree of delegation to facilitate the workings of Congress.³⁷

33. J. LOCKE, *TWO TREATISES OF GOVERNMENT* 363 (P. Laslett 2d ed. reprinted with amend. 1988) (emphasis added); see Gellhorn, *Returning to First Principles*, 36 AM. U.L. REV. 345, 347-48 (1987) (explaining that the legislature's authority to delegate is limited because the people have relinquished their most important power only to representatives they have chosen); Stewart, *American Administrative Law*, *supra* note 15, at 1694.

34. 143 U.S. 649 (1892).

35. *Id.* at 692; see *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) ("That the legislative power of Congress cannot be delegated is, of course, clear."); *Wayman v. Southard*, 23 U.S. 1, 42-43 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.").

36. *Clark*, 143 U.S. at 694.

37. The necessity argument emerged as the foremost rationale for more permissive delegations and became the thread linking all decisions permitting such delegations. Gradually, the perceived necessities were painted increasingly larger in order to rationalize broader delegations. See, e.g., *Mistretta v. United States*, 109 S. Ct. 647, 654-55 (1989); *United States v. Robel*, 389 U.S. 258, 274 (1967) (Brennan, J., concurring); *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); *Yakus v. United States*, 321 U.S. 414, 424 (1944); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 145 (1941); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 552 (1935) (Cardozo, J., concurring). Notably, this necessity argument also forms the basis for functionalist separation of powers analysis.

In *Panama Refining Co. v. Ryan*,³⁸ the Court conveyed the pragmatic view that the legislature often would need to delegate some functions, particularly as the federal government expanded in both size and complexity:

Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.³⁹

Such delegations, however, were intended to be limited. Professor Kenneth Culp Davis wrote that "[w]hen the federal courts retreated from their former asserted position that Congress could not delegate legislative power, they transformed the nondelegation doctrine into the proposition that Congress could not delegate without meaningful standards."⁴⁰ The Court spelled out the guidelines intended to limit such delegations in *J.W. Hampton, Jr. & Co. v. United States*.⁴¹ The Court stated first the practical rule that "[i]n determining what it [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination."⁴² Delegation of legislative power is permissible, the Court concluded, "[i]f Congress shall lay down by legislative act *an intelligible principle* to which the person or body authorized to fix such rates is directed to conform."⁴³

38. 293 U.S. 388 (1935).

39. *Id.* at 421.

40. K. DAVIS, *supra* note 11, at 151.

41. 276 U.S. 394 (1928).

42. *Id.* at 406.

43. *Id.* at 409 (emphasis added).

The "intelligible principle" standard resulted in a new, more pragmatic interpretation of nondelegation. The Court designed the standard to ensure that Congress would provide the delegate adequate instructions to guide its behavior. Under such a standard, the legislature would retain the power of "making the law." The Court feared that absent such legislative guidance, the delegate would be forced to employ its own discretion and to formulate its own policies as a means of compensating for the legislature's dereliction.⁴⁴ Such discretion would be an unconstitutional exercise of the legislative power by a body otherwise restricted to either enforcing or interpreting the law.

In its earlier *Clark* decision, the Court had taken pains to underscore this critical distinction between making and executing the law:

"The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."⁴⁵

The Court adopted the same analysis in *Hampton*, concluding that the delegation before it was permissible because "[w]hat the President was required to do [in that instance] was merely in execution of the act of Congress."⁴⁶

Soon after articulating in the intelligible principle standard *Hampton*, the Court employed it in *Schechter Poultry Corp. v. United States*⁴⁷ and *Panama Refining Co. v. Ryan*.⁴⁸ In both cases,

44. In *United States v. Robel*, 389 U.S. 258 (1967), the Court noted that "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people." *Id.* at 276.

45. *Clark*, 143 U.S. at 693-94 (quoting *Cincinnati, Wilmington R.R. v. Commissioners*, 1 Ohio St. 77, 88-89 (1852)).

46. *Hampton*, 276 U.S. at 410-11; see *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952))).

47. 295 U.S. 495 (1935).

48. 293 U.S. 388 (1935).

the Court declared provisions of the National Industrial Recovery Act unconstitutional for violating the nondelegation doctrine.⁴⁹ Suspicions of political motivations,⁵⁰ however, have marred the legacy of the two decisions. Today, they have the dubious distinction of being the last successful applications of the nondelegation doctrine.⁵¹

In the wake of *Schechter* and *Panama Refining*, the intelligible principle standard became a virtual non-entity.⁵² The late 1930s

49. In *Schechter*, Chief Justice Hughes maintained that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." 295 U.S. at 529. The Court found that in promulgating the Live Poultry Code, § 3 of the NIRA, and in leaving the definition of "fair competition" to be addressed by the industry in question, Congress had done just that. The Court concluded that "[s]uch a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id.* at 537.

Similarly, in *Panama Refining*, the Court struck down § 9(c) of the NIRA for "establish[ing] no criterion to govern the President's course . . ." 293 U.S. at 415. The Court wrote that "in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9(c) goes beyond those limits." *Id.* at 430.

50. Commentators have suggested that the cases were intended more as means of frustrating the aims of President Roosevelt's New Deal than as sincere efforts to enforce the nondelegation doctrine and the *Hampton* standard. See Aranson, Gellhorn & Robinson, *supra* note 9, at 10; Gellhorn, *supra* note 33, at 353; Schoenbrod, *Separation of Powers*, *supra* note 15, at 357 n.14.

51. Some question exists whether *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), is a nondelegation case; if it is, that decision would usurp the dubious distinction currently retained by *Schechter* and *Panama Refining*. At least one Justice and one commentator have suggested that *Carter* is a nondelegation case. See *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345, 354 n.2 (1974) (Marshall, J., concurring); Note, *The Independent Agency After Bowsher v. Synar—Alive and Kicking*, 40 VAND. L. REV. 903, 908 n.22 (1987). Judge Scalia maintained in *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.), *aff'd sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986), however, that although the statutory provision at issue in *Carter* was a "legislative delegation in its most obnoxious form," the Court's holding "appear[ed] to rest primarily upon denial of substantive due process rights." *Id.* at 1383 n.8 (quoting *Carter*, 298 U.S. at 311).

52. Professor Lowi explained that "the factor most immediately and obviously involved in the transformation from congressional to presidential government was the voluntary, self-conscious rendering of legislative power to the President, thence to the agencies in the executive branch. I call the process 'legiscide.'" Lowi, *supra* note 15, at 299. The rendering of legislative power to the agencies in the post-*Schechter* period was due in large part to

[the] major shift to functionalism after 1935. The Supreme Court relaxed the *Myers* rule that all governmental actions had to fit into one of the three formal boxes of legislative, executive, or judicial action. Academic commentators and the courts supported the New Deal's institutional innovations—hybrid organs of government with blended powers. By 1952, Justice Jackson's influential con-

through the early 1970s saw the standard eviscerated⁵³ to the point at which no provision Congress could write would trigger any more than circumspect judicial scrutiny. One commentator even advised that "[l]awyers who try to win cases by arguing that congressional delegations are unconstitutional almost invariably do more harm than good to their clients' interests" and that "[m]uch of the judicial talk about requirement of standards is contrary to the action the Supreme Court takes when delegations are made without standards. The vaguest of standards are held adequate, and various delegations without standards have been upheld."⁵⁴ Indeed, courts routinely upheld vague delegations.⁵⁵

As the nondelegation doctrine fell into obscurity, it lived, as some commentators explained, "a fugitive existence at the edge of constitutional jurisprudence."⁵⁶ Although fleeting references in an occasional dissent or concurrence saved the doctrine from extinc-

currence in *Youngstown Sheet & Tube Co. v. Sawyer* proposed a separation of powers doctrine premised on flexibility, practicality, and judicial reluctance to enforce the doctrine based on isolated parts of the Constitution.

Note, *supra* note 23, at 1767-68. For further discussion of the New Deal's revision of the original separation of powers arrangement, see Sunstein, *supra* note 21; Note, *A Two-Tiered Theory of Consolidation and Separation of Powers*, 99 YALE L.J. 431, 438 (1989) [hereinafter Note, *A Two-Tiered Theory*].

53. See Schoenbrod, *The Delegation Doctrine*, *supra* note 15, at 1227 (The approach during this period "robbed the delegation doctrine of content and intellectual respectability and blunted its ability to curb flagrant delegations of legislative power.").

54. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.01 (1958).

55. Professor Scalia noted, "Several agencies have been operating . . . under a legislative mandate no more specific than to pursue the 'public interest, convenience and necessity.'" Scalia, *supra* note 9, at 27. Examples of broad delegations that the Court upheld include: *Lichter v. United States*, 334 U.S. 742, 785-86 (1948) (providing for recovery of "excessive profits" earned on war contracts); *Yakus v. United States*, 321 U.S. 414, 420 (1944) (authorizing the President to appoint a price administrator to set maximum wartime prices "in the interest of the national defense and security"); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (setting "just and reasonable" rates for natural gas); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-27 (1943) (licensing of radio communications "as public convenience, interest or necessity requires"); *United States v. Rock Royal Co-op*, 307 U.S. 533, 545 n.4 (1939) (authorizing the Secretary of Agriculture to fix minimum prices for farm commodities at levels deemed to be "reasonable" and in "the public interest"); *New York Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24 (1932) (permitting consolidation of carriers when "in the public interest"). For an extensive supplementary listing of judicial ratifications of broad delegations, see *Synar v. United States*, 626 F. Supp. 1374, 1383 n.9 (D.D.C.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

56. Aranson, Gellhorn & Robinson, *supra* note 9, at 17.

tion,⁵⁷ by the early 1970s nondelegation was, in Justice Marshall's words, "moribund" and "virtually abandoned by the Court for all practical purposes."⁵⁸ Attempting to account for the doctrine's erosion, then Judge Scalia wrote in *Synar v. United States*⁵⁹ that the Supreme Court's decisions "display[ed] a much greater deference to Congress' power to delegate, motivated in part by concerns that '[i]n an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy.'"⁶⁰

57. See K. DAVIS, *supra* note 11, at 199. Davis grudgingly conceded that "remarks of Supreme Court Justices during the 1960s and 1970s show that the nondelegation retains at least some slight vitality, even though the vitality has more to do with verbiage than with holdings." *Id.*; see Goldsmith, *supra* note 16, at 754-55. The most notable of such references to nondelegation were Justice Brennan's concurrence in *United States v. Robel*, 389 U.S. 258 (1967), and the second Justice Harlan's partial concurrence and dissent in *Arizona v. California*, 373 U.S. 546 (1963). In *Arizona*, Justice Harlan complained that "[this] delegation of such unrestrained authority to an executive official raises . . . the gravest constitutional doubts." *Id.* at 625-26 (Harlan, J., dissenting in part).

In *Robel*, Justice Brennan complained that "the standard under which Congress delegated the designating power is so indefinite as to be meaningless." *Robel*, 389 U.S. at 272-73 (Brennan, J., dissenting). But cf. *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). In *Federal Power Commission*, Justice Brennan agreed with Justice Marshall's disparaging depiction of an obsolete nondelegation doctrine. The contradiction may stem in part from the fact that the vague delegation in the *Robel* decision affected criminal sanctions, thus implicating liberty and the exercise of fundamental rights. *Robel*, 389 U.S. at 275 (Brennan, J., dissenting); see *infra* notes 202-07 and accompanying text.

58. *Federal Power Commission*, 415 U.S. at 353 (Marshall, J., concurring). Admittedly, the Court was continuing to use the doctrine in an "interpretive mode, finding that statutory texts conferring powers on the Executive should be construed narrowly where broader construction might represent an unconstitutional delegation. Such cases indicate that while the delegation doctrine may be moribund, it has not yet been officially interred by the Court." *Synar*, 626 F. Supp. at 1384 (citations omitted). This depiction of the Court's handling of the doctrine was confirmed in *Mistretta v. United States*, 109 S. Ct. 647 (1989), as the Court acknowledged that "[i]n recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Id.* at 655 n.7; see Scalia, *supra* note 9, at 27; G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 369 (1986) [hereinafter G. STONE].

59. 626 F. Supp. 1374 (D.D.C.), *aff'd sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986).

60. *Id.* at 1384 (quoting *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 145 (1941)); see *supra* note 37.

*Phase 2—The Gradual Comeback**As problems accrue, the expected backlash*

The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.⁶¹

To the extent that its proponents envisioned the nondelegation doctrine as an integral bulwark of the separation of powers, the doctrine's erosion through an "unchecked disregard" for its import in the constitutional scheme worked a fundamental disruption in the balance of powers among the branches. As Justice Frankfurter predicted in *Youngstown Sheet & Tube Co. v. Sawyer*,⁶² both independent and executive agencies were slowly accruing power at the expense of the legislative branch.⁶³ The quality rather than quantity of the increasingly expansive delegations was disturbing. As the doctrine's influence waned, delegations became virtually standardless and Congress left to the agencies the exercise of discretion—or *lawmaking*—concerning many critical policy matters.⁶⁴

The conclusion that independent agencies and the executive branch were not only executing the law but making it as well ultimately worked to revive the nondelegation doctrine's original con-

61. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

62. 343 U.S. 579 (1952).

63. See *id.* Congress did not attempt to halt the ebb of power from its reaches, however. See McGowan, *Congress, Court and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1128-29 (1977) (suggesting that Congress often embraces broad delegations for "reasons of internal political maneuver or as an escape from having to stand up and be counted"); Scalia, *Legislative Veto*, *supra* note 14, at 24 (suggesting Congress delegates issues because they are "too hot to handle"); Schoenbrod, *Separation of Powers*, *supra* note 15, at 370 (observing that "delegation allows politicians to enact laws that promise all things to all people"); see also G. STONE, *supra* note 58, at 366 ("A broad delegation of authority thus allows Congress to claim the credit for identification of a problem while insulating it from attack if particular solutions exacerbate that problem."); Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 668 (explaining that "[m]odern public choice theory suggests that delegation enables individual legislators to reduce the political costs of policies that injure relatively uninterested voters, without losing credit for benefits bestowed on those interest groups intensely enough motivated to trace the chain of power").

64. See *supra* notes 44-45 and accompanying text.

cerns, prompting a period of "renewed respectability"⁶⁵ for the doctrine in the late 1970s through the 1980s. Many commentators believed the threat that delegations posed to the constitutional framework could not be underestimated.⁶⁶ As Professor Lowi stated: "[T]he 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 goals of limitation on power, substantive calculability, and procedural calculability."⁶⁷ The objection⁶⁸ was not "that such 'faceless bureaucrats' necessarily do a bad job as our effective legislators. It [was] rather that they are neither elected nor re-elected, and are controlled only spasmodically by officials who are."⁶⁹

65. Scalia, *supra* note 9, at 27.

66. *See supra* note 15.

67. Lowi, *supra* note 15, at 296.

68. Besides the constitutional objection central to this Note's focus—namely, that by virtue of broad delegations, the executive and independent agencies are unconstitutionally exercising legislative powers—there are other substantial arguments regarding the unconstitutionality of independent agencies in particular. Critics of these agencies, including former Attorney General Edwin Meese, argue that, based on formalist separation of powers analysis, the President should be free to remove all federal officials exercising law enforcement powers, a power in the critics' eyes unconstitutionally denied the President by the make-up of the independent agencies. *See* Taylor, Jr., *A Question of Power, A Powerful Questioner*, N.Y. Times, Nov. 6, 1985, at B8, col. 3.

69. J. ELY, DEMOCRACY AND DISTRUST 131 (1980). In Schoenbrod, *The Delegation Doctrine*, *supra* note 15, Professor Schoenbrod states:

Citizens interested in how their representative has acted on hard issues cannot necessarily get the answer from voting records, but instead must search out what happened administratively under delegations that the legislature authorized. Even if members of the public could and would penetrate the complexity and stultifying aridity of the *Federal Register* and other agency publications, the member can deny responsibility by claiming personal disagreement with what was done.

Id. at 1244-45. And in Stewart, *Beyond Delegation*, *supra* note 15, Professor Stewart states: The fundamental principle is that government may not coerce citizens except in accordance with legal authority granted through politically responsible processes of representative government . . . We no longer accept James Landis' New Deal view that broad delegations to administrative specialists could tap expertise in order to reduce decisionmaking costs and errors without loss of democratic responsiveness and accountability.

Id. at 331.

Any argument grounded on notions of accountability stands on admittedly weaker ground today; the exceedingly high winning percentage for congressional incumbents, cited as 99% in a recent *Wall Street Journal* editorial, substantially dims the prospects of ousting even

Besides the efficacy of constitutional arguments, the "pendulum may [already] have begun to swing against broad delegation"⁷⁰ in the 1970s and 1980s as a result of public dissatisfaction with both independent and executive agencies. As Professor Stewart has observed:

It is no accident that the revival of interest in the delegation doctrine in recent years has coincided with a sweeping expansion of centralized federal command and control regulation. We have become addicted to Federal rules and orders that attempt to minutely prescribe conduct throughout our complexly differentiated society. This addiction has created severe decisionmaking and political overload at the center. In turn, overload has resulted in a massive transfer of decisional power to federal administrative bureaucracies, provoking calls for vigorous enforcement by the courts of the delegation doctrine in order to restore "juridical democracy."⁷¹

Administrative agencies had lost their "reputation of being panaceas,"⁷² and "[p]ublic antipathy to overregulation by Washington bureaucracies could provide popular support for judicial requirements that Congress legislate more specifically in order to limit agency discretion."⁷³

the most offensive representative. *Addicted to Government*, Wall St. J., Jan. 9, 1990, at A14, col. 1. In addition, perhaps "[a]ll agencies of government, except the federal courts, are either directly or indirectly responsible to the people" and indirect responsibility may not result in "weaker control over the agencies." M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 207-08 (1988).

Nevertheless, the incumbents' electoral advantage should not render the accountability argument negligible. The fact that a congressman is harder to remove today than twenty years ago does not void the elementary constitutional principle that the congressman be forced to answer to constituents every two years and that he or she be subject to removal at his or her constituents' choosing. Tushnet's position institutionalizes unresponsiveness and essentially denies constituents the right to hold legislators responsible for the policy decisions they are constitutionally charged with making.

70. Schoenbrod, *The Delegation Doctrine*, *supra* note 15, at 1226.

71. Stewart, *Beyond Delegation*, *supra* note 15, at 329 (footnote omitted).

72. Schoenbrod, *The Delegation Doctrine*, *supra* note 15, at 1226. In addition to Professor Schoenbrod's critique of agency performance, see Goldsmith, *supra* note 16, at 757; Lowi, *supra* note 15, at 304-05; Scalia, *Legislative Veto*, *supra* note 14, at 24; Stewart, *Beyond Delegation*, *supra* note 15, at 324.

73. Stewart, *Beyond Delegation*, *supra* note 15, at 324 (footnote omitted).

The justices go to war

Perhaps the most important factor behind the nondelegation doctrine's revival was the influence and forceful advocacy of its well-placed proponents, Chief Justice Rehnquist and Justice Scalia. If the Supreme Court invokes the nondelegation doctrine in the near future, it will do so on the terms and in the contexts stated by these two justices.

Although Chief Justice Rehnquist did not speak for the doctrine until the 1980s, Justice Scalia advocated its revival in the late 1970s while a professor at the University of Chicago Law School. Writing in 1979, Professor Scalia candidly discussed the consequences of the doctrine's erosion and the legislature's propensity for increasingly broad delegations:

Well, who can oppose the prevention of "unreasonable risks of injury," or the provision of "safe and healthful places of employment," or the elimination of "sex discrimination"? We can all embrace these platitudes. But what do they *mean*? . . . Does the provision of a "safe place of employment" require split toilet seats, or the relocation of all fire extinguishers so that they are precisely X inches from the floor? . . . These are the sorts of issues that lay beneath the platitudes when these pieces of legislation were passed, and Congress *chose* to leave them to the agencies . . . to resolve.

Congress has been behaving in this fashion for much of the past fifty years⁷⁴

Professor Scalia argued that the "bureaucracy is not unresponsive, only unelected; that procedures are no substitute for the ballot box; and that congressional control is no longer possible."⁷⁵ A year later, he was prepared to stake out what at the time was still the relatively controversial position that "even with all its Frankenstein-like warts, knobs, and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice. The alternative appears to be continuation of the widely felt trend toward government by bureaucracy or (what is no better) government by courts."⁷⁶

74. Scalia, *Legislative Veto*, *supra* note 14, at 23-24.

75. *Id.* at 26.

76. Scalia, *supra* note 9, at 28.

As a professor, Scalia was swayed by the intellectual appeal of nondelegation. As a district court judge, however, he was handcuffed by precedent.⁷⁷ In *Synar v. United States*, Judge Scalia wrote, "Our analysis of the delegation challenged in the instant cases . . . proceeds on the assumption that the delegation doctrine remains valid law, but that its scope must be determined on the basis of the deferential post-*Schechter* cases decided by the Supreme Court."⁷⁸

In *Synar*, the plaintiffs argued that the Gramm-Rudman-Hollings Balanced Budget Act's⁷⁹ delegation to administration officials of the power to make the economic calculations that determine the estimated federal deficit, and hence the required budget cuts, violated the constitutional provision vesting "all legislative power" in Congress.⁸⁰ A novel aspect of the claim in *Synar*, however, was the argument that the appropriations power delegated under the Act was per se nondelegable.⁸¹ Hence, even the most detailed instructions guiding administration officials could not save such a delegation.

Judge Scalia summarily rejected the per se nondelegable tack.⁸² The Supreme Court had never held any legislative power nondele-

77. During his tenure on the district court, however, Judge Scalia took pains to convey that he considered the nondelegation argument valid. Noting in *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.), *aff'd sub nom.* *Bowsher v. Synar*, 478 U.S. 714 (1986), that "[i]t is strictly unnecessary for us to reach this point" because the Act in question was found unconstitutional on the ground that it vested executive power in the Comptroller-General, an officer removable by Congress, Scalia embarked nonetheless on a lengthy discussion of the nondelegation argument put forth before the court. *Id.* at 1382.

78. *Id.* at 1384.

79. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (1985).

80. *Synar*, 626 F. Supp. at 1382.

81. *Id.* at 1385. The plaintiffs' approach uniquely conceived of the nondelegation doctrine as offering two prongs of attack:

- 1) the vagueness tack—that while delegating permissibly delegable powers, Congress has erred in leaving its instructions to the delegate so vague that the delegate must employ his own discretion and act as a lawmaker himself. This would amount to the unconstitutional delegation of Congress's express power to make the law.

- 2) the nondelegable tack—that certain powers are so inherently a part of the legislative system as to be "core" legislative functions and per se nondelegable. Any delegations of such powers are, as such, per se unconstitutional.

82. *Id.* at 1385-86. A unanimous Supreme Court recently followed Scalia in rejecting the per se nondelegable tack. In *Skinner v. Mid-America Pipeline Co.*, 109 S. Ct. 1726 (1989),

gable because it was among Congress' "core functions." Judge Scalia opined that such a core functions analysis would be effectively standardless and that even if core functions were defined, "there is no reason to believe that appropriations functions would be among them."⁸³

Although he dismissed the plaintiffs' per se nondelegable theory, Judge Scalia openly supported the nondelegation doctrine generally and articulated his own interpretation of the doctrine:

[T]he ultimate judgment regarding the constitutionality of a delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope *plus* the specificity of the standards governing its exercise. When the scope increases to immense proportions (as in *Schechter*), the standards must be correspondingly more precise.⁸⁴

Although the particular scope of the appropriations power and the specificity of the delegation at issue in *Synar* allowed the Act to withstand a nondelegation doctrine challenge, Scalia's receptiveness to such challenges left *Synar* noteworthy in the chronicle of the doctrine's revival.

Justice Scalia set prudent restraints on his understanding of the doctrine's application in *Mistretta v. United States*⁸⁵ and joined the Court in rejecting the doctrine's application to that case, but his dissenting opinion confirmed his faith in the doctrine's intellectual viability. Justice Scalia wrote, "It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive

plaintiff Mid-America argued that Congress' taxing power was at most per se nondelegable and at least a delegation governed by much stricter guidelines than required for other congressional delegations. In rejecting this contention, Justice O'Connor wrote for the Court: "We find no support, then, for Mid-America's contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power." *Id.* at 1733.

83. *Synar*, 626 F. Supp. at 1385.

84. *Id.* at 1386.

85. 109 S. Ct. 647 (1989). For a further description of Scalia's analysis, see *infra* notes 134-44 and accompanying text.

Branch, the basic policy decisions governing society are to be made by the Legislature."⁸⁶

Some of Chief Justice Rehnquist's opinions similarly opened the door for plaintiffs like those in *Synar* to include nondelegation arguments in their claims. Justice Rehnquist's concurrence in *Industrial Union Department v. American Petroleum Institute*⁸⁷ and his dissent in *American Textile Manufacturers Institute v. Donovan*⁸⁸ illustrated his belief that the nondelegation doctrine approach remained viable. In *Industrial Union*, Justice Rehnquist complained that the "governmental body best suited and most obligated to make the choice confronting us in this litigation"—whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths—"has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court."⁸⁹

Although acknowledging that the nondelegation doctrine had eroded to the point at which "the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to particular cases,"⁹⁰ Justice Rehnquist concluded that the statutory provision in question failed to pass muster.⁹¹ Justice Rehnquist admonished that "[the Court] ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era."⁹²

86. *Mistretta*, 109 S. Ct. at 677 (Scalia, J., dissenting).

87. 448 U.S. 607, 686-87 (1980) (Rehnquist, J., concurring). The delegation controversy here and in *American Textile* centered on the phrase "to the extent feasible" in § 6(b)(5) of the Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) (1982). The section directed the Secretary of Labor to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity . . ." *Id.*

88. 452 U.S. 490, 543 (1981) (Rehnquist, J. and Burger, C.J., dissenting).

89. *Industrial Union*, 448 U.S. at 672 (Rehnquist, J., concurring).

90. *Id.* at 675 (Rehnquist, J., concurring).

91. *Id.* at 686 (Rehnquist, J., concurring) ("[T]he standard of 'feasibility' renders meaningful judicial review impossible.").

92. *Id.* (Rehnquist, J., concurring).

In *American Textile*, Justice Rehnquist reiterated his conviction that the nondelegation doctrine mandated that the Court find the statutory provision at issue in *Industrial Union* unconstitutional:

[I]n failing to agree on whether the Secretary should be either mandated, permitted, or prohibited from undertaking a cost-benefit analysis, Congress simply left the crucial policy choices in the hands of the Secretary of Labor. . . . I believe that in so doing Congress unconstitutionally delegated its legislative responsibility to the Executive Branch.⁹³

The ascent of the formalist school

The final factor in the nondelegation doctrine's return to respectability was the ascendancy of the formalist approach to separation of powers issues. This view dominated the Court from 1976 to 1988.⁹⁴ As formalism went, so too went the nondelegation doctrine. Both theories enjoyed simultaneous returns to respectability in the mid-1980s.⁹⁵ This result is not surprising, for "[t]he nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of government."⁹⁶ Indeed, the nondelegation doctrine is a corollary of formalism,⁹⁷ as both have at their core the notion that each branch alone should exercise its own powers.

Phase 3—The Setbacks

If the nondelegation doctrine's return to respectability was due in small part to the parallel ascendancy of the formalist separation of powers philosophy, logic suggests that the latter's fall would have a corresponding impact on the doctrine. In fact, the formalist

93. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 548 (1981).

94. See *supra* note 22 and accompanying text.

95. The nondelegation doctrine had just received prominent mention in the Rehnquist concurrence and dissent, see *supra* text accompanying notes 87-93, and was about to receive substantial attention in Judge Scalia's *Synar* opinion, see *supra* text accompanying notes 78-84. At the same time, the formalist philosophy had manifested its predominance in two of the Court's landmark decisions. See *INS v. Chadha*, 462 U.S. 919 (1983); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

96. *Mistretta v. United States*, 109 S. Ct. 647, 654 (1989); see *Synar v. United States*, 626 F. Supp. 1374, 1383 (D.D.C.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986).

97. See *supra* text accompanying note 19.

school has realized two severe setbacks in the past two years,⁹⁸ both of which may prevent the nondelegation doctrine's comeback.

In *Morrison v. Olson*, the Court vehemently rejected a formalistic separation of powers analysis.⁹⁹ Advocating a more flexible approach,¹⁰⁰ the Court noted that "we have never held that the Constitution requires that the three Branches of Government 'operate with absolute independence.'"¹⁰¹ Although neither the majority opinion nor Justice Scalia's dissent discussed the nondelegation doctrine in particular, such sentiments signal a more liberal, even acquiescent approach toward delegations. Delegations are, after all, the means by which interdependency among the branches is forged.

Although it did not explicitly employ classic functionalist language, the Court demonstrated a concern for the guiding principles behind functionalism: encroachment of one branch's power and aggrandizement of that power to another branch. As to the former concern, the Court said that a separation of powers violation would occur when the encroached power was "of such a nature that [it] impede[d] the [branch's] ability to perform [its] constitutional duty"¹⁰² As to the latter concern, the Court stressed that *Morrison* did not involve a congressional attempt to gain control over an executive officer,¹⁰³ a fact that Justice Scalia vigorously contested in his dissent.¹⁰⁴

98. See *Mistretta*, 109 S. Ct. at 647; *Morrison v. Olson*, 108 S. Ct. 2597 (1988).

99. 108 S. Ct. 2597 (1988); see Note, *Chipping Away at the President's Control over his Administration: An Analysis of Morrison v. Olson and Beyond*, VI J. LAW & POL. 205, 226 (1989) ("If Justice Scalia is correct and the majority has simply thrown up its hands in frustration and resorted to an ad hoc balancing test, *Morrison* is an ominous signal for separation of powers formalism.").

100. Dean George Alexander described the Court's balancing approach in *Morrison* as a "shift of power test" that focuses on "the extent to which power is actually shifted from one branch of government to another." Alexander, *Separation of Powers After the Independent Counsel Decision*, 29 SANTA CLARA L. REV. 1, 3-6 (1989) (ultimately concluding that the Court should not involve itself in disputes between the legislative and executive branches).

101. *Morrison*, 108 S. Ct. at 2620 (quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974)).

102. *Id.* at 2619.

103. *Id.* at 2616, 2620.

104. Describing the special prosecutor law as arising out of a dispute between Congress and the President, Justice Scalia stated:

That is what this suit is about. Power. The allocation of power among Congress, the President and the courts in such fashion as to preserve the equil-

Professor Keith Werhan has asserted that in *Morrison* the Court did not merely muddle through the functionalist approach, but rather enunciated a new "eclectic" test that somehow merged the formal and functional inquiries.¹⁰⁵ According to Werhan, Justice Rehnquist's focus on the text and history of the appointments clause at the beginning of the *Morrison* opinion demonstrates that the Court now employs an eclectic two-pronged approach: First, it makes a formalist inquiry into the text and history of the Constitution; second, if formalism does not answer the question, the Court inquires into encroachment and aggrandizement.¹⁰⁶

Werhan's proposition is ill-founded. Even by his own admission, the Constitution and its separation of powers history speak only to the "easy" cases.¹⁰⁷ Under Werhan's model, formalism can seldom adequately address cases before the Court, which consequently almost always will apply a functionalist analysis. In the end, this amounts to a shift to functionalism.

Further, Werhan misplaced his reliance on Chief Justice Rehnquist's use of text and history, which could be merely a rhetorical tool to justify his use of functionalism. Indeed, one commentator has speculated that the reason the Chief Justice, formerly a strong formalist, authored the *Morrison* opinion was to ensure that he could later limit the case to its facts.¹⁰⁸ This might explain the opinion's muddled application of the functionalist approach.¹⁰⁹ Finally, the *Mistretta* opinion defies the proposition that a novel "eclectic" approach now orchestrates the Court's separation of powers jurisprudence. *Mistretta* began not with Werhan's expected

librium the Constitution sought to establish—so that "a gradual concentration of the several powers in the same department," can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing . . . [b]ut this wolf comes as a wolf.

Id. at 2623 (Scalia, J., dissenting) (citation omitted). For a succinct analysis of Scalia's dissent, see Pierce, Jr., *Morrison v. Olson, Separation of Powers, and the Structure of Government*, 1988 SUP. CT. REV. 1, 2-4, 23.

105. Werhan, *supra* note 7, at 432-33, 445.

106. *Id.* at 445.

107. *Id.* at 446.

108. Note, *supra* note 99, at 237 n.163.

109. See *id.* at 225 ("[T]he majority opinion was ambiguous about the precise basis for its decision. In fact, it provided at least three different rationales for upholding the independent counsel scheme. . . . Thus the precise constitutional basis for this decision is painfully unclear.").

textual analysis, but rather with a general discussion of separation of powers theory.¹¹⁰

Justice Scalia's dissent in *Morrison* demonstrated the traditional formalist approach to separation of powers analysis. Under Scalia's approach, one must first classify the power exercised.¹¹¹ In *Morrison*, even the majority opinion conceded that the powers at issue, investigation and prosecution, were executive powers.¹¹²

The second step under formalist analysis is to determine who exercises the power.¹¹³ The Constitution requires that the exercisor's classification mirror the classification of the power exercised. Thus, only the executive branch may exercise executive powers, such as prosecution. Employing his formalist standard, Justice Scalia concluded that the independent counsel provision of the Act deprived the President of control over executive power and thus violated the separation of powers doctrine.¹¹⁴ For Scalia, who gained control of the executive functions at issue was irrelevant; that the President no longer controlled them was enough.¹¹⁵

Prior to the *Morrison* decision, the formalist approach had dominated the Court's separation of powers jurisprudence.¹¹⁶ Yet in *Morrison*, Justice Scalia was the sole dissenter from an uncharacteristically functionalist opinion. *Morrison* marked a significant break from the recent line of separation of powers opinions.¹¹⁷ That *Morrison* was just that—a break and not a mere aberration—

110. *Mistretta v. United States*, 109 S. Ct. 647, 658-59 (1989).

111. *Morrison*, 108 S. Ct. at 2626 (Scalia, J., dissenting).

112. *Id.* at 2619 ("There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.").

113. *Id.* at 2626 (Scalia, J., dissenting).

114. *Id.* at 2631 (Scalia, J., dissenting).

115. Scalia continued: "It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are." *Id.* at 2628 (Scalia, J., dissenting).

116. See *supra* note 22 and accompanying text.

117. Professor Richard Pierce, Jr., has described the state of separation of powers jurisprudence after *Morrison* with three observations. First, the Court has chosen not to create a "free-standing doctrine of separation of powers." Pierce, Jr., *supra* note 104, at 21. Second, it is granting "politically accountable branches" much deference when they agree to change institutional structures. *Id.* at 21-22. Third, "the Court has defined the doctrine of separation of powers . . . only by enforcing other principles that are firmly rooted in the text and history of the Constitution." *Id.* at 22.

tion—became apparent when the Court followed it with another functionalist decision in *Mistretta v. United States*.¹¹⁸ Viewed together, the decisions may be the harbinger of what will become of the nondelegation doctrine.

In the subsequent *Mistretta* opinion, the Court expressly recognized that the “nondelegation doctrine is rooted in the principle of separation of powers.”¹¹⁹ Justice Blackmun wrote the eight-member majority opinion in functionalist language, however, that precluded the doctrine’s assertion. Blackmun characterized the recent line of separation of powers cases as demonstrating a “concern of encroachment and aggrandizement,”¹²⁰ the polestars of functionalism.¹²¹ Using these polestars, Blackmun fashioned criteria to analyze the constitutionality of binding rules issued by an independent rulemaking body located, allegedly, in the judicial branch. First, citing *Morrison*, Blackmun stated that the judicial branch must not be assigned “‘tasks that are more appropriately accomplished by [other] branches.’”¹²² Second, Blackmun stressed that the “‘institutional integrity of the Judicial Branch’”¹²³ must not be threatened.

Employing those criteria, the Court concluded that rules governing sentencing are an appropriate subject for a judicial branch agency because the sentencing function is an integral part of the judicial process.¹²⁴ The Court also held that the Sentencing Commission did not threaten the institutional integrity of the judicial branch because the Commission “is not a court, does not exercise judicial power, and is not controlled by or accountable to members

118. 109 S. Ct. 647 (1989).

119. *Id.* at 654 (citing *Field v. Clark*, 143 U.S. 649, 692 (1892)).

120. *Id.* at 659.

121. See Comment, *supra* note 7, at 123 (“A functional interpretation looks at the practical effect of the overall structural relationship created by the entity to see whether the control mechanism actually creates an imbalance of power among the branches.”); Note, *supra* note 99, at 215 (“[F]unctionalism stresses a less literal approach to separation of powers issues by providing for judicial assessment of whether the law in question invades a core function of a branch of government or is merely an insignificant encroachment.”).

122. *Mistretta*, 109 S. Ct. at 660 (quoting *Morrison v. Olson*, 108 S. Ct. 2597, 2601 (1988)).

123. *Id.* (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986)).

124. *Id.* at 664.

of the Judicial Branch."¹²⁵ Again, the Court employed a pragmatic, functional analysis to validate a "commingl[ing of] the functions of the Branches . . . that pose no danger of either aggrandizement or encroachment."¹²⁶

If *Morrison* represents the Court's new, more permissive stance on the commingling of government functions, that the Court found the appellants' nondelegation arguments in *Mistretta* unpersuasive is no surprise. As is typical of modern nondelegation decisions,¹²⁷ the Court retreated to an explanation of the necessities of congressional delegation, stating that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."¹²⁸ This explanation does little to explain why Congress necessarily had to place the Sentencing Commission in the judicial branch and require the appointment of federal judges to the Commission,¹²⁹ none of whom had much sentencing expertise.¹³⁰ The explanation does reveal, however, that the Court has no intention of requiring narrow delegations of power from Congress.

The majority gave mere lip service to the intelligible principle standard set forth in *J.W. Hampton, Jr. & Co. v. United States*,¹³¹ and reiterated its approval of broad delegations, stating that "this Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'"¹³² The Court completed its analysis by listing the various directions Congress gave the Commission in the enabling legislation.¹³³

125. *Id.* at 665.

126. *Id.* at 660.

127. *See supra* note 37.

128. *Mistretta*, 109 S. Ct. at 654.

129. *See infra* notes 152-64 and accompanying text.

130. Reply Brief for Respondent, *United States v. Mistretta*, 109 S. Ct. 647 (1989) (Nos. 87-1904, 87-7028).

131. 276 U.S. 394 (1928); *see supra* notes 41-43 and accompanying text.

132. *Mistretta*, 109 S. Ct. at 655 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946)).

133. *Id.* at 656.

Even Justice Scalia, again the lone dissenter, agreed with the Court's rejection of the nondelegation argument, though for different reasons. He stressed first the importance of the nondelegation principle in a tripartite form of government.¹³⁴ Justice Scalia then postulated that "[e]xcept in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature."¹³⁵ In Justice Scalia's analysis, "[i]t should be apparent . . . that the decisions made by the Commission are far from technical, but are heavily laden (or ought to be) with value judgments and policy assessments."¹³⁶ Thus, Justice Scalia all but concluded that the Commission exercised legislative power in violation of the nondelegation doctrine.

Justice Scalia posited, however, that a court must recognize *prudent* limitations on its application of the nondelegation doctrine. Under his theory, no statute is completely precise and those executing and applying the law thus need to make judgments, some of which involve policy considerations.¹³⁷ Accordingly, the question is not "Is there a delegation of legislative (policymaking) authority?" but rather "How much delegation of legislative (policymaking) authority is too much?"¹³⁸ Justice Scalia quoted the concern set forth in *Hampton*: "[T]he limits of delegation 'must be fixed according to common sense and the inherent necessities of the governmental co-ordination.'"¹³⁹ Scalia consequently argued that the Court should not be too willing to second guess Congress on how much delegation is necessary because Congress is equally endowed with common sense and better able to inform itself of the necessities of government.

Notwithstanding Justice Scalia's prudential limitations on the doctrine, he clearly believed that the Court decided *Mistretta* wrongly.¹⁴⁰ Delegations, in his view, are necessary incidents to the

134. *Id.* at 677 (Scalia, J., dissenting).

135. *Id.* (Scalia, J., dissenting).

136. *Id.* at 676 (Scalia, J., dissenting).

137. *Id.* at 677 (Scalia, J., dissenting).

138. *See id.* (Scalia, J., dissenting).

139. *Id.* at 677 (Scalia, J., dissenting) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)).

140. *Id.* at 683 (Scalia, J., dissenting). For a critique of the majority opinion in *Mistretta*, see generally Note, "The Judge Would Then Be The Legislator": *Dismantling Separation*

execution and adjudication of statutes. The express delegation of lawmaking authority to the Sentencing Commission, however, was not incidental to any executive or judicial function and was therefore unconstitutional. As Justice Scalia explained:

The whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of law-making, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be.¹⁴¹

Congress gave the Commission the responsibility of creating law and informing Congress as to its progress; in Justice Scalia's mind, this constituted a pure delegation of legislative power in violation of the separation of powers doctrine.¹⁴² The result of the Court's allowance of such a pure delegation may be that "Congress will find delegation of its lawmaking powers much more attractive in the future"¹⁴³ and will create "all manner of 'expert' bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility."¹⁴⁴

EXPLANATIONS FOR THE COURT'S SHIFT

On the verge of regaining currency only two years ago, the nondelegation doctrine today seems as "moribund" as when Justice Marshall first invoked that characterization sixteen years ago.¹⁴⁵ With the Court's abandonment of its earlier formalism for a more functionalist approach in both *Mistretta*¹⁴⁶ and *Morrison*,¹⁴⁷

of *Powers In The Name of Sentencing Reform*—*Mistretta v. United States*, 109 S. Ct. 647 (1989), 65 WASH. L. REV. 249 (1990).

141. *Id.* at 678 (Scalia, J., dissenting).

142. *Id.* at 679 (Scalia, J., dissenting). Scalia concluded, "I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new branch altogether, a sort of junior-varsity Congress." *Id.* at 683 (Scalia, J., dissenting).

143. *Id.* at 680 (Scalia, J., dissenting).

144. *Id.* (Scalia, J., dissenting).

145. *See supra* note 11.

146. 109 S. Ct. 647 (1989).

the jurisprudential underpinnings of the doctrine appear to have vanished. This development ironically occurred just as the conservative wing rose to majority status on the Court¹⁴⁸ and left suspect the notion that formalism was an inviolable tenet of conservative jurisprudence. Indeed, "‘a court that [was] more conservative than at any time in the last 40 years’"¹⁴⁹ rendered two of the more functionalist decisions in the Court's recent history. This peculiar result may represent a profound intellectual shift in the Court's separation of powers philosophy; or, the cases may illustrate mere results-oriented decisionmaking.¹⁵⁰

147. 108 S. Ct. 2597 (1988).

148. See *supra* note 1.

149. Savage, *Justice Consistently Conservative; Kennedy's Record Sours Liberals' Victory On Bork*, L.A. Times, June 11, 1989, at 1, col. 5 (quoting Bruce Fein).

150. Professor William P. Murphy accused the Court of following a "results-oriented" approach in its 1988-89 term:

The Court's decisions are discretionary within a wide range of available legal guidelines which can be selected or manipulated to rationalize any one of several different results. It seems altogether clear that the Court is not bound, but merely guided, by the text of whatever document it is construing, the intention of the framers of the document, its own doctrines or its own case precedents.

W. Murphy, *Supreme Court Review*, Remarks Before the ABA Labor and Employment Law Section (Aug. 7, 1989). Judge Laurence Silberman applied this thesis to separation of powers analysis. See L. Silberman, Remarks on Agency Autonomy and the Unitary Executive at Conference on The Presidency and Congress: Constitutionally Separated and Shared Powers (January 19, 1990).

Judge Silberman explained that the Court's separation of powers jurisprudence hinged on whether the power taken from one branch ends up in the judicial branch. He noted that in *Buckley v. Valeo*, 424 U.S. 1 (1976), *INS v. Chadha*, 462 U.S. 919 (1983) and *Bowsher v. Synar*, 478 U.S. 714 (1986), the Court upheld executive power, and that none of the statutes at issue in these cases involved an accrual of power in the judicial branch. However, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), *United States v. ICC*, 337 U.S. 426 (1949), *United States v. Nixon*, 418 U.S. 683 (1974), *Morrison v. Olson*, 108 S. Ct. 2597 (1988) and *Mistretta v. United States*, 109 S. Ct. 647 (1989), all involved vesting some power in the judicial branch. Judge Silberman stressed that this is not indicative of a conscious effort by the justices to obtain power, but rather demonstrates an institution's faith in its own fairness. Regardless of the Court's motivations, he said that one key to understanding recent separation of powers cases is to look for the judiciary's real interest in the inter-branch dispute. L. Silberman, *supra*. Certainly, other "results-oriented" explanations for the Court's shift exist. For example, a plausible suggestion may be that the conservative justices simply prefer a conservative White House regulating the agencies, not a liberal Congress. In failing to enforce the nondelegation doctrine, they indirectly encourage such a result by allowing Congress to continue making broad delegations. This view is suspect, however, as it fails to explain the near unanimity of both *Morrison* and *Mistretta*, and relies on unusually politically based motives of the justices.

The Court's most recent separation of powers decision, *Mistretta*, suggests that the results-oriented approach is a more accurate characterization. Far from a cogent, well-reasoned discussion of the Court's separation of powers philosophy, *Mistretta* stands strangely deficient, perhaps an attempt to reach a particular result absent traditional scholarly justification.¹⁵¹ Specifically, the Court failed to explain how it determined that the Sentencing Commission was located in the judicial branch for the purposes of separation of powers analysis.¹⁵²

Deciding which branch is exercising power is an *a priori* question in both formalist and functionalist analysis.¹⁵³ Formalist analysis begins by asking which branch is exercising the power at issue. Next, formalism inquires into the nature of the power being exercised. Formalism dictates that if the answer to the two questions is identical, the action is constitutional.¹⁵⁴ Thus, if one can manipulate the answer to the first question, one can manipulate the constitutional outcome. Four possible ways exist to decide which branch is exercising the power: (1) looking exclusively at who controls the agency or commission; (2) looking exclusively at what powers the agency or commission exercises; (3) giving effect to congressional language, when it exists, that says to which branch an agency or commission belongs; or (4) employing some combination of the above.

When *Mistretta* reached the Court, no one was sure in which branch the Commission belonged for the purposes of separation of

151. Others have said the same about the *Morrison* decision. See *supra* note 170.

152. One author has concluded that the Court located the Commission in the judicial branch out of deference to Congress' articulation of the Commission's placement in the statute. Comment, *supra* note 7, at 133 n.105. Although this may be accurate, the Court never articulated such a reason in its decision and in fact later concluded that Congress exerted the most control over the Commission. The Court also neglected to address Justice Scalia's musings on the location issue.

153. For purposes of this section, we refer to this decision as the "location question."

154. The location question is at the foundation of functionalist analysis as well because that approach focuses on encroachment of power *from one branch* and aggrandizement *to another branch*. As *Morrison* demonstrates, the Court views separation of powers as being more concerned with where the power ends up than from where it is taken. See *Morrison*, 108 S. Ct. at 2620-21. Indeed, this is evident from the fact that Congress can give significant power to an independent agency, but it cannot give the same power to another branch. Cf. *Mistretta*, 109 S. Ct. at 666 n.20.

powers analysis.¹⁵⁵ The Senate explained the Commission's placement in the judicial branch as merely the extension of a judicial function of sentencing, with the placement being designed to allow federal judges to participate without giving up their lifetime appointments.¹⁵⁶ In its brief, the Commission implicitly proposed a different test: The power the independent agency is to exercise should determine its placement.¹⁵⁷ *Mistretta*, along with the Commission, argued that the Court was bound by the congressional statement as to which branch the Commission belonged.¹⁵⁸

The Reagan administration pursued yet another tack, focusing on the type of power that the Commission exercised. It asserted that the Commission was characterized correctly as an independent agency in the executive branch.¹⁵⁹ The government argued that the task of "making more particular [Congress'] general determinations regarding the appropriate punishments for crimes"¹⁶⁰ was an executive function and that the grant of the authority to the Commission was permissible because the structure, operation and responsibilities of the Sentencing Commission are entirely

155. Legislators debated the composition and placement of the Commission and eventually compromised by placing the Commission in the judicial branch and allowing the President to appoint the commissioners. 28 U.S.C. § 991(a) (Supp. V 1987). Three of the seven commissioners were to be federal judges whom the President selected from a list of six judges recommended by the Judicial Conference of the United States. The President's appointment power was restricted by the advice and consent of the Senate, and his removal power was limited. *Id.*

156. *Mistretta, Brief of the United States Senate as Amicus Curiae on Cross Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Eighth Circuit.*

157. The Commission posited:

Congress was acting on its "strong feeling that, even under this legislation, sentencing should remain primarily a judicial function." The power to impose punishment is a judicial power . . . Congress thus properly concluded that, historically, center of gravity of the sentencing power is located in the judicial branch, and that responsibility for implementing the decision to create a new system of determinate sentences should, accordingly, be centered there as well.

Mistretta, Brief of the United States Sentencing Commission As Amicus Curiae Supporting Affirmance.

158. The crux of the argument is that because Congress' statement of location has implications for the operation and control of the Commission and therefore has statutory significance, it should have constitutional significance as well. *Mistretta, Brief of Respondent-Petitioner John M. Mistretta.*

159. See *Mistretta, Brief for the United States.*

160. *Id.*

consistent with the lawful exercise of that power.”¹⁶¹ The government urged the Court to look beyond the fact that Congress had placed the Commission in the judicial branch and to base the Court’s determination instead on the powers of the Commission. The government argued:

The Constitution . . . does not speak of “branches” at all, but instead speaks of “power.” If the Commission is exercising executive power, as we believe it is, the only question of constitutional significance is whether the structure and function of the Commission are consistent with the exercise of that power. The designation of the Commission as an agency “in the judicial branch” may be of symbolic significance and may even affect the application of various other statutes to the Commission. But the “judicial branch” designation standing alone, has no bearing on whether the Sentencing Commission may constitutionally exercise the power it has been assigned.¹⁶²

In *Mistretta*, the Court did not indicate whether one answers the location question by focusing on who controls the agency or commission exercising the power in question, the nature of the power exercised, or Congress’ statement of location. Although it acknowledged that the Commission “does not exercise judicial power,” “is fully accountable to Congress” (unlike other judicial bodies), and its members “are subject to the President’s limited powers of removal” (also unlike other judicial bodies),¹⁶³ the Court drew the questionable conclusion that the Commission was properly considered in the judicial branch for the purposes of separation of powers analysis. One may assume the Court simply ratified Congress’ placement of the Commission in the judicial branch.¹⁶⁴

The Court’s silence on the location issue is deafening. Its lack of coherence on this issue particularly annoyed Justice Scalia who, as a formalist, would “decide the question of which Branch an agency belongs to on the basis of who controls its actions.”¹⁶⁵ In its next

161. *Id.*

162. *Id.*

163. *Mistretta v. United States*, 109 S. Ct. 647, 665-66 (1989).

164. *See id.* at 680-82 (Scalia, J., dissenting).

165. *Id.* at 681 (Scalia, J., dissenting). Incidentally, whether the Court is still wedded to the notion of branches or has adopted the government’s proposed “powers” analysis is not clear. *See id.* at 665-66.

separation of powers opinion, however, the Court will probably have to articulate more fully how to answer the location question because a clear congressional statement such as that in *Mistretta* is unusual.

The Court's answer to the location question could drastically affect formalist analysis and, by extension, the prospects for revival of the nondelegation doctrine. If the Court adopts Justice Scalia's approach and focuses on who controls the agency, formalism remains a viable tool for separation of powers analysis. If, however, the Court focuses on the powers exercised by an agency in order to classify it,¹⁶⁶ a different conclusion results. Formalist analysis would not work with this standard because the Court would be asking essentially the same question twice: What type of power is being exercised?¹⁶⁷ The answers to the two-step formalist analysis would be identical and every ruling would be for constitutionality. The Court, therefore, would be limited to using functionalist analysis, under which the nondelegation doctrine would finally be interred.

The muddled analysis in *Mistretta* betrays a results-oriented approach. The Court preferred preservation of the Commission. Had the Court found the Commission unconstitutional, judges would have had to resentence approximately 4,500 individuals.¹⁶⁸ Perhaps to avoid such an administrative nightmare, the Court reached a contrary result.

166. The government, the Senate and the Commission advocated this position in *Mistretta*. See *supra* notes 156-62 and accompanying text.

167. Ironically, this fallacy is the inverse of Chief Justice Burger's *Chadha* analysis, as some commentators have acknowledged. In *Chadha*, Burger answered the formalist question of what power was being exercised by similarly circular reasoning, stating that "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it." Note, *A Two-Tiered Theory*, *supra* note 52, at 443 (quoting *Chadha*, 462 U.S. at 950).

168. See Kamen, *Court Backs Rules on Sentencing; Decision Removes Doubts on Validity of 1984 Reform Act*, Wash. Post, Jan. 19, 1989, at A1, col. 6:

Of the nearly 40,000 federal defendants who were sentenced in the 12 months after the guidelines went into effect Nov. 1, 1987, 5,651 committed crimes after that date and could have been sentenced under the guidelines, according to the commission. Of that number, only 1,187 were sentenced under the old system In addition, some defendants have already completed their sentences and others are likely to face stiffer sentences under the guidelines and are not expected to appeal.

In a recent speech before the American Bar Association, Professor William P. Murphy asserted that a results-oriented approach permeated the term in which the Court decided *Mistretta*. Murphy claimed:

The past term of Court gave the nation a stark and dramatic demonstration that at the Supreme Court level law is the reflection of the personal predilections and subjective value judgments of the Justices. Conservatives long accused a liberal Court majority of reading its values into law. The charge was absolutely correct. But the claim was that conservative Justices would not "make" the law but simply "interpret" the law. The verbal distinction between interpreting law and making law is naive and the claim that conservatives would be different from liberals was hypocritical. What conservatives really desired was a Court majority whose judicial legislation would further a different set of values and interests. The desire has been achieved, and what should have been known all along has now been publicly demonstrated—conservative Justices are judicial activists as fully as liberal Justices.¹⁶⁹

If Murphy is correct, *Mistretta* and *Morrison* reflect less a change in the Court's separation of powers analysis than a response to the justices' perceived exigencies of a particular situation.¹⁷⁰ This explanation suggests that formalism and, thereby, the nondelegation doctrine may not be on their last legs. Indeed, if the

169. W. Murphy, *supra* note 150.

170. The pursuit of a desired result, rather than scholarly dictates, also may have guided the Court in *Morrison*. More was at stake in that case than just the outcome of independent counsel Alexia Morrison's investigation. A finding that the independent counsel provision of the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591-599 (Supp. V 1987), was unconstitutional would have put in question the convictions of former White House aides Michael Deaver and Lyn Nofziger, who were prosecuted by independent counsels Whitney North Seymour, Jr., and James C. McKay, respectively. See Kamen, *Supreme Court to Rule on Independent Counsels; Minority Contracting Case Also Accepted*, Wash. Post, Feb. 23, 1988, at A4, col. 1; Taylor, Jr., *Justices to Decide Constitutionality of Special Prosecutor Law*, N.Y. Times, Feb. 23, 1988, at D29, col. 2 (discussing the case's potential impact on the Nofziger and Deaver convictions).

A further consideration was the pending Iran-Contra investigation, including its ironic parallel to Watergate, see Mauro, *Did Scalia Persuade Colleagues to Revisit Runyon?*, MANHATTAN LAWYER, May 17, 1988, at 12, and the possibility that a finding of unconstitutionality in *Morrison* might interfere with such an investigation. The independent counsel provision was in fact the "key reform to emerge from the Watergate scandal." Denniston, *Courtly Manners*, AMERICAN LAW., July/Aug. 1988, at 135.

Court wishes to retain two different methods of separation of powers analysis with which it may gerrymander results on a case-by-case basis, it must not only retain formalism, but also must answer the location question by focusing on something other than the nature of the power exercised.

Formalist opinions may again be on the horizon, and the location question, when next answered by the Court, ought to focus on who controls, not what power is exercised. As long as courts employ formalist analysis, the resurrection of the nondelegation doctrine is feasible. The next section focuses on possible means to that end.

THE NONDELEGATION DOCTRINE SHOULD BE REVIVED

The Necessity

Simply stated, delegation is out of control. On virtually a daily basis, Congress transfers lawmaking power in the guise of vague delegations to agencies that "are now well beyond monitoring by our political representatives, either in the White House or on Capitol Hill."¹⁷¹ The implications for the nation's governing apparatus, in both institutional and practical terms, make compelling the case for revival of the nondelegation doctrine. The Court's rejection of the legislative veto, a significant check on the agencies, in *INS v. Chadha*,¹⁷² illustrates further the doctrine's necessity. Until that decision, the legislative veto had been, in Justice White's words, "an important if not indispensable political invention that allow[ed] the President and Congress to . . . assure[] the accountability of independent regulatory agencies, and preserve[] Congress'

Although Attorney General Meese had given Lawrence Walsh, the independent counsel investigating the Iran-Contra scandal, a parallel appointment as a Justice Department prosecutor to prepare for the contingency of a finding of unconstitutionality in *Morrison*, "a constitutional defect in the statute could have affected the early part of Mr. Walsh's investigation—when he did not have the parallel appointment Such a constitutional taint, said Professor Paul F. Rothstein of Georgetown University Law Center, could have affected not only the early evidence-gathering but the entire investigation." Coyle, *Full Speed Ahead for D.C. Probes; Court Removes Constitutional Taint*, Nat'l L. J., July 11, 1988, at 3, col. 1. Although Walsh was appointed independent counsel on Dec. 19, 1986, his parallel appointment was not made until Mar. 5, 1987. *Independent Counsels: A Short History*, Wash. Post, June 30, 1988, at A22, col. 5.

171. Scalia, *Legislative Veto*, *supra* note 14, at 24.

172. 462 U.S. 919 (1983).

control over lawmaking."¹⁷³ With that "post-legislation" check no longer technically at its disposal, Congress must resort instead to a "pre-legislation" check—specifically, narrow drafting of delegations.¹⁷⁴

At their inception, "federal regulatory agencies were romantically conceived as institutions headed by expert citizens who could not be removed by the president and who could therefore exert public power with speed and disinterest."¹⁷⁵ In the New Deal era, many believed that the institutional system of separate branches "prevented the government from reacting flexibly and rapidly to stabilize the economy and to protect the disadvantaged from fluctuations in the unmanaged market . . . [and] created political struggles that disabled officials in the executive branch from making regulatory policies free of partisan pressure."¹⁷⁶

The agencies were supposed to circumvent these problems: "[R]eformers believed that administrative officials would serve as independent, self-starting, technically expert, and apolitical agents of change."¹⁷⁷ The end result, however, has proven far less satisfactory than the agencies' architects envisioned. The agencies have left suspect any claims of expertise,¹⁷⁸ independence,¹⁷⁹ or efficiency.¹⁸⁰

The fundamental problem with administrative agencies is the basic institutional changes that excessive delegations to the agencies have wrought. Then-Professor Scalia accurately perceived:

The main problem is that the agencies have been assigned too many tasks requiring judgments that are of an essentially politi-

173. *Id.* at 972-73 (White, J., dissenting).

174. Justice White criticized what he recognized as the inevitable consequence of the majority's decision, stating that "[w]hile Congress could write certain statutes with greater specificity, it is unlikely that this is a realistic or even desirable substitute for the legislative veto." *Id.* at 973 n.10 (White, J., dissenting).

175. Fein, *Get Rid of Regulatory Agencies—They Aren't Independent and They're Unconstitutional*, Wash. Post, July 27, 1986, at D5, col. 4.

176. Sunstein, *supra* note 21, at 424; see Note, *A Two-Tiered Theory*, *supra* note 52, at 438.

177. *Id.* at 422.

178. See Lowi, *supra* note 15, at 304-05; Aranson, Gellhorn & Robinson, *supra* note 9, at 23; Note, *supra* note 23, at 1769.

179. See Aranson, Gellhorn & Robinson, *supra* note 9, at 26; Lowi, *supra* note 15, at 306; Fein, *supra* note 175, at D5, col. 4.

180. See, e.g., Stewart, *Beyond Delegation*, *supra* note 15, at 324.

cal nature and that ought to be made by our elected representatives. . . .

. . . .

. . . [T]he truth is that the bureaucracy is not unresponsive, only unelected; that procedures are no substitute for the ballot box; and that Congressional control is no longer possible.¹⁸¹

The American people have a right to expect that only those they choose will enact the nation's legislation; that bureaucrats are exercising such power is a distortion of the democratic underpinnings of American government.¹⁸² The Lockean contract the American people forged with their government more than 200 years ago should not be any less binding today:

The constitutional problem that underlies the current dissatisfaction is that Congress has not fulfilled its constitutional responsibilities. Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress"

. . . .

The theoretical foundation of this basic concept of legislative responsibility derives from John Locke's insistence that legislators cannot delegate their legislative authority. The legislature's authority to delegate its lawmaking power is severely constrained not so much because of a fear of its possible misuse, but because of a conviction that *the people agreed to relinquish their most important power only to representatives that they alone have chosen*.¹⁸³

181. Scalia, *Legislative Veto*, *supra* note 14, at 26.

182. *But cf.* Lowi, *supra* note 15, at 306-07 (lending credence to the argument that lawmaking by the agencies may ironically be more democratic than that by Congress because the rulemaking process provides for easy access and participation by citizens); Marshall, "Let Congress Do It": *The Case For An Absolute Rule Of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 224 (1989) ("[P]art of the saving grace of a delegation to an agency whose officials are answerable to the President is the indirect electoral accountability of these decisionmakers.") (footnote omitted). To add insult to injury, "the Supreme Court has never [even] offered a serious constitutional defense for the existence of 'independent agencies.' . . . The *Morrison* Court did not address the constitutional issue directly, but the Court clearly assumed the constitutionality of independent agencies." Note, *supra* note 99, at 208 (footnotes omitted).

183. Gellhorn, *supra* note 33, at 347-48 (footnotes omitted) (emphasis added).

The Proposed Modifications

The intelligible principle standard

Nondelegation is still a valid constitutional doctrine. Neither *Morrison* nor *Mistretta* has repudiated it outright. In a constitutional vacuum then, its deterrent capacity would continue to insure that policy choices remained in Congress' hands. As a practical matter, however, the Court cannot apply the doctrine strictly because of the absence of a justiciable standard and of any way of defining an improper delegation of a policy choice.¹⁸⁴ Hence, the Court has effectively rendered this valid constitutional doctrine useless.

When the Court cannot enforce a constitutional doctrine in a literal sense, however, it has an obligation to consider the doctrine's purposes in an effort to at least satisfy the spirit of the doctrine. In this instance, that purpose is accountability. Thus, although allowing *executive* agencies to make Congress' policy choices violates the nondelegation doctrine in its purest sense, such a delegation at least partially satisfies the purpose of accountability. The executive branch is, after all, also accountable to the people. The Court can better rationalize its reluctance to enforce the doctrine in such instances.

When, however, Congress leaves policy choices to *independent* agencies, which are neither branches nor even participants in the constitutionally mandated legislative process, no accountability rationale can explain the Court's reluctance to apply the nondelegation doctrine. Even worse are those agencies such as the Sentencing Commission that exercise only adjudicatory power because they cannot be controlled indirectly by the executive branch, as can an independent agency exercising all three powers.¹⁸⁵ The sta-

184. Were the Court to apply the doctrine in the absence of such a standard, working instead an ad hoc determination in each case, a formalist doctrine would ironically be translated into a functionalist tool.

185. The main argument in favor of independence for agencies such as the Federal Trade Commission is that such agencies perform adjudicatory functions that should not be controlled by the Executive. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 322, 330-33 (1989). According to this argument, there are two ways the President (or Congress) could control adjudications in agencies exercising adjudicatory, legislative and executive functions: directly or indirectly. Direct presidential interference in an agency adjudication likely would be a violation of due process.

tus of one power independent agencies places them to one end of the continuum of accountability. In this zone, the Court's reluctance to enforce the doctrine is not justified.

A scheme that recognizes a distinction between delegations to accountable executive agencies and delegations to unaccountable independent ones, limiting application of the doctrine to the latter, silences critics who argue that a revival of the doctrine would necessarily cripple the government. Such a limitation ensures that only those delegations most offensive to the doctrine's purposes are censured and the scope of those bodies most unaccountable is impeded.

What remains is the task of constructing a justiciable standard with which courts may enforce the doctrine in such limited scenarios. The "rules statute" versus "goals statute" distinction advanced by Professor Schoenbrod is offered here as a means of determining which delegations pass the intelligible standard threshold.¹⁸⁶ A rules statute lays down a rule demarcating permissible from impermissible conduct.¹⁸⁷ A goals statute, on the other hand, although in the form of a rule, in reality sets forth only goals.¹⁸⁸ The latter would be an impermissible form of delegation because it calls for policymaking via the use of discretion, rather than mere interpretation.¹⁸⁹ Professor Schoenbrod writes that

However, the President or Congress could influence an adjudication in a "three-power agency" indirectly by exerting control over the agency's executive or legislative powers. Effectively, the President would hold the agency's non-adjudicatory power hostage, seeking as ransom his desired adjudicatory result. It follows, then, that the fewer powers an agency exercises, the less opportunity the political branches have to exert such control.

Put simply, the justification for agency independence is impotent when applied to agencies that exercise only one power. If that power is adjudicatory, then due process prevents congressional and executive interference and statutory "independence" is redundant. If, however, the one-power agency exercises solely non-adjudicatory power, there is no justification for independence; the agency should be accountable to a political branch. This is the case with the Sentencing Commission, which is charged with creating legislation for Congress. See *Mistretta*, 109 S. Ct. at 680 (Scalia, J., dissenting).

186. See Schoenbrod, *Separation of Powers* and Schoenbrod, *The Delegation Doctrine*, *supra* note 15.

187. See Schoenbrod, *Separation of Powers*, *supra* note 15, at 359. An example of a rules statute is one that prohibits the emission of a specific number of pounds of a given pollutant.

188. *Id.* An example of a goals statute is one that prohibits the emission of more pollution than the agency deems is reasonable.

189. Professor Schoenbrod explained:

"[g]oals statutes frustrate judicial review and congressional electoral accountability. They enable legislators to escape the difficult, value-laden choices implicit in balancing competing policy goals [In contrast,] rules statutes make the legislative decisions substantive and concrete by stating what people can or cannot do in the statute."¹⁹⁰

Concededly, this scheme is susceptible to semantic manipulation. For example, a delegation that "the EPA prohibit emission levels that damage the public health" is an impermissible goals statute in the guise of a permissible rules statute. When honestly applied, however, the distinction between the two is apparent enough to serve as a judicially manageable standard. With respect to Congress, rules statutes are a type of permissible legislative delegation to which that body can limit itself.

Some argue that, in light of time and expertise deficiencies, Congress has little choice but to issue broad delegations such as those found in goals statutes.¹⁹¹ This argument relies on a number of erroneous presumptions. That Congress does not have the number of in-house experts that an agency does,¹⁹² for example, is an inadequate justification for the breadth of delegations today. Certainly, Congress "can request data from agencies before legislating In some situations, perhaps Congress should not wait for information, but should acknowledge the uncertainties and make a decision on existing information and political pressures, rather than burying the uncertainties and political pressures in agency deliberations."¹⁹³ Further, although the legislative process is notoriously

A rules statute requires the legislature to assume more responsibility and hence to be more accountable for the bearing of that responsibility than does a goals statute In a goals statute, the legislature does not go that far; it indicates legislative hopes and requires a delegate to allocate rights and duties corresponding to those hopes.

Schoenbrod, *The Delegation Doctrine*, *supra* note 15, at 1254.

190. *Id.* at 1254-55.

191. *See, e.g.*, Comment, *supra* note 7, at 119.

192. Commentators note, however, that "agency heads do not necessarily have more expertise than do members of Congress, particularly committee and subcommittee chairmen and ranking minority members." Aranson, Gellhorn & Robinson, *supra* note 9, at 23.

193. Schoenbrod, *The Delegation Doctrine*, *supra* note 15, at 1278.

slow, the contention that the administrative process is any more expedient has no merit.¹⁹⁴

Finally, the established committee system that Congress has to handle its relations with the agencies makes it entirely practicable that Congress could do the work involved in lending some substance and clarity to its delegations. Indeed, in *Mistretta*, as an example, Congress could just as easily have gained "sentencing expertise" by creating a commission to draft legislation that Congress could pass by both houses and present to the President for signing. Forcing Congress to act affirmatively to pass the guidelines would have ensured that it was in fact the President and Congress who had made the policy choices with respect to criminal punishment. No doubt the sentencing guidelines would have been radically different had Congress and the President been forced to bear responsibility for them. In terms of congressional politics, however, it was much easier to sit back and allow the guidelines to become law than to pass them affirmatively.

The oft-hailed "efficiency" argument in favor of delegations is, at best, a guise to hide the truth that our elected officials simply do not want to bear the brunt of public opinion for their public choices.¹⁹⁵ Throwing the work of thousands of bureaucrats on the shoulders of 535 members of Congress, however, is not the solution. Rather, we recommend using bureaucratic expertise to draft "legislation" that Congress must then pass, or requiring Congress to pass, at a minimum, real standards that make the fundamental policy choices and bind bureaucrats.

Mistretta is particularly disturbing as it insures that Congress will continue to use the "one power" independent agency to make its hard choices.¹⁹⁶ This is imminently worse from a separation of powers perspective than allowing a "three power" agency to do the same thing. Congress and the President at least can exercise some

194. *Id.* at 1278. "Agencies have frequently delayed long past congressional deadlines for promulgating regulations, often pleading lack of knowledge, resources, manpower and time. Their decisions may also lack full consideration, especially given the pressures to which they are subject." *Id.*

195. *See supra* note 63.

196. *See Comment, supra* note 7, at 141.

control over even "independent" three power agencies. The same cannot be said for a "junior-varsity Congress."¹⁹⁷

The fundamental rights approach

Much of the discussion in this Note has focused on separation of powers and nondelegation as they affect the branches of government. Yet both doctrines have at their core a concern for more than just horizontal, or institutional, relationships. The governmental structure dictated by both doctrines exists for a purpose: to protect individual liberty.¹⁹⁸ Thus, individuals also have an interest in separation of powers and nondelegation concerns, which we define as a vertical relationship.¹⁹⁹

Stated simply, the choice of which branch makes the final policy decision affects the ultimate policy choice.²⁰⁰ From this assumption

197. *Mistretta*, 109 S. Ct. at 683 (Scalia, J., dissenting).

198. Justice Scalia recognized this purpose in his *Morrison* dissent. *Morrison*, 108 S. Ct. at 2637; see Feigenbaum, *The Preservation of Individual Liberty Through the Separation of Powers and Federalism: Reflections on the Shaping of Constitutional Immorality*, 37 EMORY L.J. 613, 614 (1988) (The framers' main objective in devising the separation of powers scheme "was that political power should not be able to prevail over individual rights, that individual liberty should not be sacrificed for the convenience, jealousy, or self-interest of government."); Comment, *Separation of Powers and the Individual*, 55 BROOKLYN L. REV. 965, 978-79 (1989) ("The Framers of our Constitution adopted the system of separation of powers to increase governmental efficiency and protect liberty. Separation of powers . . . protects liberty by requiring cooperation of the separate branches before the government can act.").

199. The Court has alluded to this relationship, stating, for example, that:

Article III, §1 serves both to protect "the role of the independent judiciary within the constitutional scheme of tripartite government," and to safeguard litigants' "right to have claims decided before judges who are free from potential domination by other branches of government." . . . Although our cases have provided us with little occasion to discuss . . . this latter safeguard, our prior discussions of Article III, §1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests.

Commodity Futures Trading Comm. v. Schor, 478 U.S. 833, 848 (1986) (citations omitted).

200. This, in essence, is the premise behind public choice theory. Public choice theory views statutes as the embodiment of compromises between legislators, including the possibility of agreeing to be vague when specificity would undermine agreement. For a general explanation of public choice theory, see Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); see also Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988).

follows the conclusion that when Congress delegates without making fundamental policy choices, the body to which it delegates will make them, and those policy choices likely will be different from the ones Congress would have made. This premise gives governmental structure and the nondelegation doctrine new importance, for now separation of powers is not merely procedural, but substantive as well. Put differently, individuals have a right under the Constitution to the policy choices that Congress would have made.

This principle alone, however, does not confer standing on all citizens to challenge agency action on separation of powers or nondelegation grounds. When fundamental policy choices that Congress should make affect personal interests, the Court is remiss in not analyzing the separation of powers and nondelegation issues with some form of heightened scrutiny.²⁰¹ Such situations implicate both the horizontal and vertical separation of powers interests.

Justice Brennan accurately explained the personal interest involved in delegation in *United States v. Robel*.²⁰² Justice Brennan conceded that "Congress ordinarily may delegate power under broad standards,"²⁰³ and that "in conferring power upon an appropriate authority, [it is enough that] Congress indicate its general policy, and act in terms or within a context which limits the power conferred."²⁰⁴ Nonetheless, he indicated that Congress' delegation authority is more limited in areas that affect fundamental individ-

201. The court of appeals in *Morrison* recognized implicitly the need for some examination of the individual interest involved in a separation of powers dispute. *In re Sealed Case*, 838 F.2d 476, 509 (D.C. Cir. 1988) ("It is not the quantity of cases or investigations withdrawn from executive supervision that is important, for a qualitatively significant encroachment upon the executive's control over even a single case may have a drastic impact on the individual involved.").

202. 389 U.S. 258 (1967). In *Robel*, the defendant faced a charge of unlawful membership in the Communist Party while employed at a defense facility. His nondelegation argument was that

[b]ecause the [Subversive Activities Control Act] contains no meaningful standard by which the Secretary [of the Interior] is to govern his designations . . . the "defense facility" formulation is constitutionally insufficient to mark "the field within which the [Secretary] is to act so that it may be known whether he has kept within it in compliance with the legislative will."

Id. at 272-73 (Brennan, J., concurring) (quoting *Yakus v. United States*, 321 U.S. 414, 425 (1944)).

203. *Id.* at 274 (Brennan, J., concurring).

204. *Id.* at 274-75 (Brennan, J., concurring) (citations omitted).

ual liberties because "the numerous deficiencies connected with vague legislative directives, whether to a legislative committee, to an executive officer, to a judge and jury, or to private persons, are *far more serious when liberty and the exercise of fundamental rights are at stake*."²⁰⁵ Legislative judgments are especially necessary in areas affecting personal liberty,²⁰⁶ and when Congress wishes to infringe on constitutionally protected interests, it may do so only by passing legislation.²⁰⁷

Professor Donald A. Dripps also recognized the nondelegation doctrine's role as a protector of individual rights and suggested that there is a strong connection between the nondelegation doctrine and procedural due process cases.²⁰⁸ Dripps believes that procedural due process cases have been a poor enforcement tool for

205. *Id.* at 275 (Brennan, J., concurring) (citations omitted) (emphasis added). Justice Brennan also reiterated the need for Congress to make fundamental policy choices in such cases, explaining:

Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people. "[S]tandards of permissible statutory vagueness are strict . . ." in protected areas. "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them."

Id. at 276 (Brennan, J., concurring) (quoting *NAACP v. Button*, 371 U.S. 415, 432 (1963); *Greene v. McElroy*, 360 U.S. 474, 507 (1959)).

206. Justice Brennan explained:

The need for a legislative judgment is especially acute here, since it is imperative when liberty and the exercise of fundamental freedoms are involved that constitutional rights not be unduly infringed. . . . [Congressional determinations] "must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not already authorized . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws."

Id. at 277 (Brennan, J., concurring) (citations omitted).

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

208. Dripps, *supra* note 63, at 659 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)); see *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Vitek v. Jones*, 445 U.S. 480 (1980); *Barry v. Barchi*, 443 U.S. 55 (1979); *Bishop v. Wood*, 426 U.S. 341 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976); *Paul v. Davis*, 424 U.S. 693 (1976); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Bell v. Burnson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

what are actually individual interests in nondelegation.²⁰⁹ The connection between the two doctrines rests in a constitutional requirement that Congress define federal policy.²¹⁰ According to Dripps, the intelligible principle requirement used by the Court in delegation cases is a recognized constitutional principle even if it has been rendered effectually inchoate.²¹¹ The procedural due process cases, to the contrary, lack a "legitimate predicate" in recognized rules of constitutional law.²¹² Dripps suggests that courts should treat these cases as nondelegation cases, varying the level of scrutiny according to the seriousness of the right involved. He explains:

The nature of the underlying right will still affect the analysis by determining the clarity of congressional policy required under the non-delegation doctrine. A relatively vague delegation may withstand scrutiny if the power delegated governs commercial activity. This is not to disparage property rights but only to admit their secondary importance to rights to life and liberty. The hierarchy of judicial value, with the exercise of political freedoms and the maintenance of life itself at the apex, will appear in delegation cases just as it has in due process cases.

The difference under my proposal would be that courts would measure the sufficiency of legislative procedures against the goal of non-delegation, rather than against the goal of protecting some other interest.²¹³

Professor Dripps is not the only commentator to note the connection between due process and nondelegation. Numerous scholars have noted that *Chadha* appears to be a due process case in separation of powers clothing.²¹⁴ As Paul Verkuil has explained:

What was offensive about *Chadha's* treatment by (one house of) Congress was that he was, by all appearances, arbitrarily singled out for harsh treatment. . . . In this setting, when Congress acts adversely upon individuals without explanation, due process and

209. Dripps, *supra* note 63, at 659.

210. *Id.* at 670.

211. *Id.* at 676.

212. *Id.*

213. *Id.* at 681.

214. See, e.g., Feigenbaum, *supra* note 198, at 620; Verkuil, *supra* note 185, at 312; Comment, *supra* note 198, at 980-81.

bill of attainder concerns mesh to form a reinforcing rationale for judicial intervention.²¹⁵

Indeed, Verkuil makes a compelling argument that due process concerns explain an overwhelming number of the Court's separation of powers and nondelegation decisions.²¹⁶ However, Verkuil, unlike Dripps, does not argue for a reinvigorated nondelegation doctrine. Rather, Verkuil believes that due process and bill of attainder analysis can take the place of separation of powers cases that focus on individual interests.²¹⁷

When Congress delegates authority, as it did to the United States Sentencing Commission in *Mistretta*, it often seeks to reduce the political costs of decisionmaking.²¹⁸ Yet accountability is the goal of the nondelegation doctrine.²¹⁹ When Congress must make fundamental policy choices, accountability is enhanced, and the work product is changed.²²⁰ Courts have recognized an individual interest in accountability when "administrative" action threatens liberty interests, although some describe it as a due process right.²²¹

215. Verkuil, *supra* note 185, at 312-13.

216. See *id.*; see also Pierce, Jr., *Separation of Powers and the Limits of Independence*, 30 WM. & MARY L. REV. 365, 365-66 (1989).

217. Verkuil, *supra* note 185, at 320, 341.

218. See *supra* note 63.

219. Brian Koukoutchos has postulated that Justice Scalia premised his concerns with individual rights in *Morrison* on accountability. Koukoutchos asserts, however, that the President is accountable for the actions of a special prosecutor because of the "for cause" removal provision. Koukoutchos, *Constitutional Kinetics: The Independent Counsel Case and the Separation of Powers*, 23 WAKE FOREST L. REV. 635, 714-15 (1988). This alleged check notwithstanding, numerous other dangers relating to the independent counsel argue against such a position. For a succinct exposition of such dangers, see Comment, *supra* note 198, at 990-91.

220. As Professor Bruff has noted, "Procedural formality not only conforms congressional power to accountability; it also influences the congressional product. The Constitution's procedural requisites for legislation ameliorate the effects of faction and localized constituencies, and foster policies that advances the public interest." Bruff, *supra* note 19, at 508.

221. In a decision overruled by *Mistretta*, a district court reasoned:

[W]hen a definite sentence is not statutorily mandated, a defendant being deprived of his liberty pursuant to a statute which sets a sentencing range is constitutionally entitled to an articulated exercise of discretion by the judge before whom he appears rather than to the mechanical application of formulae adopted by non-constitutional commissioners invisible to him and to the general public. *The essence of due process is accountability, reason and a fair*

The problem with Verkuil's approach—applying due process analysis instead of separation of powers or nondelegation analysis to protect individual rights—is that it does not go far enough in protecting individual rights. Verkuil recognizes that there is a problem with congressional delegation of legislative authority.²²² But due process analysis does not solve the problem in the difficult cases. It might protect the Chadhas of the world, but what about the *Mistrettas*?

Professor Pierce accurately described the state of due process jurisprudence in his critique of Verkuil's approach: "[P]rocedural due process protects only individuals or small numbers of individuals from arbitrary government actions that single them out for adverse action. In contrast, when a government action affects a large number of people, their recourse is through the political process."²²³ Pierce is right, of course, in his interpretation of the Court's due process jurisprudence. When fundamental policy choices regarding individual liberties are made by an unaccountable body rather than by passing legislation and presenting it to the President, individuals deserve some protection. Due process analysis, as Pierce demonstrates, simply does not provide it.

In applying Dripps' theory to *Mistretta*, one must first note that the delegation to the Commission necessarily implicated the liberty interests of defendants convicted of crimes. Congress thus delegated the authority to make fundamental policy choices.²²⁴ Be-

opportunity to be heard. These cannot be replaced by any administrative code, however extensively considered or precisely drawn.

United States v. Bolding, 683 F. Supp. 1003, 1005 (D. Md. 1988) (emphasis added), *rev'd*, 876 F.2d 21 (4th Cir. 1989). Judge Bork echoed the importance of accountability, stating, "The Constitution preserves our liberties by providing that all of those given the authority to make policy are directly accountable to the people through regular elections." R. BORK, *THE TEMPTING OF AMERICA* 4-5 (1990).

222. Verkuil, *supra* note 185, at 318.

223. Pierce, Jr., *supra* note 216, at 367. Pierce concludes that a procedural due process argument would fail in *Mistretta* for precisely this reason. Pierce, Jr., *supra* note 104, at 36.

224. The Commission has complete discretion in the imposition of "sentences of probation, a fine, or imprisonment" or "other authorized sanctions" for all federal offenses. 28 U.S.C. § 994(c) (1982 & Supp. IV 1987). Although it most likely will not, the Commission theoretically could promulgate guidelines calling for life imprisonment without parole for all federal offenses. More likely to be exercised, and more politically oriented, is its authority to implement the death penalty for certain federal offenses. Yet another policy choice, and within its discretion, is the Commission's decision to establish fines for all non-indigent de-

cause those policy choices probably are different from those that the legislative process would have reached,²²⁵ and because the personal interests at stake rank among the highest of judicial values, the delegation to the Commission should have received closer scrutiny.

Liberty interests will not be implicated in all separation of powers cases. Such an interest is difficult to conceive in *Bowsher v. Synar*,²²⁶ for instance. There, the dispute was on a purely horizontal level.²²⁷ However, when liberty interests are implicated, the Court must find a way to address the vertical relationship as well. Perhaps in cases in which alternative constitutional guarantees (*i.e.* due process and bill of attainder clauses) can protect liberty interests, those guarantees should be used as Verkuil advocates.²²⁸ But in cases in which liberty interests are implicated and no other constitutional guarantee applies, the Court should apply separation of powers and nondelegation analysis rigorously.

This rigorous application should take the form of strict scrutiny.²²⁹ Under such a test the Court should inquire first into whether government structured the law the way it has because of a compelling government interest. Reasons of efficiency would work

pendants convicted of federal offenses. The Commission may also consider criminal punishment for corporations.

225. As Judge Bork explained:

[Q]uestions of governmental structure, competence, and authority are, of course, closely related to the resolution of the Madisonian dilemma When the President and Congress come into a conflict requiring resolution by the Court . . . [i]t matters greatly to the individual . . . which arm of government has legitimate authority in a field that affects him. It matters not only in terms of the result that one branch of government ordains but, since different governmental bodies have constituencies of different sizes and compositions, it matters to the citizen's chances of participating in decisionmaking.

R. BORK, *supra* note 221, at 140.

226. 478 U.S. 714 (1986).

227. Professor Paul Gerwitz, however, found it troubling that the Court in *Bowsher* did not address the real issue: whether Congress may bind "itself with a series of mechanical across-the-board spending cuts rather than making considered value choices on an ongoing basis" Gerwitz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 349 (1989).

228. See *supra* notes 217-22 and accompanying text.

229. For a general discussion of strict scrutiny in the equal protection/due process context, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 530-31 (3d ed. 1986) (citing *United States v. Carolene Product Co.*, 304 U.S. 144, 152 n.4 (1958)).

here. Second, the Court should determine if Congress could have achieved its purpose through "less violative means." In application, this second prong would consider the accountability purpose of separation of powers and the right of the people to have Congress and the President make fundamental policy choices.²³⁰

In the *Mistretta* scenario, the test would apply as follows: Certainly, Congress' purposes of gaining the input of those with sentencing expertise and increasing congressional efficiency are legitimate and would pass the first prong. The Commission would fail under the second prong, however. The sentencing guidelines became law without congressional or executive approval of the fundamental policy choices contained therein. Alternative means to achieve Congress' purposes did exist. First, Congress could have established the Commission in the executive branch under legislation in which Congress and the President made the fundamental policy choices regarding sentencing.²³¹ Second, Congress easily could have required the Commission to send its proposed Guidelines to Congress as a legislative proposal upon which both houses and the President would be required to act affirmatively. Thus, a virtually standardless delegation that might normally pass the Court's "rational basis" separation of powers review—a review that focuses solely on institutional, horizontal relationships—would fail under a "strict scrutiny" separation of powers review that considers the primary vertical concern: accountability for fundamental policy choices affecting liberty interests.

CONCLUSION

The Constitution was not born of a hurried or whimsical undertaking. Its provisions evidenced the long and careful deliberations of the founding fathers. The wisdom of those leaders cannot be

230. The authors reiterate what they believe to be a relatively uncontroversial proposition: that the policy choices made by politically accountable bodies will differ from those made by unaccountable bodies. More controversial is whether the choices made by unaccountable bodies are better than those made by accountable bodies.

231. For example, Congress could have decided that the death penalty should not be included as a sentencing option, that all violent offenders should go to jail or that corporate crimes should be punishable by imprisonment of officers as well as fines. It then could have left it to the executive branch's Commission to fill in the details regarding mitigating factors and so on.

readily discarded. Essentially, however, that is what Congress and the courts have done in their emasculation of the nondelegation doctrine during the past fifty years. The resulting impact on both the institutional workings of the American Government and the personal liberty interests of its citizens has been profound. Indeed, in abandoning the doctrine, Congress and the courts have ignored this society's democratic underpinning—the notion that only those accountable to the people shall have the authority to create legislation binding on its citizens. If “taxation without representation” proved a mighty slogan for the colonists, then “legislation without representation” should have no less impact today. A minor administrative revolution in the form of the nondelegation doctrine's revival on the terms stated herein is appropriate if the label “democracy” is to be more than just a pretense.

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