THE UNINTELLIGIBLE STANDARD: RETHINKING THE MANDATE OF THE FTC FROM A NONDELEGATION PERSPECTIVE

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I
INTRODUCTION

A common practice in the area of administrative law is delegation of legislative authority to administrative agencies. Many statutes, rather than prescribe rules of behavior themselves, set up administrative agencies to prescribe rules in specific subject areas.[1] The administrative rules promulgated pursuant to this scheme have the force of law. This practice, however, seems at odds with plain constitutional text, which says that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[2] Citing this language, a group of academics, the nondelegationists, argue that the elected Congress rather than unelected bureaucrats should make law. Others supporting nondelegation suggest that members of Congress delegate away responsibility for selfish reasons; forcing this responsibility back where it belongs would not only be consistent with the Constitution but may also result in improved democracy.

The defenders of delegation, in contrast, note that this proposed scheme is impracticable. While there are those who say bureaucratic rulemaking may actually improve the democratic process,[3] most of its proponents base the need for delegation on

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1. The statutes setting up administrative agencies are often referred to as organic statutes.

2. U.S. CONST. art. I, § 1.

3. Another critique, discussed at length in this Note, is that the words "democratic process" lack a single, accepted definition. Thus, the general debates over the issue of improving democracy suffer from lack of definition of key terms. *See infra* Part IV.B.2.

practical reasons, for example, the impossibility either of requiring Congress to pass the numerous rules currently set by agencies or the impossibility of determining an analytically satisfactory distinction between a properly drawn statute and one impermissibly delegating legislative authority.

Full delegation and strict nondelegation, however, need not be the only alternatives. This Note argues for a contextual approach, which would consider the political realities of a given field and base the allowable level of delegation on those factors. The Note examines as its primary example possible delegation to the Federal Trade Commission (the "FTC" or the "Commission") of the authority to regulate entertainment media marketing campaigns.

Prior to the election of 2000, there had been ongoing debate about the proper social response to violent entertainment and its allegedly negative impact on the psyche of American youth. During the 2000 election campaign, the Democratic presidential nominee, then-Vice President Albert Gore, suggested that the FTC use its jurisdiction over false and deceptive advertising to regulate the entertainment media's marketing campaigns.

This Note argues that the FTC's assertion of such jurisdiction would be a prime example of the problem inherent in unfettered delegation. Such an assertion of jurisdiction with the overwhelming intent to address what is basically a social problem would highlight the absence of any clear mandate in the agency's organic statute. In the absence of a clear mandate, the wide-ranging rulemaking provisions of the FTC's organic statute should be declared unconstitutional under a contextual nondelegation model. Rather than an attempt to revive a disputed constitutional doctrine, this approach would be consistent with the "intelligible principle" test.[4] While the current approach to delegation may strike down this particular regulation as one that raises "important constitutional issues,"[5] such an approach, this Note argues, does not go far enough and offers few benefits as compared with the contextual nondelegation model.

Section II of the Note discusses the FTC situation in detail. Section III relates the history of the FTC's rulemaking authority as well as the process by which agencies promulgate their rules. Section IV provides a synopsis of the academic debate, followed by a description of the judicial approach to delegation in Section V.

4. *See infra* Part V.A.

5. For an application of this doctrine to the FTC and the doctrine's shortcomings in that context, see *infra* Parts VI.A–B.

Section VI looks at delegation in the context of the FTC, arguing for a context-specific application of the nondelegation approach. Finally, the Note compares the benefits of such an approach with its alternatives and concludes that the FTC's unfettered discretion makes its organic statute an easy case for more stringent constitutional requirements.

II
THE FTC REPORT

A. Social Background

On June 1, 1999, shortly after the Colorado high school shootings,[6] President Clinton asked the FTC to undertake a study to determine whether the entertainment industry markets and advertises products with violent content to young people.[7] The study was to consider two questions in particular:

1. Does the industry promote products, which the industry itself acknowledges warrant parental caution, in venues where children make up a substantial percentage of the audience?
2. Are these advertisements intended for such an audience?[8]

The report, released in September 2000, confirmed that while the movie industry has categorized content with respect to its appropriateness for children of various age categories, companies routinely target children younger than the "appropriate" age.[9]

6. On April 20, 1999, two students entered Columbine High School in Littleton, Colorado and went on a deadly rampage, killing twelve students and a teacher before turning their guns on themselves. *See* Patrick O'Driscoll & Tom Kenworthy, *Massacre over Within Minutes*, USA TODAY, May 16, 2000, at 3A, 2000 WL 5778323. Various commentators noted that the violent computer games these killers were apparently fond of were contributing factors. *See* Gene Collier, *Are We Facing Our 'Doom'?*, PITTSBURGH POST-GAZETTE, May 5, 1999, at E1 (ridiculing those who claim that violent culture, as epitomized in the video game "Doom," was the sole cause of the Columbine tragedy, but noting that such forces may have played some role), 1999 WL 5270884.

7. FED. TRADE COMM'N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES 1 (2000), http://www.ftc.gov/reports/violence/vioreport.pdf [hereinafter REPORT] (discussing Letter to the Attorney General and the Chairman of the Federal Trade Commission on a Study on Youth Violence and Media Marketing, 1999 PUB. PAPERS 864 (June 1, 1999)).

8. *Id.*

9. *Id.* at 52–53.

B. Unfair Practices Identified by the FTC

With respect to the movie industry, the report found the greatest fault with advertising placement standards, which are not guided by any self-regulatory system.[10] Not only, concluded the report, are young viewers exposed to advertising for movies that are later rated as inappropriate for them, but marketing campaigns are often designed to attract young audiences, regardless of the movie's probable rating.[11] Thus, studios bought television spots on youth-oriented channels, such as MTV,[12] and during youth-oriented shows, such as *Buffy the Vampire Slayer*, *WWF* and *WCW Wrestling*, and *Xena: Warrior Princess*, to advertise age-inappropriate movies.[13] On the big screens, studios requested trailer placement for movies with mature content at teen-oriented features and further advertised these movies in places where teens congregate.[14]

C. The FTC's Proposals

The FTC, on a number of occasions, emphasizes "that its review and publication of this Report, and its proposals to improve self-regulation, are not designed to regulate or even influence the content of movies . . . ."[15] At the same time, "[s]elf-regulatory programs can work only if the concerned industry associations actively monitor compliance and ensure that violations have consequences."[16] Additionally, the Commission concluded that "continuous public oversight is also required and that Congress should continue to monitor the progress of self-regulation in this area."[17]

The report also analyzed the First Amendment implications of three rule proposals intended to restrict the marketing of violent entertainment media products to children. One such proposal called for a mandatory, government-imposed advisory system.[18] An-

10. *Id.* at 11.
11. *Id* at 11–12.
12. *Id.* at 15.
13. *Id.*
14. *Id.* at 16–17.
15. *Id.* at v.
16. *Id.* at vi.
17. *Id.*
18. *See id.* app. C at 7–8, http://www.ftc.gov/opa/2000/09/youthviol.htm (citing MAJORITY STAFF OF SENATE COMM. ON THE JUDICIARY, 106TH CONG., REPORT ON CHILDREN, VIOLENCE, AND THE MEDIA: A REPORT FOR PARENTS AND POLICY MAKERS (Comm. Print. 1999), http://www.senate.gov/~judiciary/mediavio.htm). *See also* Media Violence Labeling Act of 2000, which was considered by the Senate Committee on Commerce, Science and Transportation in the last Congress:
Sec. 2 . . .

other proposal sought to limit advertisements and promotions for violent entertainment products to certain types of media or venues not likely to attract an audience composed largely of children.[19] The final proposal aimed at limiting violent content in the advertising itself, relying on Supreme Court decisions that had upheld states' power to regulate children's access to constitutionally protected speech.[20] The discussion of the third proposal concluded, "[s]hould federal or state legislatures adopt laws treating violence like obscenity, it may fall to the courts to interpret precisely what constitutes violence that is equivalent to obscenity."[21] This emphasis on legislatures implies that the Commission is not willing to argue that its rulemaking mandate gives it the personal authority to limit the content of advertising. The Commission's power to enact the other two proposals, however, is a subject of greater controversy. While the FTC itself has emphasized the desirability of self-regulation,[22] the political pressure to regulate the entertainment industry is likely to persist and the FTC may be asked to undertake the task.

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b) Policy Regarding Violence in Audio and Visual Media Products and Services.—It is also the policy of Congress, and the purpose of this Act, to provide for the establishment, use, and enforcement of a consistent and comprehensive system in plain English for labeling violent content in audio and visual media products and services (including labeling of such products and services in the advertisements for such products and services), whereby—

(1) the public may be adequately informed of—

(A) the nature, context, and intensity of depictions of violence in audio and visual media products and services; and

(B) matters needed to judge the appropriateness of the purchase, viewing, listening to, use, or other consumption of audio and visual media products and services containing violent content by minors of various ages; and

(2) the public may be assured of—

(A) the accuracy and consistency of the system in labeling the nature, context, and intensity of depictions of violence in audio and visual media products and services; and

(B) the accuracy and consistency of the system in providing information on matters needed to judge the appropriateness of the purchase, viewing, listening to, use, or other consumption of audio and visual media products and services containing violent content by minors of various ages.

Media Violence Labeling Act of 2000, S. 2497, 106th Cong. § 2 (2000).

19. REPORT, *supra* note 7, app. C at 8 (discussing Letter from Ralph Nader, Director, & Gary Ruskin, Executive Director, Commercial Alert, to Robert Pitofsky, Chairman, FTC (June 22, 1999), http://www.essential.org/alert/mediaviolence/ftclet.html), http://www.ftc.gov/opa/2000/09/youthviol.htm. **R**

20. *Id.* app. C at 9.

21. *Id.*

22. *See supra* text accompanying note 15. **R**

III
THE FTC AND THE ADMINISTRATIVE RULEMAKING PROCESS

A. The Federal Trade Commission Act and the Expansion of Rulemaking Authority

While the Federal Trade Commission Act (the "FTCA")[23] was initially directed at prohibiting trade-restraining methods of competition,[24] two subsequent amendments to the Act profoundly expanded the FTC's authority over practices that do not adversely impact competition. Since this Note critiques unfettered delegation of congressional power to the FTC, it is worth glancing at the scope and history of the FTC's rulemaking authority.

The first post-FTCA act to augment explicitly the FTC's authority was the Wheeler-Lea Act of 1938.[25] It expanded the reach of the FTCA's prohibitions to cover "unfair or deceptive acts or practices" as well as "unfair methods of competition."[26]

The FTC relies on section 6(g) of the FTCA for the statutory authority to promulgate rules articulating specific conduct prohibited by the Wheeler-Lea Act. Section 6(g) gives the FTC power "[f]rom time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."[27] This provision has been held to delegate to the FTC the power to promulgate substantive rules.[28] Further, the key case of *FTC v. Sperry & Hutchinson Co.*[29] held that the agency's rulemaking authority extends to acts and practices that are unfair and rejected the more restrictive interpretation that such authority only extends to acts that violate antitrust laws.[30]

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23. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–46, 47–57a, 57b–57b-4, 57c, 58 (1994)).

24. *See* PETER C. WARD, FEDERAL TRADE COMMISSION: LAW, PRACTICE AND PROCEDURE § 1.01 (perm. ed., rev. vol. 2001).

25. Wheeler-Lea Act of 1938, ch. 49, 52 Stat. 111.

26. Wheeler-Lea Act, ch. 49, sec. 3, § 5(a), 52 Stat. 111, 111 (codified as amended at 15 U.S.C. § 45(a) (1994)). This expansion of authority was a reaction to a Supreme Court case that held that the prohibition of "unfair methods of competition" did not include authority to regulate practices that had no adverse impact on competition. FTC v. Raladam Co., 283 U.S. 643, 649 (1931). The Court retreated from this position in *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934), and the Wheeler-Lea Act codified the more expansive interpretation.

27. FTCA § 6(g) (codified as amended at 15 U.S.C. § 46(g) (1994)).

28. *See* WARD, *supra* note 24, §5.01 (citing Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973)). R

29. 405 U.S. 233 (1972).

30. *Id.* at 244.

Shortly after the Court decided *Sperry & Hutchinson Co.*, Congress greatly expanded the FTC's rulemaking authority yet again through the 1975 Magnuson-Moss Warranty—Federal Trade Commission Improvement Act.[31] The Act's specific grant of rulemaking authority is codified at 15 U.S.C. § 57a(a)(1):

> [T]he Commission may prescribe—
> (A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), and
> (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title) . . . . Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.[32]

B. How Rules Are Made

Rules promulgated by the FTC under its organic statute are called trade regulation rules ("TRRs").[33] In addition to TRRs, the FTC promulgates rules pursuant to specific congressional delegations unrelated to § 57a and issues industry guides, which do not have the force of law.[34] These specific congressional delegations delineate congressional goals and policies, mandate procedure, and place upon the Commission the burden of statutory enforcement.[35]

In contrast to these specific delegations, the FTC's organic statute, as amended by the Magnuson-Moss Act, merely defines the

31. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. §§ 45, 46, 49, 50, 52, 56, 57a–57c, 58, 2301–2312 (1994)).

32. 15 U.S.C. § 57a(a)(1) (1994).

33. FTC Rules of Practice, 16 C.F.R. § 1.7 (2001). The rules themselves may be found in volume 16 of the Code of Federal Regulations.

34. *See* Application of Guides in Preventing Unlawful Practices, 16 C.F.R. Part 17 (2001); FTC Rules of Practice, 16 C.F.R. § 1.5 (2001).

35. *See, e.g.*, Wool Products Labeling Act of 1939, 15 U.S.C §§ 68–68j (1994); Fur Products Labeling Act, 15 U.S.C. §§ 69–69j (1994); Textile Fiber Products Identification Act, 15 U.S.C. §§ 70–70k (1994); Hobby Protection Act, 15 U.S.C. §§ 2101–2106 (1994); Hart-Scott-Rodino Antitrust Improvements Act of 1976 § 201, 15 U.S.C. §§ 18a, 21 (1994 & Supp. V 1999) (pre-merger notification requirements). Such examples of circumscribed delegation of authority stand in sharp contrast to the unfettered delegation this Note critiques. The very existence of such delegation undercuts the argument that circumscribed delegation is impossible as a practical matter.

word "commerce" for the purposes of the FTCA.[36] Apart from that, 15 U.S.C. § 57a neither sets out nor references any definitions.[37] While there has been some litigation over rules promulgated under § 57a,[38] the precise substance of the section remains a matter of uncertainty.

The additional requirements that the Act places on the Commission relate to its rulemaking procedure. In general, the FTC and most other administrative agencies exercise lawmaking power through a procedure known as informal rulemaking. Basically, this procedure mandates public notice of a proposed rule's substance and an opportunity for written comment from the affected parties.[39] Courts have found this requirement to impose a number of restrictions on the agencies.[40] While these restrictions are attempts to ensure some democratic accountability in administrative lawmaking, they have apparently backfired. Saddled with both judicially-

36. "Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.
15 U.S.C. § 44 (1994).

37. To be precise, § 57a(a)(1) does direct the reader to a different section of the code, 15 U.S.C. § 45(a)(1), for a definition of "unfair or deceptive acts or practices in or affecting commerce." That section, however, says simply that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1) (1994).

38. *See* Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 968–72 (D.C. Cir. 1985) (discussing the history of uncertainty surrounding scope of FTC's power); Harry & Bryant Co. v. FTC, 726 F.2d 993 (4th Cir. 1984) (upholding an unfairness determination).

39. *See* Administrative Procedure Act of 1946, § 4, 5 U.S.C. § 553 (1994). Section 553(b) imposes requirements for notice and § 553(c) defines the opportunity for comment. *See id.* §§ 553(a)–(b). This provision is applicable to the FTC through 15 U.S.C. § 57a(b) (1994). The requirements are elaborated upon in 15 U.S.C. § 57a(c) (1994). For the purposes of the paper, however, it is accurate to say that, taking into account its additional requirements, the FTC still essentially participates in informal, notice-and-comment rulemaking.

40. For example, some courts have read the notice requirement to mandate that the final rule must substantially resemble the published proposal: "[I]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." Small Refiner Lead Phase-Down Task Force v. U.S. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983). While the standard of "deviates too sharply" sounds like a reasonable interpretation of the statute, some circuits have read it restrictively. *See, e.g.*, Nat'l Black Media Coalition v. FCC, 791 F.2d 1016, 1022, 1024 (2d Cir. 1986) (setting aside a final rule where it deviated in the outcome, but not subject matter, from the proposed rule published as notice).

imposed provisions and many statutory requirements,[41] agencies have shied away from notice-and-comment informal rulemaking and have increasingly relied on their pre-notice determinations of what the rule should be. Final rules promulgated in recent times tend simply to mirror the notice published before the public comment period commenced.[42]

It would be unfair, however, to characterize this practice as totally unrestrained. The FTC, like all other agencies, depends heavily on both the President and Congress and is subject to executive orders and appropriations decisions. Additionally, after passage of the Congressional Review Act,[43] administrative rules have become vulnerable to congressional oversight, in addition to ever-present judicial review. To that effect, the FTCA requires the agency to provide a sufficient basis for judicial review of its actions. For example, 15 U.S.C. §57a(d)(1) instructs that, after promulgating a §57a(a)(1)(B) rule, the Commission must accompany it with a statement of basis and purpose, which includes:

> (A) a statement as to the prevalence of the acts or practices treated by the rule;
>
> (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and
>
> (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.

Ultimately, judicial review of administrative rules focuses on the rule's compatibility with the organic statute's mandate. As this Note argues, such a review is meaningless if the organic statute does not provide a clear mandate.

The effectiveness of the Congressional Review Act has also been questioned.[44] Although the shadow of the Act may create incentives for agencies to behave in politically accountable ways, in

41. *See, e.g.,* Regulatory Flexibility Act, 5 U.S.C. §§ 601–612 (1988); Congressional Review of Agency Rulemaking, 5 U.S.C. §§ 801–808 (Supp. II 1997); Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1538 (Supp. II 1997); Paperwork Reduction Act, 44 U.S.C. §§ 3501–3520 (1982).

42. For example, in the case of the rule entitled Passport Procedures—Amendment to Requirements for Executing a Passport Application on Behalf of a Minor, the final rule, 66 Fed. Reg. 29904 (June 4, 2001) (amending 22 C.F.R. § 51) strongly resembles the published notice of the proposed rule, 65 Fed. Reg. 60132 (proposed Oct. 10, 2000).

43. Congressional Review of Agency Rulemaking, *supra* note 41. **R**

44. *See* Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051, 1052 (1999).

reality the Act itself has rarely been used.[45] Ultimately, to say that informal rulemaking completely flies in the face of democratic principles is an overstatement. Still, informal rulemaking and the safeguards currently imposed serve to combine a significant power with unsatisfactory structural check mechanisms.

C. The Breadth of the FTC's Authority

As might be expected from the preceding discussion, some academics have interpreted the lack of substantive congressional limitations as a grant of very broad rulemaking authority to the FTC. Legislative history confirms the breadth of this delegation. In his dissent in *INS v. Chadha*,[46] Justice White quotes Representative Broyhill as saying that under the agency's:

> very broad authority to prohibit conduct which is 'unfair or deceptive' . . . the FTC can regulate virtually every aspect of America's commercial life. . . . The FTC's rules are not merely narrow interpretations of a tightly drawn statute; instead, they are broad policy pronouncements which Congress has an obligation to study and review.[47]

Although this undefined mandate has drawn criticism from many academics,[48] the FTC in 1978 nevertheless attempted to make a rule regulating advertising directed at children, a rule that was, in part, premised on notions similar to those underlying the contemporary effort to control marketing strategies.[49] As recounted by the

45. Congress invoked the Act for the first time last March, using it to disapprove (repeal) regulations the Occupational Safety and Health Administration under President Clinton had issued requiring businesses to establish ergonomics programs if employees suffered from repetitive strain injuries. *See* Act of March 20, 2001, Pub. L. No. 107-5, 115 Stat. 7 (disapproving Ergonomics Program, 29 C.F.R. § 1910.900 (2001)); Lizette Alvarez & Steven Greenhouse, *Senate G.O.P. Moving to Nullify Clinton Rules on Worker Injuries*, N.Y. TIMES, Mar. 3, 2001, at A8.

46. 462 U.S. 919, 972 n.9 (1983) (White, J., dissenting).

47. 124 CONG. REC. 5012 (1978) (statement by Rep. Broyhill), *quoted in Chadha*, 462 U.S. at 972 n.9 (White, J., dissenting).

48. *See, e.g.,* Thomas H. Nelson, *The Politicization of FTC Rulemaking*, 8 CONN. L. REV. 413 (1976).

49. Children's Advertising, 43 Fed. Reg. 17,967 (proposed Apr. 27, 1978). The proposed rule included three elements:

> (a) Ban all televised advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise comprehend or evaluate the advertising;
>
> (b) Ban televised advertising for sugared food products directed to, or seen by, audiences composed of a significant proportion of older children, the consumption of which products poses the most serious dental health risks;

D.C. Circuit in *American Financial Services Ass'n v. FTC*, the proposed rule, which would have prohibited "the advertising of certain products during 'children's programming,'"[50] sparked a controversy that prompted Congress to enact the Federal Trade Commission Improvements Act of 1980.[51] This Act suspended the rulemaking process with respect to children's advertising and placed a moratorium on the initiation of any new rules seeking to regulate commercial advertising as an unfair practice until congressional oversight hearings were held on the subject.[52]

In response, the FTC issued a statement purporting to be a self-binding policy guideline.[53] Effectively, however, it reiterated the very permissive definition of unfairness approved in *Sperry & Hutchinson Co.*[54] As both courts and commentators have acknowledged, this definition of unfairness is not very helpful in practice:[55]

(c) Require televised advertising for sugared food products not included in Paragraph (b), which is directed to, or seen by, audiences composed of a significant proportion of older children, to be balanced by nutritional and/or health disclosures funded by advertisers.

Id. at 17969.

50. 767 F.2d 957, 969 (D.C. Cir. 1985).

51. Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified as amended in scattered sections of 15 U.S.C.).

52. *Am. Fin. Servs. Ass'n*, 767 F.2d at 969–70.

53. "To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided." Letter from Federal Trade Commission to Senators Wendell H. Ford and John C. Danforth (Dec. 17, 1980), *reprinted in* H.R. REP. NO. 98-156, pt. 1, at 33, 36 (1983), *quoted in Am. Fin. Servs. Ass'n*, 767 F.2d at 971.

54. (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972) (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (FTC Jan. 1, 1965)).

55. For judicial reaction, see *Am. Fin. Servs. Ass'n*, 767 F.2d at 971 ("While the Commission's three-part unfairness standard sets forth an abstract definition of unfairness focusing on 'unjustified consumer injury,' it does little towards delineating the specific 'kinds' of practices or consumer injuries which it encompasses."). For the academic reaction, see, *e.g.*, Ernest Gellhorn, *Trading Stamps,* S & H, *and the FTC's Unfairness Doctrine*, 1983 DUKE L.J. 903, 957 ("Without a more explicit

> The broad delegation of discretionary authority to the FTC to define unfair practices makes our task particularly difficult in this case. . . . Congress has expressly declined to delineate . . . a legal standard claiming that the standard must be stated in broad terms to allow the Commission to respond to evolving market conditions and practices.[56]

Nevertheless, the courts have been reluctant to analyze the statute itself and have instead concentrated on the rules promulgated under the statute.[57] It is precisely this kind of broad delegation that worries the proponents of the nondelegation doctrine.

IV
THE DELEGATION DEBATE

A. The Nondelegation Argument

1. The Originalist Perspective

Nondelegation arguments are based both on originalism[58] and on public choice theory.[59] The originalist perspective posits that

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economic focus, however, this modification still allows the FTC and the courts to roam freely in applying the unfairness doctrine."); David A. Rice, *Consumer Unfairness at the FTC: Misadventures in Law and Economics*, 52 GEO. WASH. L. REV. 1 (1983).

56. *Am. Fin. Servs. Ass'n.*, 767 F.2d at 969.

57. *Id.* at 982 ("[I]t is not for the court to step in and confine, by judicial fiat, the Commission's unfairness authority to acts or practices found to be deceptive or coercive. Our role is simply to review the Commission's exercise of its unfairness authority in this case.").

58. The originalist approach to constitutional interpretation posits that the true meaning of the Constitution is to be derived from its text and (in most variations) the history surrounding the enactment debates and leading to the signing of the Constitution. Originalists also scrutinize the Constitution's structure. For this perspective on the delegation problem, see Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807 (1999).

59. Public choice theory uses economic techniques to analyze political decisions. The notable literature on the subject includes DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); Edward L. Rubin, *Public Choice in Practice and Theory*, 81 CAL. L. REV. 1657 (1993) (reviewing FARBER & FRICKEY, *supra*); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990). The basic insight of the public choice models is that legislators care primarily about reelection. To that end, the legislator will seek to look good to his or her constituents and, if possible, make them believe that he or she has maximized their interests. *See, e.g.,* Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982). Some law scholars attack public choice as being informed more by theory than by experience. *See* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 27 n.3 (9th ed. 1995). Nevertheless, one of the scholars arguing that the model is useful if applied in a qualified way has applied it to

the constitutional statement that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States"[60] means that only Congress, presumably the most democratically responsive organ of the government, may make law.[61] When Congress delegates lawmaking power to agencies that are part of the executive branch, it crosses constitutionally mandated boundaries.[62] The claim is reinforced by the temporal context surrounding the Constitutional Convention. According to some accounts, the framers wanted to avoid both a European-style monarchy and an unchecked legislature styled after the Articles of Confederation.[63] Consequently, the Constitution is structured so as to maintain a separation of powers under which the President enjoys the authority to check congressional lawmaking but, in most circumstances, may not make law himself.[64]

By all accounts, strict separation has been disrupted: administrative rulemaking has had a tremendous impact on the locus of lawmaking power. As Justice White stated, "[f]or some time, the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process."[65] From an originalist perspective, it is clear that such a revolutionary change of affairs profoundly alters the structural framework of our government in a way that was not anticipated by the framers. For originalists, this in itself presents constitutional difficulties.

2. Public Choice Theory

While agreeing that the Constitution mandates congressional lawmaking, public choice theorists add that congressional lawmaking is also crucial to representative democracy.[66] Using the econo-

bolster the demand for a renewed nondelegation doctrine. See DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 88–94, 226 n.23 (1993) for his variation on public choice theory.

60. U.S. CONST. art. I, § 1.

61. *See* SCHOENBROD, *supra* note 59, at 3, 155–57. R

62. *Id.* at 155–58.

63. *See* Hamilton, *supra* note 58, at 810–11. R

64. *See id.* at 812.

65. *INS v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting).

66. *See* SCHOENBROD, *supra* note 59, at 99–105. It bears noting that Schoenbrod's reliance on the public choice theory translates into arguments that the status quo leads to worse laws than would have been made under a nondelegation regime. *See id.* at 119–35. This deviates from the originalist opponents of delegation, who occasionally concede that agencies may be better situated to make law R

mist-styled rational actor model, public choice theory argues that reelection serves as the major motive for all decisions made by legislators while in office.[67] Consequently, publicly elected officials who may be held accountable to their electorate should be promulgating the laws that affect such an electorate. Further, public choice theorists argue, Congress may have selfish and even sinister reasons for delegating.[68] For example, a statute setting universally desirable goals and broadly delegating the lawmaking authority to implement such goals is politically beneficial, since it enables Congress to claim support for uncontroversial issues, such as protection of children or the environment, while removing itself from politically unpopular but necessary costs, such as the consequent rise in prices of consumer goods and services.[69] As nondelegation proponents are fond of saying, delegation provides Congress with an escape route from making "hard choices."[70]

Delegation may also enable politicians to benefit themselves in ways that would cause political fallout were such actions taken in public. Congress may set up an agency that promulgates salary increases for governmental employees.[71] Worse yet, members of Congress may accept contributions from industry groups with politically unpopular agendas and then lobby on behalf of these groups in front of agencies.[72] Because ex parte contacts between legislators and administrators are a practical reality, subtle forms of such lobbying efforts may never become publicly known.[73]

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but should be precluded from doing so based on separation of powers. *See, e.g.*, Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron*-Based Delegations*, 20 CARDOZO L. REV. 989, 1001–02 (1999) ("agencies' contrary interpretation of their authority has resulted in a substantial expansion of that authority in a manner not considered or probably even imagined by Congress. As appealing as these assertions of jurisdiction may be as social policy matters, there is no reason to defer to the agencies' broad reading of their authority.").

67. *See supra* note 59. R

68. *See* SCHOENBROD, *supra* note 59, at 88–94. R

69. *Id.*

70. *Id.* at 14.

71. In fact, Congress has attempted to use delegation to give itself a pay raise, though, according to Schoenbrod, the pay raise was so scandalously unreasonable that the measure ultimately failed. *See id.* at 10–11.

72. *Id.* at 4–9.

73. For example, most of the agency rulemaking is informal rulemaking and courts have held that ex parte communications from Congress (i.e. informal communications that do not become part of the record) in the context of informal rulemaking are allowable as long as these contacts focus on the substance of the proposed rule. *See, e.g.,* Sierra Club v. Costle, 657 F.2d 298, 409 & n.539, 410 (D.C. Cir. 1981) (holding that meetings between EPA officials and Senate Majority

In addition, the agencies themselves may be even more vulnerable than Congress to certain other powerful forces.[74] The fact that agency bureaucrats do not depend on the electorate allows them to be influenced by Congress, the President, and interest groups, without fear of repercussions during the next election cycle.[75] Yet another concern, one that preoccupies judges more than public choice theorists, is the fact that, inasmuch as agency action may be subject to judicial review, broad delegation of power provides little guidance to the courts as to the scope of the statute.[76]

Listed one after another, these concerns may seem daunting. Nevertheless, it is important to remember that those proposing change have the burden of showing that the proposed solution is not riddled with problems of its own. Proponents of delegation find many such problems in the nondelegation regime, while simultaneously extolling delegation's virtues.

B. The Prodelegation Argument

1. Delegation as a Democratic Virtue

Proponents of administrative rulemaking argue, first, that lawmaking requires flexibility and that Congress is simply too cumbersome to be effective.[77] Partisan bickering, they assert, combined with the majorities required to pass legislation in the shadow cast by presidential veto power, make the legislative branch a very slow-moving vehicle for new legislation. Second, delegationists also question the clarity of the constitutional mandate. Justice Stevens, for example, finds that the constitutional provisions endowing Congress with legislative powers and the President with executive powers "do not purport to limit the authority of either recipient of

Leader Robert Byrd did not constitute congressional pressure in the rulemaking process sufficient to justify overturning the rule in question).

74. *See id.* at 408 (excusing the EPA from putting the substance of intra-executive branch meetings with the White House in the record).

75. For the nexus between private interests and agencies, see SCHOENBROD, *supra* note 59, at 111–12. For a specific example in the context of environmental protection, see *id.* at 122–25. R

76. Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring) ("I would suggest that the standard of 'feasibility' renders meaningful judicial review impossible.").

77. For prodelegation arguments, *see* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

power to delegate authority to others."[78] Additionally, the delegationists argue, the Supreme Court has clearly moved away from a strict interpretation of Art. I, § I.[79] In any event, the delegationists maintain that it is not sensible to impede a scheme essential to the operation of our government because certain constitutional language susceptible to more than one interpretation may be read as restricting the scheme.[80] Furthermore, some delegation proponents even find that the election victories of the New Deal coalition effectively amended the Constitution to allow delegation.[81]

Finally, the delegationists assert that the procedural requirements surrounding administrative rulemaking provide some degree of accountability. Public hearing provisions and the availability of judicial review ensure that administrative rules will not be arbitrary.[82] The President exercises control over agencies and his ac-

78. Whitman v. American Trucking Ass'ns, 121 S. Ct. 903, 921 (2001) (Stevens, J., concurring). It bears noting, however, that Justice Stevens's argument would seem to reject the idea that the "intelligible principle" test is somehow constitutionally mandated. Nevertheless, he adopts this test in upholding the statute. "As long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconstitutional about it." *Id.* Conversely, it seems, a delegation that does not provide a sufficiently intelligible principle may be inherently unconstitutional, according to Justice Stevens. Given his rejection of a constitutional limitation on congressional delegation authority, it is unclear why he would adhere to the intelligible principle standard.

79. Most often, the claim that the Constitution does not bar delegation draws support from the Court's decisions upholding such delegation. *See, e.g.* DAVIS, *supra* note 77, at 47–48. R

80. The argument the Court often uses to uphold statutes in the face of delegation claims is based more on notions of functional government than it is on constitutional interpretation: "In determining what [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 government co-ordination." Mistretta v. United States, 488 U.S. 361, 372 (1989) (quoting J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 406 (1928)) (internal quotation marks omitted).

81. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447–48 (1987); see generally Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051-57 (1984), for an argument that the political success of New Deal supporters effected a "structural amendment" to the Constitution permitting a more activist government.

82. For a discussion of beneficial interactions between agencies and the public, see Schuck, *supra* note 77, at 781-83. For a discussion of judicial review, see *id.* at 787–89. Although Schuck questions the effectiveness of the review itself, *see id.* at 787–88, he ultimately finds that working in the shadow of judicial review makes agency rulemaking more disciplined. *See id.* at 788. R

countability shrouds regulatory agencies in democratic legitimacy.[83] Moreover, the President is not as beholden to special interests as is Congress—the executive power is national and the President need not promise a local constituency special benefits to maximize reelection chances.[84] Delegationsts also note that a close working relationship between administrators and experts promotes better decision-making.[85] In fact, delegation proponents claim that America's recent period of prosperity was a victory for the administrative state.[86]

2. Delegation and Various Perspectives on Democracy

A wholly separate perspective meriting discussion argues that equating congressional accountability with democracy misrepresents the concept of democracy.[87] Specifically, there are two "competing conceptions of democracy": pluralist and civic republican.[88] "The pluralist conception views government as more or less democratic depending on the extent to which official decisions conform to the aggregated preferences of the electorate."[89] In contrast, "[t]he civic republican conception treats government as democratic only to the extent that official decisions are reached through a process of reflective deliberation on the 'common good.'"[90]

Each of these approaches is then further subdivided. There is a pluralist populist conception, which "assigns equal weight to each

83. Mashaw's book discusses the accountability of the executive branch in a section entitled "Accountability in a Presidential System." *See* MASHAW, *supra* note 77, at 152–56. R

84. *See* Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1407 (2000) (citing MASHAW, *supra* note 77, at 152). R

85. SCHOENBROD, *supra* note 59, at 12 (describing the position of his opponents, he writes, "delegation produces more sensible laws by transferring lawmaking from elected officials, who are beholden to concentrated interests, to experts, who can base their decisions solely upon a cool appraisal of the public interest"). For a comprehensive discussion of the New Deal expert model of agency decisionmaking, see JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 44–46 (1978). R

86. Schuck, *supra* note 77, at 778. R

87. Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 795 (1999).

88. *Id.* at 796–97. A possible objection to this claim is that there can in fact be many more than two conceptions of democracy. My objection to Kahan's argument, however, is based on a premise that whichever conception one adopts, the theory of democracy in America is rooted in representative governance, a goal best accomplished through some meaningful checks on administrative discretion.

89. *Id.* at 796 (emphasis omitted).

90. *Id.* at 796–97 (emphasis omitted).

voter's policy preferences and then simply adds them,"[91] and a market pluralist variant, which "takes the intensity of voters' preferences into account as well."[92] As for civic republicanism, there is a "dialogic approach, which defines the 'common good' as the view that emerges, or that would emerge, from a full and open process of deliberation, and a communitarian approach, which views the good as consisting of the shared values that make up a political community's distinctive culture or way of life."[93]

Within this paradigm, claiming that either delegation or nondelegation furthers democracy is meaningless because it "requires resorting to some normative consideration outside of democracy. If that normative consideration exists, it is that normative consideration, and not any constitutional principle of democracy that is condemning delegation."[94] In other words, one's perspective on the issue of delegation and democracy is dependent upon certain underlying assumptions about democracy, none of which are inherent to "democracy" as a concept.

Although this perspective does not argue either for or against delegation as a policy matter, the attack on the claim of a constitutionally-derived democratic principle functionally erodes one of the bases of the nondelegation doctrine—delegation as a democratic virtue. While the argument is offered against the strong form of nondelegation, which this Note does not fully endorse, it bears directly on all other nondelegation arguments as well.

As a starting point in addressing the aforementioned argument, it is important to note the "normative consideration" underlying the nondelegation doctrine: people in a democracy, whatever the word may mean, should have a say in the laws that govern them. With the possible exception of "communitarian" civic republicanism, which can be stretched to justify such blatantly unacceptable options as an enlightened monarchy,[95] all democratic conceptions further this "normative consideration." What is important is that the system, however conceptualized, preserves the ability of people to participate, even if indirectly, in the lawmaking process.

It is true that the Administrative Procedure Act ensures public participation by providing notice and opportunity to comment

91. *Id.* at 796.

92. *Id.*

93. *Id.* at 797 (footnote omitted).

94. *Id.* at 806 (emphasis omitted).

95. *See* David Schoenbrod, *Delegation and Democracy*: *A Reply to My Critics*, 20 CARDOZO L. REV. 731, 757 (1999).

before administrative rules are promulgated.[96] Nevertheless, it is generally agreed that legislators, whose jobs depend on the support of their constituents, will be more sensitive to the effects of certain legislation on those constituents than will bureaucrats working for regulatory agencies, structured to maximize the bureaucrats' political independence.[97] Furthermore, confusion as to what constitutes sufficient notice has driven agencies to conduct much of the substantive process of rulemaking before such notice is given, to some extent effectively circumventing the Administrative Procedure Act requirements.[98] There does not seem to be a structural incentive for non-accountable administrators to take into account the input they receive during a public hearing, unless that input comes from insiders, such as legislators, officers of the executive branch, or, on a more cynical note, from lobbies for the regulated industries.[99] Although in some cases the lobby input may be consistent with the market pluralist variant of democracy, where intensity of interest is a legitimate source of democratic pressure, the ultimate structure of agency rulemaking is simply less sensitive to outside input than the structure of an elected Congress.

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96. *See supra* Part III.B.

97. This is the basic premise of the public choice theory. *See supra* Part IV.A.2.

98. As might be expected, agencies do a great deal of work before a [Notice of Proposed Rulemaking] is issued. Before they propose a rule, they need to collect and analyze information, worry about enforcement possibilities and incentives, develop a supportable view of their legal authority, think about the costs the rule will impose, consider how the rule will "play" with their immediate political constituencies (Congress and the White House) as well as their more public environment—and coordinate the various people in the agency who each know part, but not all, of what needs to be considered.

STRAUSS ET AL., *supra* note 59, at 306. However, the authors go on to say, "[i]n short, for a large number of rules, notice to the public—in the practical sense of notification of what is being contemplated, along with an implied invitation to call and comment—comes long before 'notice' in the sense of § 553." *Id.* at 307. Thus, while there is opportunity for public comment, it is, practically speaking, not always subject to the constraining requirements imposed by statutes and courts. This has the potential to further diminish agency accountability. **R**

99. Indeed, the major justification for agency rulemaking is the quest for expertise. To some extent, the expertise model is necessarily paternalistic: agencies are better situated to make law than are ordinary people through their elected members of Congress because agencies know better. *See* Schoenbrod, *supra* note 95, at 732–35. For an example of delegation failing to create law based on expertise, see SCHOENBROD, *supra* note 59, at 49–56 (discussing the Department of Agriculture's inability over a period exceeding fifty years to exercise its delegated authority to set a standard for establishing an "orderly market"). **R** **R**

In a functioning democracy, Congress must listen to the electorate. Although this may not necessarily lead to the best policy, the rejection of the above-stated normative concept—the idea that people should have a say in the laws that govern them—is untenable. The challenge for one mindful of both government functionality and basic principles of American constitutionalism is to fashion a system in which politically controversial decisions affecting large numbers of American citizens are made, to the extent possible, by the most accountable governmental body.

3. Delegation as a Practical Necessity

The argument outlined in the preceding section of the Note—that Congress should legislate to the largest extent possible—is the source of much delegation controversy. A popular argument against strict nondelegation is that it is simply infeasible.[100] On the one hand, Congress does not have the time to pass the number of laws currently adopted by the agencies.[101] On the other hand, congressional attempts to pass statutes controlling agency action would be so complex as to be unworkable.[102] In addition, as long as agencies exist to enforce the law, they necessarily interpret it. Even if the courts were to enforce the nondelegation doctrine, they would have to differentiate between legitimate interpretation and illegitimate rulemaking, a task that is far too complex.[103] Even Justice Scalia, a strict separationist,[104] writes:

> Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over

100. "[I]n 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." Mistretta v. United States, 488 U.S. 361, 372 (1989).

101. To compensate for the drop in federal legislative activity, some academics propose dealing with substantial threats to the public through the use of state or local laws and private arrangements rather than the many complex laws agencies now make. *See* SCHOENBROD, *supra* note 59, at 136–44. R

102. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 133 (1980) (citing Stewart, *supra* note 77, at 1695). R

103. *See* Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 724–33 (1994) (reviewing SCHOENBROD, *supra* note 59; setting out the proposed distinction therein and critiquing it). R

104. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 705–09 (1988) (Scalia, J., dissenting) (contending that restrictions placed on the President's ability to control independent counsels appointed under the Ethics in Government Act, though not absolute, violated the constitutional mandate of separation of powers).

unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.[105]

It is precisely this argument that the contextual nondelegation scheme seeks to address. While the sheer volume of laws and the scope of government regulation would decrease dramatically if a strict nondelegation regime replaced the current delegation system (whether or not such a decrease is desirable is a profoundly political question not addressed in this Note), the impact of a contextually sensitive model would be much less radical.

4. Delegation and Judicial Policy-Making

Finally, some delegation proponents argue that strict nondelegation damages democracy by providing a more active role for the courts: because there is no clear distinction between well-tailored statutes and unconstitutional delegations of lawmaking, courts hiding behind the nondelegation doctrine may entangle themselves in policymaking by declaring statutes that they don't like to be too broad and green-lighting statutes they favor.[106] When courts become the final arbiters of policy, democratic accountability suffers even more.[107]

The brief answer to this concern is that under the current delegation model the doctrines employed by the courts to interpret rules promulgated under vague organic statutes are also devoid of principled content. Using them, courts can, and do, reach decisions that effectively entangle them in policymaking.[108]

While this section of the Note has demonstrated the wide range of academic opinion concerning delegation, the judicial response has been much more one-sided. The following section discusses the tendency of courts to approve wholesale delegation of legislative power.

105. *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting).

106. Schuck concludes, "In the end, then, the nondelegation doctrine is a prescription for judicial supervision of both the substance and forms of legislation and hence of politics and public policy, without the existence or even the possibility of any coherent, principled, or manageable judicial standards." Schuck, *supra* note 77, at 792–93. R

107. *Id.* at 793.

108. *See infra* Part V.B.1.

V
THE COURTS AND THE DELEGATION DOCTRINE

A. The Early Cases: The Birth of the Intelligible Principle Standard

There is some disagreement as to the meaning of early cases which reviewed statutes for allegedly delegating lawmaking responsibility outside of the legislative branch.[109] Three cases—*Washington v. W.C. Dawson & Co.*[110] (prohibiting Congress from delegating to the states, the "power to alter, amend or revise the maritime law");[111] *United States v. L. Cohen Grocery Co.*[112] (vague criminal statute was a delegation to courts and juries); and *Knickerbocker Ice Co. v. Stewart*[113] (improper delegation of maritime law to the states)—suggest that delegation concepts were present in early twentieth century jurisprudence. Although the statutes in question were generally upheld, nondelegation proponents argue that the statutes delegated only legitimate fact-finding authority and not the illegitimate authority to make law.[114] Delegation proponents, in contrast, claim that the statutes delegated to the President the power to shape policy.[115]

Both sides agree, however, that the next crucial case to come down on this matter was *J.W. Hampton, Jr., & Co. v. United States*.[116] *J.W. Hampton* sets out the following test: "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body [with the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[117] Following *J.W. Hampton*, two cases—*A.L.A. Schechter Poultry Corp.* v. *United States*[118] and *Panama Refining Co. v. Ryan*[119]—invalidated statutes on delegation grounds, finding no such "intelligible principles." Since then, thanks in part to the active growth of the administrative state during the New Deal, courts have been ea-

109. For a discussion of early cases, see generally STRAUSS ET AL., *supra* note 59, at 82–84. *But see* SCHOENBROD, *supra* note 59, at 30–31, 33–36. **R**

110. 264 U.S. 219 (1924).

111. *Id.* at 227.

112. 255 U.S. 81 (1921).

113. 253 U.S. 149 (1920).

114. *See* SCHOENBROD, *supra* note 59, at 30–31, 33–36. **R**

115. *See* STRAUSS ET AL., *supra* note 59, at 82–83; DAVIS, *supra* note 77, at 47–50. **R**

116. 276 U.S. 394 (1928).

117. *Id.* at 409.

118. 295 U.S. 495 (1935).

119. 293 U.S. 388 (1935).

ger to find "intelligible principles" to save statutes, no matter how much lawmaking power such statutes delegate.[120]

B. Delegation in Light of the Intelligible Principle Standard

1. The Clear Statement Doctrine

The permissive "intelligible principle" delegation test has not, however, led courts invariably to uphold administrative rules promulgated pursuant to broad delegation.[121] Rather, in attempting to locate "intelligible principles" in statutes that delegate as much lawmaking power as does, for example, the FTCA,[122] courts have sometimes required narrowing the scope of delegation. Thus, a Court may declare a certain rule to be an impermissible exercise of delegated authority if Congress clearly did not mean for the agency to exercise that kind of authority. This is the clear statement doctrine. Predictably, this intent-based test has led to some close decisions.[123]

Overall, such judicial interpretation has met with explicit disapproval from the judicial branch itself:[124]

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . In such a case, a court may not substitute its own construction of a statu-

120. One line of cases even found that extremely general language such as "public interest" qualified as an "intelligible principle" for the purposes of the delegation doctrine. *See, e.g.,* Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (upholding delegation to Federal Communication Commission of the power to regulate airwaves "in the public interest"); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932) (upholding Interstate Commerce Commission's delegated authority to approve railroad company consolidations which are in the "public interest").

121. Regulations are set aside by the courts on a fairly consistent basis. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (striking down the Food and Drug Administration's regulations governing tobacco products' accessibility to children); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980) (setting aside the Secretary of Labor's standard regulating occupational exposure to benzene); Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903 (2001) (setting aside the Environmental Protection Agency's revised national ambient air quality standards).

122. *See supra* Part III.C.

123. *See, e.g.*, *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (a 5-4 split, with Justices O'Connor, Rehnquist, Scalia, Kennedy, and Thomas in the majority, and Justices Breyer, Stevens, Souter, and Ginsburg dissenting).

124. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

> tory provison [sic] for a reasonable interpretation made by the administrator of an agency.[125]

Thus, when a statute is ambiguous, any reasonable agency interpretation appears to prevail. Nevertheless, the Supreme Court has continued to deduce the clarity of statutes by comparing them to other statutes, looking at legislative history, placing the provision in context, and interpreting the statute to create "a symmetrical and coherent regulatory scheme."[126]

2. The Avoidance Doctrine

Likewise, the Court has narrowed the scope of delegation in cases where agency interpretation of the statute would involve constitutionally controversial issues. For example, in *Kent v. Dulles,*[127] an open-ended conferral of authority to the Secretary of State to "grant and issue passports . . . under such rules as the President shall designate and prescribe"[128] was interpreted to exclude authority to deny a passport to a suspected Communist.[129] Such delegation, the Court reasoned, would raise "important constitutional questions"[130] such as the right to travel[131] and freedom of expression.[132]

Like the clear statement principle, the avoidance doctrine also eludes clear and mechanical application. Because courts do not reach the question of whether the rule actually violates the Constitution, but only whether "important constitutional issues" are present, application of the test may often depend on the judge's perception of the Constitution. This involves both the judge's opinion of what constitutional rights should be prioritized and the way the judge perceives the scope of those rights. While such issues are constantly recurring in constitutional interpretation, the avoidance doctrine gives a judge particularly broad discretion by suggesting that she sidestep the constitutional issue rather than address it.

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125. *Id.* at 843–44.

126. Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995).

127. 357 U.S. 116 (1958).

128. *Id.* at 123 (quoting Act of August 18, 1856, ch. 127, § 23, 11 Stat. 52, 60 (codified as amended at 22 U.S.C. § 211a) (1994)) (internal quotation marks omitted).

129. *Id.* at 129–30.

130. *Id.* at 130.

131. *Id.* at 129.

132. *See id.* at 130.

C. The Current Approach to Delegation

Recently, there has been talk of reviving the nondelegation doctrine.[133] Specifically, although the contemporary Supreme Court has yet to invalidate a statute on delegation grounds, it has become increasingly more open to consideration of the concerns behind the doctrine.[134] This is consistent with the Court's recent emphasis on more formal separation of powers, both horizontal[135] and vertical.[136]

One scholar has referred to the abandonment of the nondelegation doctrine in the 1970s and 1980s[137] as "death by association."[138] He meant that the fate of the doctrine was tied to the fate of other disfavored pre-New Deal doctrines, such as constraining interpretations of the Commerce Clause and the doctrine of substantive due process.[139] Now that those doctrines have seemingly been revived, has the time come for revival of delegation? A new judicial proposal for managing nondelegation concerns has sur-

133. *See* SCHOENBROD, *supra* note 59; Hamilton, *supra* note 58; AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (invalidating an agency rule to address, essentially, delegation concerns). **R**

134. Chief Justice Rehnquist, for instance, has acknowledged that delegation is occasionally used by Congress to pass the hard choices on to others, as discussed *supra*, Part V.A.2:

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

Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

135. Two seminal cases have insisted on stricter separation of powers between the President and Congress by disallowing the legislative veto of the actions of the executive branch and by disallowing the presidential line-item veto. *See* INS v. Chadha, 462 U.S. 919, 959 (1983) (legislative veto); Clinton v. City of New York, 524 U.S. 417, 421 (1998) (line-item veto).

136. The insistence on more rigid vertical separation (the design ensuring that there be no federal intrusion on state powers) goes under the rubric of "federalism," and is represented by cases such as *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).

137. "The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes . . . ." FPC v. New England Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring in part and dissenting in part).

138. ELY, *supra* note 102, at 133. **R**

139. *Id.* at 132.

faced. In *AT&T Corp. v. Iowa Utilities Board*,[140] the Court conceded that the delegating statute for the Federal Communications Commission (the "FCC") is ambiguous but, nevertheless, invalidated the agency's particular interpretation of it as unreasonable. The rationale: the interpretation failed to contain "limiting standards" and allowed private parties to fix the the regulation's content.[141] According to some scholars, the Court in this case effectively opened the door for a new incarnation of the nondelegation doctrine, albeit one based on due process rather than Article I.[142] That is, the Court "invalidated the FCC's rule for failing to supply the very limiting standards that had once been Congress's responsibility. The Court effectively required the agency to pick up where Congress had left off and to carry forward the lessons of the old nondelegation cases."[143]

This proposal of self-binding administrative standards originally surfaced in a *University of Chicago Law Review* article.[144] The author of that article was primarily concerned with arbitrary adjudication. For him, limiting standards provided regularity and fair warning, thereby reducing the incidence of preferential treatment of certain parties in adjudicatory proceedings.[145] For those purposes, the standard's origin did not matter.[146]

The concerns surrounding delegation of lawmaking ability are entirely different. Primary among them is the idea that it is the elected legislators who should be making law. The *AT&T Corp.* doctrine concededly fails to address this concern. Nevertheless, the idea of requiring agencies to promulgate their own limiting standards was adopted by the D.C. Circuit in *American Trucking Ass'ns v. EPA*,[147] in which the court reviewed the Environmental Protection Agency's air quality standards for compliance with the Clean Air Act. The court held that the rulemaking provision of the Act was too broad to pass the "intelligible principle" test.[148] Instead of invalidating the statutory provision, however, the court instructed the agency to state some self-limiting criteria.[149] The delegation analy-

140. 525 U.S. 366 (1999).
141. *Id.* at 387–92.
142. *See* Bressman, *supra* note 84, at 1415–18. R
143. *Id.* at 1401.
144. Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).
145. *Id.* at 725–26.
146. *Id.* at 729.
147. 175 F.3d 1027 (D.C. Cir. 1999), *rev'd in part*, 121 S. Ct. 903 (2001).
148. *Id.* at 1034–37.
149. *Id.* at 1038–40.

sis in the D.C. Circuit's opinion was promptly reversed by the Supreme Court.[150]

The Supreme Court's reversal of the *American Trucking Ass'ns* delegation analysis naturally raises the question of whether the nondelegation doctrine has suffered a major blow in the courts just as it began to reemerge in academic circles. Such a blanket statement seems unfounded. Certainly, the Court strongly rejected self-binding standards as a solution to the delegation problem. Nevertheless, the majority acknowledged the delegation problem but argued that the delegation at issue in the case was constitutional for two reasons. First, in a fairly formalistic sentence, the Court concluded that the statute in question delegates decision-making authority rather than legislative power.[151] Second, according to the Court, the agency discretion at issue is informed by certain statutory requirements: a discrete set of pollutants subject to regulation, a solid scientific basis for regulation, and standards that are requisite,[152] which the Court emphasized to mean "not lower or higher than is necessary."[153] Further, in language that may prove important in the context of the FTC, the Court characterized *Schechter*, one of the cases that applied the "intelligible principle" standard to strike down a statute, as conferring "authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'"[154] Finally, in a concurring opinion, Justice Thomas explicitly invited any subsequent litigants to bring nondelegation challenges based strictly on the text of the Constitution.[155]

Despite these nods to nondelegation, the Court's ultimate holding certainly falls in line with holdings highly deferential to

150. Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903, 916 (2001). The Court nevertheless rejected the agency's interpretation of the statute, not on the grounds of nondelegation but rather on the grounds that the agency's interpretation was unreasonable under the *Chevron* doctrine. *Id.*

151. *Id.* at 912. "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. . . . [The Constitution] permits no delegation of those powers, and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle . . . .' (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) (citations omitted). *Id.* Although this argument comes up very subtly in the majority opinion, it is highlighted and criticized in Justice Stevens' concurrence. *See id.* at 920 (Stevens, J., concurring).

152. *Id.* at 912 (majority opinion).

153. *Id.* at 914.

154. *Id.* at 913 (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

155. *Id.* at 919–20 (Thomas, J., concurring).

delegating statutes. The Court even cited cases that have upheld delegation when the "intelligible principle" was nothing more than "public interest."[156] By validating against a delegation challenge a statute whose only guideline is that the agency act in the public interest, the Court seemed to undercut any argument that nondelegation is still a vibrant doctrine. The Court added, however, that:

> the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EPA regarding the manner in which it is to define "country elevators," . . . it must provide substantial guidance on setting air standards that affect the entire national economy.[157]

This guidance requirement was met, the Court concluded, by the relevant statutory guidelines.[158] Thus, despite upholding the statute against a delegation challenge, the Court did not change the state of the doctrine in any drastic way.

Whatever changes may lie ahead, both the judicial approach and the current political reality suggest that the central premise of the strong form of nondelegation—that we should entirely prohibit vague delegations of rulemaking authority—is unlikely to be honored. In contrast, the cases in which the Court purported to address delegation concerns suggest that the principles underlying those concerns are still viable. As the next section will demonstrate, attempting to satisfy these principles by avoiding definition of the delegation's scope is not feasible in the FTC context.

VI
FTC JURISDICTION OVER SOCIALLY HARMFUL MARKETING CAMPAIGNS IN LIGHT OF THE CURRENT DOCTRINE

A. The FTCA and the Avoidance Doctrine

As alluded to above, an FTC attempt to extend rulemaking authority into the area of marketing strategies could raise novel con-

156. *Id.* at 913 (majority opinion) (citing Natl. Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943), and N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932)).

157. *Id.* (citations omitted).

158. The Court gave its definition of the word "requisite" twice. *See id.* at 912, 914. By repeating its definition of the word "requisite," the Court may have indicated that, for the purposes of the "substantial guidance" standard, it was impressed with the fact that the statute had some kind of quantitative limitation.

stitutional issues.[159] A court hostile to such a rule could easily invalidate it using the current avoidance doctrine outlined in *Kent v. Dulles*:

> We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ the standard to restrict the citizens' right of free movement.[160]

It is important to note that while this passage deals specifically with delegation of authority to adjudicate, the Court later suggested that this doctrine applies to all statutory delegations, presumably including delegations of rulemaking authority.[161]

The argument that the issue of media regulation is constitutionally sensitive is both widely noted and conceded in the FTC report.[162] The report even includes an appendix analyzing various regulatory proposals from the First Amendment perspective.[163] The claim that the avoidance doctrine of *Kent v. Dulles* precludes a rule going to the heart of this important constitutional question (absent an explicit congressional provision of authority) is fairly straight-forward. More interesting in this context is a comparison of this approach with the approach of strict nondelegationists.

The language of *Kent v. Dulles* suggests a version of the nondelegation doctrine based on a somewhat different set of considerations than the traditional view. In *Kent*, the Court found that Congress may delegate authority to act if the Court would have clearly upheld such actions had they emanated from Congress itself (since judicial review of congressional rulemaking is limited to a statute's constitutionality). Presumably, should Congress explicitly delegate authority to act in a constitutionally questionable manner, the Court would review the constitutionality of the delegating provi-

159. Kevin Sack, *Gore Takes Tough Stand on Violent Entertainment*, N.Y. TIMES, Sept. 11, 2000, at A1.

160. Kent v. Dulles, 357 U.S. 116, 130 (1958). For a discussion of the doctrine, see *supra* Part IV.B.2.

161. Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (noting that recent appearances of the doctrine have "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.")

162. *See* REPORT, *supra* note 7, app. C, http://www.ftc.gov/opa/2000/09/youthviol.htm. R

163. *Id.* The appendix is entitled "First Amendment Issues in Public Debate over Governmental Regulation of Entertainment Media Products with Violent Content."

sion and not the agency action. In other words, the administrative scheme may not be used to make a run around constitutional provisions.

This view has implications for any intentionally broad delegation of power to an agency, such as the delegation to the FTC. Although it may seem obvious that Congress meant for an agency to have virtually plenary power over a subject area, courts may refuse the agency the full extent of this power. This not only leaves the agency with an effectively circumscribed delegation, it may have a potentially potent chilling effect: an agency will most likely steer clear of any constitutionally questionable interpretation. Thus, even with broad delegations, the avoidance doctrine of *Kent v. Dulles* assures that agencies will most likely act within certain limits.[164]

B. Problems with the Avoidance Doctrine

Although a strict nondelegationist would welcome the results reached under the avoidance doctrine, she would disagree with the rationale behind them. Striking down select rules in the name of the Constitution neither advances democratic accountability[165] nor provides clear guidelines for the courts.[166] It is seldom easy to determine whether a constitutional question exists without actually reaching it.[167] It is also unclear whether there is a principled distinction between important and unimportant constitutional questions and, if there is, how to gauge the issue's importance. The wiggle room provided by the fact that the Court is deciding whether constitutional questions exist rather than whether the rule itself is constitutional, gives judges broad discretion over the policy-making process.

Additionally, the real question behind nondelegation concerns the proper roles of the various branches of government. Even strict nondelegationists concede that by interpreting statutory provisions, a proper executive task, agencies make behavior-affecting choices. When behavior-setting by both executive and legislative branches is

164. *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2110–12 (1990).

165. Democratic accountability as a general concept is discussed *supra* Part V.B.2.

166. The possibility of judicial review has been used as a factor distinguishing "permissible" delegation from the constitutionally invalid one-house veto. *See* text accompanying *infra* note 203. R

167. The concern here is that an unprincipled court which approves of a certain rule in a constitutionally sensitive subject area may read the organic statute broadly and uphold the rule, deciding that the constitutional questions the rule implicates are well settled.

inevitable, Congress should make the choices more vital to the democracy. This might mean, for example, that Congress should make those laws that affect the greatest number of people, set nation-wide policies, or are likely to become politically controversial.[168] In those cases, it is particularly important that Congress be the body to allocate the burdens among the competing interests. In sum, the question of whether a specific rule implicates constitutional questions is a very poor proxy for deciding whether the rule is promulgated in an area too important to fall outside the spotlight of accountability.

C. The Nondelegation Alternative

1. The Context-Specific Model

As has been discussed already, the nondelegation doctrine focuses on the constitutional instruction that the democratically accountable Congress be the governmental body to make the laws.[169] The advantages of this scheme include the democratic principles of self-governance as well as the benefit of public lawmaking—since the legislative process is public and legislators' voting records are readily available, legislators must be conscious of their constituencies when voting. Additionally, under this theory, if one believes that there is an identifiable difference between rulemaking and rule interpretation, strict nondelegation would make the policing of agencies' rule interpretation by the courts simpler. The oftencited disadvantages of nondelegation are: the cumbersomeness of Congress; the loss of flexibility provided by the agencies' ability to fashion rules quickly as novel problems arise; the fact that the day-to-day laws that must be promulgated are both too numerous and too technical for Congress to handle effectively; and the impossibility of fashioning a workable rule distinguishing rulemaking from rule interpretation.[170]

Examining the advantages and disadvantages of nondelegation it becomes clear that various considerations acquire different degrees of importance depending on the context. Even assuming the infeasibility of a wholesale invalidation of rulemaking provisions, there are certain rulemaking provisions that are unjustifiably broad

168. "[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. . . .[Thus, Congress] must provide substantial guidance on setting air standards that affect the entire national economy." Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903, 913 (2001) (internal citations omitted).

169. *See supra* Part IV.A.1.

170. *See supra* Part IV.B.3–4.

and that would not implicate the kind of pragmatic concerns sometimes raised in defense of the administrative state. Those who see the democratic worries of nondelegation proponents as legitimate but treat administrative rulemaking as practically unavoidable under the current state of affairs should be sympathetic to the idea of using the nondelegation doctrine to at least rein in the excesses of the administrative state.

2. Potential Difficulties

As a practical matter, the argument to invalidate § 57a has some appeal because the Supreme Court has not directly addressed the issue. Lower federal courts, however, have not only upheld rules promulgated under the statute but have explicitly accepted its delegation as a particularly broad one.[171] The judicial acceptance of broad delegation to the FTC stems from *Sperry & Hutchinson Co.*,[172] the Supreme Court case that opened the door for the Magnuson-Moss Act.[173] Thus, while an argument for the invalidation of the statute may not necessarily involve overturning precedent, it would clearly constitute a major departure from the status quo. Because of the precedent approving the delegation, the argument for a nondelegation-informed model is much harder to enunciate than an avoidance-based *Kent v. Dulles* argument. Nevertheless, because the avoidance doctrine does not address the major underlying concern of democratic accountability, the position of this Note is that an argument for tightening some control over the FTC is analytically more appealing.

3. The FTCA and the "Intelligible Principle" Standard

The strongest nondelegation argument for invalidation of the FTC rulemaking provision is that the statute at issue fails the "intelligible principle" test. Inasmuch as the "intelligible principle" test has any teeth, § 57a fails even a very permissive threshold.

The concern behind the "intelligible principle" test appears to be twofold: it attempts to respond to the democratic demand that Congress, at the very least, set the policy behind a given statute, and it provides some basis for judicial review.[174] Neither of these policies is served by § 57a.

171. *See* Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 969–72 (D.C. Cir. 1985).

172. 405 U.S. 233 (1972).

173. *See supra* Part III.A–B.

174. The Court does not really discuss these factors when applying (or citing) the intelligible principle test. Nevertheless, in light of the concerns behind unfettered delegation, these are the two concerns to which the test is most responsive.

As was acknowledged repeatedly in the course of the controversy over the FTC during the late 1970s and early 1980s, its statutory rulemaking mandate is particularly broad.[175] Notably, *American Financial Services Ass'n* has demonstrated that the statute does not give the courts sufficient language upon which to base judicial review.[176] The argument that § 57a sets out a clearly identifiable congressional policy is equally weak.[177] The language of the statute is so broad as to make identification of a congressional policy impossible. The agency is allowed to promulgate "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce." On its face, the only visible limitation on the FTC's authority is the requirement that it be active in the subject area of commerce. Indeed, in acknowledging the breadth of the scope of the FTCA, Justice White noted that "the FTC can regulate virtually every aspect of America's commercial life."[178] As non-existent as that limitation may already seem, an attempt by the FTC to regulate the marketing of socially harmful entertainment products would further weaken the argument that some meaningful limitation is provided.[179] While certainly affecting America's commercial life, such regulation would first and foremost be social.

During the days of a loose interpretation of the Commerce Clause, the nominal requirement that congressional legislation be related to interstate commerce was seen to grant Congress plenary power, subject to the Constitution's guarantees of individual liber-

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If the test is to have any substantive content, it must be an attempt to address the issues of accountability and judicial review. Of course the fact that the Court generally does not discuss these concerns in an explicit manner tends to prove the idea that courts have often lost sight of the substantive meaning behind the "intelligible principle" standard and instead have paid empty homage to the language of precedent.

175. *See Am. Fin. Servs. Ass'n*, 767 F.2d at 969–72.

176. *See id.*

177. *See supra* Part III.C. for a suggestion that there is no easily ascertainable congressional policy.

178. *See* INS v. Chadha, 462 U.S. 919, 972 (White, J., dissenting) (citing 124 CONG. REC. 5012 (1978) (statement by Rep. Broyhill)).

179. This argument is concerned less with the possibility that the FTC would effectively take over and regulate our lives—a specious speculation, given political realities—than with the scope of permissible FTC action. An implicit grant of plenary power to the agency would make it a convenient vehicle for any legislation, however rare, that Congress would hesitate to pass because of its political costs. For a discussion of agency as vehicles for avoiding hard choices, see *supra*, Part V.A.2.

ties.[180] Upholding against a delegation challenge an attempt by the FTC to regulate the media would be analogous to recognizing that the FTCA delegates this plenary power. Compare the costs in each arena, however: in Commerce Clause case law, the plenary power given to a federal legislative body undercut the concept of federalism. Granting such plenary power to the FTC, an executive agency composed of unelected bureaucrats, weakens the entire concept of a representative democracy.[181]

Despite all this, the Court would likely uphold § 57a against a nondelegation challenge. The "intelligible principle" test has been satisfied by very vague language such as "public interest."[182] Furthermore, the Court has treated other manifestations of broad FTC jurisdiction with approval.[183] These arguments, however, show only that the Court has sometimes merely paid homage to the "intelligible principle" standard without genuinely trying to apply it. There is some indication that the concerns behind the nondelegation doctrine are currently being treated with more sympathy.[184]

4. Cumbersome Congressional Concern

While the breadth of delegation to the FTC provides an argument for application of some form of the nondelegation doctrine, many of the concerns behind the doctrine do not apply in the context of the FTC. First, the cumbersomeness of Congress is an advantage when the laws being drafted are politically controversial. Many argue that the entire system of separation of powers is designed to ensure the impossibility of hasty action (thus, for exam-

180. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) ("Judicial review in [the Commerce Clause] area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress."). In *United States v. Morrison*, 529 U.S. 598, 637 (2000) (Souter, J., dissenting), Justice Souter designates the period during which a loose interpretation of the Commerce Clause held sway as the time between the Court's decisions in *Wickard v. Filburn*, 317 U.S. 111 (1942), and *United States v. Lopez*, 514 U.S. 559 (1995).

181. This comparison does not suggest that the FTC would really act as a "varsity Congress" and enjoy the kind of legislative power associated with Congress. The point of the comparison is that the critique of a framework which grants plenary power to a government body subject to separation of powers proved successful in the Commerce Clause setting, where the separation of powers is necessitated by the theory of federalism. The same critique should then be applicable in the delegation context, where the separation is necessitated by the theory of representative democracy.

182. For a list of these cases, see Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903, 913 (2001).

183. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

184. *See supra* Part V.C.1.

ple, the presidential veto serves as a check on hurried decision-making by Congress).[185] The debate engendered by the FTC when it went through a period of vigorous rulemaking in the 1970s serves as evidence that the agency is a hotbed of political controversy.[186] (Perhaps such controversy is inevitable when the agency's mandate is as broad as ensuring the smooth functioning of the economy or preventing unfairness to consumers). If the enforcement of a nondelegation doctrine can reduce the politically controversial role of the FTC by leaving the most controversial areas of commercial oversight with the cumbersome Congress, that should be a reason for and not against such enforcement.

Second, while some may remark that sometimes, especially in the context of environmental protection, politically controversial decisions must be made more quickly than the years it often takes Congress to pass a law,[187] that rationale does not apply quite as well to the FTC. Most of the FTC's trade regulation rules deal with proper disclosure.[188] A particularly egregious example of non-disclosure, such as a case where the costs of non-disclosure to consumers involve the loss of human life, would probably prompt fairly quick action from Congress and would be disseminated to the public through mass media faster than any government body could act.[189] Otherwise, a genuinely difficult choice between the benefits of some disclosure to the public and the costs of this disclosure to the industry is a good example of an area not warranting quick action. Furthermore, inasmuch as a choice about commerce will inherently involve numerous interested parties, it seems particularly desirable to involve the traditional political process.

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185. *Chadha*, 462 U.S. at 946–48 (majority opinion).

186. The uproar over the FTC's attempted regulation of children's advertising provides a good example of the way the FTC sometimes finds itself in the midst of political controversy. *See* text accompanying *supra* notes 49–52. For the purposes of this Note, it should be obvious that an attempt by the government to regulate Hollywood would, in the current political climate, be controversial. R

187. *See* Bradford C. Mank, *The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization*, 25 ECOLOGY L.Q. 1, 42–43 (1998).

188. For a list of FTC rules currently in effect, *see generally* 16 C.F.R.

189. While this justification is fairly speculative, the actual import of the nondelegation doctrine on quick decision-making is less dramatic than it appears. Isolated incidents of gross non-disclosure may be remedied through administrative adjudication, a major administrative function not discussed in this Note. For an in-depth discussion of administrative adjudication, see STRAUSS ET AL., *supra* note 59, at 256–91. Furthermore, it must be remembered that agency rulemaking is also a lengthy process. R

5. The Issue of Expertise

A similar response may be offered to the claim that the administrative state has the benefit of close expert interaction.[190] It is important to note that in a system based on democratically accountable decision-making, members of Congress are not the only people involved in the legislative process. For example, Congress "can call on staffs as expert as those the administrators have available, and . . . [is] also entitled to the assistance of the executive departments' technical staffs."[191] The expertise justification for agencies seems to be strongest when an agency is involved in a fair amount of rulemaking that requires, even at the highest levels, solid working knowledge of the subject matter. Such is not the case with the FTC. Regulation of commerce often necessitates a good understanding of the industries being regulated; however, it is hard to imagine that FTC administrators possess that expertise. More likely, they enjoy a solid grasp of economic theory. Such expertise would potentially provide significant advantages were the FTC in the business of tightly regulating commerce through rulemaking. The realities of capitalism and the politically precarious situations the agency has survived ensure a much quieter role.[192] Furthermore, an assertion of jurisdiction over the marketing campaigns of entertainment companies would undercut the argument that the FTC is in the business of regulating commerce. This Note has with good reason assumed that such regulation would be blatantly based on social and political problems.[193] This would turn the FTC into an agency whose powers mirror the powers of Congress—hardly an expert body. Finally, it is quite likely that the expertise enjoyed by FTC administrators, as opposed to experts, is not greater than that of Congress. Therefore, the argument that the administrators themselves need to be experts the likes of which one is unlikely to see in Congress is weak in this context.

190. *See* text accompanying *supra* note 85. R

191. *See* ELY, *supra* note 102, at 133 (footnote omitted). R

192. *See* text accompanying *supra* notes 49–52. R

193. Stated explicitly, the assumption that the regulations discussed deal with social and political problems is based on the fact that the Report was prompted by the Colorado high school shootings, a social tragedy with no significant economic impact. Furthermore, the proposal to use FTC jurisdiction to regulate media advertising came during an election campaign as part of a candidate's plan to deal with social ills.

6. Distinguishing Legislation from Interpretation

The most obvious concern with the strong form of nondelegation is that it is very difficult to draw proper demarcating lines indicating the kind of rulemaking provision that would adequately satisfy the nondelegation threshold.[194] This concern has been noted in the context of the FTC[195] where the primary justification for a broad mandate is the changing nature of the market. If the purpose of the FTC is to maintain orderly markets, the reasoning goes, delegation must be broad to allow the FTC to change its policies as the market changes in unpredictable and dramatic ways.

To some extent, this argument begs the question. There is a conceded trade-off between accountability and flexibility. Both may be taken to extremes. A system focused entirely on flexibility would involve case-by-case adjudication with no binding precedent or statute. Such a system would raise serious questions of due process and would turn the basic concept of democracy—people should have a say in what laws govern them—on its head. A system based purely on accountability would have elected officials voting on every single regulation. While such a system may conceivably work on a local level, it would seriously hamper the federal government. Therefore, some kind of balance must be struck between the two. The reasoning behind broad delegation to the FTC assumes that provisions ensuring due process, such as the FTC's procedural requirements for rulemaking and adjudication, adequately ensure reasoned and fair decision-making. This reasoning utterly fails to address the democratic aspect of accountability.

While there is no easy solution, the difficulty of establishing demarcating lines often fails to deter courts in other contexts. For example, the current Supreme Court, citing federalism concerns, has effectively revived Commerce Clause limitations despite protests that there is no meaningful distinction between economic and noneconomic activity.[196] In the context of the delegation doctrine it-

194. *See supra* Part IV.B.4.

195. *See* Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 965–66 (D.C. Cir. 1985).

196. *Compare* United States v. Lopez, 514 U.S. 549, 567–68 (1995) (striking down federal law barring firearm possession within school zone as outside Congress's Commerce Clause power) *and* United States v. Morrison, 529 U.S. 598, 617–18 (2000) (invalidating law providing federal civil remedy for victims of gender-motivated violence), *with Lopez*, 514 U.S. at 629 (Breyer, J., dissenting) ("Schools . . . serve *both* social and commercial purposes, and one cannot easily separate the one from the other") *and Morrison*, 529 U.S. at 656 (Breyer, J., dissenting) ("The 'economic/noneconomic' distinction is not easy to apply. Does the local street corner mugger engage in 'economic' activity or 'noneconomic' activity when he mugs for money?").

self, one scholar has written that "nearly every doctrine of constitutional limitation has been attacked as vague. Essentially the charges go to the institution of judicial review as we have it rather than specifically to the delegation doctrine."[197]

7. The Problem with the Self-Limitation Principle

a. Self-Limitation Has Nothing to Do With Democratic Accountability

Yet another nondelegation-based argument is the idea of curing the FTCA's vagueness by requiring the agency to limit itself.[198] Indeed, after its troubles in the 1980s[199] the FTC has purported to limit its discretion. As a practical matter, this argument would be clearly ineffective because, as mentioned above, it was recently rejected by the Supreme Court.[200] Furthermore, there are good analytical reasons this approach would be an inadequate substitute for nondelegation. First, if the concern behind the delegation doctrine is that the democratically elected Congress should be the body making the law, the self-limitation scheme is a grievous violation of that principle. Through its standardless delegation to an agency whose purposes are as broad as ensuring the smooth functioning of the economy, Congress potentially abdicates an enormous amount of responsibility. Significant to the claim that the FTC is not democratically accountable are not only the usual arguments bearing on the agency's lack of public accountability but also specific criticisms directed at its attitude toward the regulated parties:

> Why has rulemaking failed at the FTC? A major cause is the FTC's insensitivity to the societal value of business activities. The FTC has failed to incorporate business interests into its decisionmaking processes. . . . All the interests under the care of the FTC have been disserved by its adversarial attitude toward commercial interests.
>
> It is clear that this insensitivity cannot be attributed to lack of input by the target industries. The records in FTC trade regu-

197. Louis L. Jaffe, *An Essay on Delegation of Legislative Power* (pt. 2), 47 COLUM. L. REV. 561, 577 (1947).

198. *See supra* Part V.C.1.

199. *See supra* Part III.C.

200. The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us inherently contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.
Whitman v. Am. Trucking Ass'ns, 121 S. Ct. 903, 912 (2001).

lation rulemaking proceedings are dominated by industry submissions and testimony.[201]

b. Self-Limitation Has Not Provided Meaningful Guidance to the Judiciary

Second, the limits that the FTC imposed on itself have not provided meaningful policing guidelines for the courts.[202] In *INS v. Chadha*, the Court distinguished delegation of lawmaking authority to agencies, which it approved of, from delegation of lawmaking authority to only one house of Congress, which it found unconstitutional, by asserting that agency rulemaking is subject to judicial review.[203] For judicial review to be meaningful, the judicial power must be guided by some constitutional or statutory limitations. In the case of the FTC, however, the statute does not provide courts with any meaningful guidelines. In the absence of guidelines and faced with the *Chevron* policy of deference to agency interpretation,[204] judicial review of rules promulgated under the agency-set guidelines becomes either purely nominal or creates a risk of policymaking by the courts. While judicial review of statutes in a strict nondelegation regime is vulnerable to criticism based on the potential such review creates for judicial policymaking,[205] the FTC presents a poor example. Faced with such substantial evidence (including law review articles, cases, or legislative history) of the breadth of the FTC mandate, it is hard to see how any judge could seriously argue that the statute does not blatantly delegate very broad rulemaking authority. Of course, this presents the greater question: what happens if Congress limits the agency's discretion? On judicial review, how will a judge know whether Congress has done enough?

8. The Benefits of Contextual Nondelegation

In the long run, contextual application of nondelegation may result in less judicial policy-making than the current doctrine. Con-

201. Charles H. Koch, Jr. & Beth Martin, *FTC Rulemaking Through Negotiation*, 61 N.C. L. REV. 275, 311 (1983).

202. Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 971–72 (D.C. Cir. 1985) ("While the Commission's three-part unfairness standard sets forth an abstract definition of unfairness focusing on 'unjustified consumer injury,' it does little towards delineating the specific 'kinds' of practices or consumer injuries which it encompasses.").

203. *See* INS v. Chadha, 462 U.S 919, 953 n.16 (1983).

204. *See supra* Part V.B.1.

205. *See supra* Part V.B.I.

sider the force of precedent: under the current scheme, many new rules promulgated pursuant to broad delegation are subject to possible invalidation for any number of reasons, including the clear statement test and the avoidance doctrine.[206] Under nondelegation, however, courts would review rules for compliance with defined and limiting statutory provisions. Judicial policy-making by discretion would more likely show itself in the courts' review of the statutes' compliance with the principles of delegation. In that review, however, courts would be constrained by precedent. Once a statute has been adjudged to be sufficiently specific, the rules promulgated pursuant to that statute's meaningful guidance would carry a very heavy presumption of validity. In the long run, this ensures that Congress and the agency share the legislative authority with courts serving a well-defined reviewing function.

Also, under the current regime, when a court invalidates an especially controversial rule, it has reason to hope that Congress will not go through the trouble of amending the statute explicitly to provide the agency with authority to make that kind of a rule.[207] Under the contextual nondelegation regime, Congress has less choice: if it wants to save the rulemaking provision,[208] it will have to redraft the statute to make it more specific, and in so doing, will be forced to make politically controversial choices—precisely what Congress ought to be doing. So that the redrafting process does not disrupt those rules already promulgated, the courts could provide for time allowance.[209] What is important for the time being, however, is the fact that, as written, the FTC rulemaking mandate

206. For a discussion of how the clear statement principle vests the courts with significant authority because the statutory statements tend to be anything but clear see *supra* Part IV.B.1.

207. The assumption behind this argument is the basic public choice insight: Congress delegates precisely to escape the political fallout that follows controversial legislation. For a more in-depth discussion of the public choice theory, see *supra* Part IV.A.2.

208. The assumption, of course, is that Congress has all the incentives to save the rulemaking provision. The variation of the nondelegation principle supported by this Note recognizes the practical necessity of an agency engaging in some quasi-legislative activity. Since Congress recognizes this necessity and has a systemic stake in ensuring effective enforcement of its own statutes, Congress would presumably be concerned with ensuring that the agency retain some rulemaking power.

209. Schoenbrod recommends that rather than immediately overturning statutes that unconstitutionally delegate, the Supreme Court should phase them out over a period of "perhaps twelve years" so that the legislative process would not be overwhelmed with efforts to replace agency laws with statutes. SCHOENBROD, *supra* note 59, at 175. R

under § 57a is so devoid of meaning or guidelines as to be clearly violative of even fairly lax interpretations of the nondelegation doctrine.

VII
CONCLUSION

Congress's broad delegation of rulemaking authority to the Federal Trade Commission is a very clear example of its abdication of responsibility to unelected bureaucrats. The fact that the FTC may have been considered to have rulemaking authority over the marketing of violent media products highlights the extent to which administrators participate in the kind of governance that democratic principles leave for elected legislators. Although agency rules are ultimately subject to judicial review, very broad delegations of authority set no helpful guidelines for the courts. Thus, the courts cannot evaluate whether or not a given rule has been promulgated in accordance with an agency's organic statute. The canons of interpretation the courts have resorted to using, such as the clear statement principle and the avoidance doctrine, are far less mechanical than their names may imply.

Thus, the concern with the increase of judicial intrusion into legislative processes under a nondelegation regime is overstated in light of current practices. While the strict nondelegation doctrine has been criticized for providing no discernible principles by which to distinguish legitimate from illegitimate delegations of authority, this valid concern should not deter the courts from invalidating the most blatant abuses of delegation. In some cases, the FTC's included, the disadvantages of stricter enforcement of nondelegation are not as insurmountable as they may first seem, while the main, overriding advantage is a return to the principles of democratic legitimacy in the decision-making process.