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Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment

A. J. Kritkos

Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment

A.J. Kritikos [*]

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I. INTRODUCTION

At the end of the nineteenth century, the U.S. Supreme Court declared: "That [C]ongress cannot delegate legislative power to the president is a princi-

[*] A.J. Kritikos is an attorney in private practice in Illinois. He received his J.D. from Harvard Law School and clerked for Judge Tom Hardiman of the U.S. Court of Appeals for the Third Circuit. He thanks Judge Jeff Sutton, Professor Gary Lawson, Professor Mary Ann Glendon, Joel Alicea, and Ryan McCartney for their insightful commentary and suggestions for the Article. Any opinions expressed and errors made are solely the author's.

ple universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution."[1] But then came the birth of the administrative state amidst the Great Depression – ushering in a new understanding of the separation of powers that emphasized functionalism over formalism. Accordingly, it has been over eight decades since the U.S. Supreme Court found a violation of the non-delegation doctrine, despite countless challenges to statutes that have included almost limitless delegations. Outside of scholarly debate, that universally recognized principle vital to constitutional government seems to be a dead letter.

An autopsy of federal non-delegation jurisprudence reveals an interesting insight: the Supreme Court has never repudiated the theoretical underpinnings of the non-delegation doctrine or questioned its importance in maintaining the separation of powers. Instead, the Court has whittled the non-delegation doctrine down to a nub because of practical concerns with implementing it. First, the Court has stated that there is an insurmountable line-drawing problem that occurs when delineating a permissible delegation from an impermissible one.[2] And second, the Court has asserted that the non-delegation doctrine cannot be seriously enforced in a complex, modern society without disastrous consequences.[3] I argue that both of those problems are real but can be mitigated by a non-delegation test that emphasizes the primacy of the legislature in lawmaking, and there are two existing models of a better way that the Court can choose from. A compromise solution pioneered by the civil non-delegation jurisprudence of Florida shows that the doctrine can be flexible while still limiting vacuous delegations.[4] Alternatively, Florida's criminal non-delegation jurisprudence and opinions by two leading federal jurists promote strict formalism when the delegation at issue provides the executive with authority to define a crime.[5] This latter approach allows for an experiment by federal courts that would limit to the criminal context renewed non-delegation enforcement.

In Part II, I address the line-drawing problem the U.S. Supreme Court has backed itself into by formulating a toothless non-delegation test. Currently, the Court simply asks whether there is an intelligible principle underlying the delegation.[6] Unsurprisingly, no statutes fail that low bar, and it is a bar that the Court has lowered even further over time. The historical non-delegation test devised by Chief Justice John Marshall was used for over a century in federal jurisprudence before being abandoned for the intelligible principle test.[7] While the Marshall test does not wholly resolve line-drawing problems, some states

1. Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).

2. *See* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

3. *Id.* at 372 (majority opinion).

4. *See infra* Part II.B.

5. *See infra* Part V.A.

6. *Mistretta*, 488 U.S. at 372.

7. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (establishing the "intelligible principle" test).

have adopted and applied the Marshall test with considerable success, showing that the line-drawing concerns are overblown.[8] Florida, in particular, has been able to consistently apply the non-delegation doctrine by asking whether a given statute makes the fundamental and primary policy decision,[9] which is similar to the Marshall test's inquiry. California, on the other hand, adopted the Marshall test but has applied it erroneously and undermined the rule of law justifications for enforcing the non-delegation doctrine.[10]

Most of the recent federal delegation jurisprudence contends that it is impractical to enforce the non-delegation doctrine in a complex society. Part III argues that the problem with this line of reasoning is that the Court presupposes that the non-delegation doctrine must be administered in one rigid way in all contexts. I rely on Florida case law to show that assumption is false. As noted above, Florida courts have adopted a sliding scale approach in their non-delegation jurisprudence, so where a statute deals with very technical issues, like cost-recovery mechanisms for nuclear power plants, the courts give the legislature more leeway to delegate broadly.[11] Furthermore, the test can become more stringent in some contexts, such as when a legislature delegates crime-making authority to an executive agency. The Marshall test, as applied and fleshed out in Florida, thus proves to be rather elastic.

Florida's imperfect application of the Marshall test raises some genuine problems. In Part IV, I respond to the notion that Florida's version of the Marshall test gives judges too much discretion. Though I recognize that Florida's non-delegation jurisprudence has flaws, it is nevertheless a step in the right direction and superior to the current federal approach. Florida's approach at least takes care of easy cases and thus provides some constraint on the most vacuous delegations.

In Part V, I discuss Florida's non-delegation enforcement in the criminal context, as well as opinions by Judge Jeff Sutton and then-Judge Neil Gorsuch on delegations to the executive to define crimes. Florida case law adheres to strict formalism for delegations involving criminal penalties, and Judge Sutton and Justice Gorsuch echo that approach. Though there are benefits to following the Florida civil enforcement approach as a compromise between formalists and functionalists, I conclude that federal courts should adopt the approach of Florida, Judge Sutton, and Justice Gorusch for delegations involving defining crimes. The importance of getting the law right and acting on sure-footed authority is at its peak when the State takes away life or liberty, so enforcing the non-delegation doctrine to protect criminal defendants is worth the effort of fleshing out the doctrine. But only enforcing the non-delegation doctrine in the criminal context would also provide federal courts with an experiment, allowing the judiciary to develop law in a limited setting before either expanding

8. *See infra* note 198 and accompanying text.

9. Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978).

10. *See infra* note 198 and accompanying text.

11. *See* S. All. for Clean Energy v. Graham, 113 So. 3d 742, 750 (Fla. 2013) (per curiam).

it to civil delegations also or confining it to just the criminal sphere. Ultimately, state constitutional law and the opinions of a couple of thoughtful federal jurists provide interesting models for how the federal judiciary can revitalize non-delegation enforcement. Only the U.S. Supreme Court has the power to reverse course and return to a faithful adherence of our government's commitment to the separation of powers.

II. LINE-DRAWING CONCERNS, THE MARSHALL TEST, AND FLORIDA

In *Mistretta*, Justice Antonin Scalia argued in dissent that "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."[12] Justice Scalia, writing for the majority in a subsequent case, reiterated that point, stating, "[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'"[13] In essence, the Court is acknowledging that it is too difficult to draw a clear line delineating permissible from impermissible delegations. As described by one scholar, the Court refuses to "tackle the line-drawing problem" inherent in the non-delegation doctrine for fear of "unleashing a parade of horribles."[14]

The Court's fears are legitimate but overblown. The Court demands both too much and too little from the non-delegation doctrine. The demand is too much when the Court implicitly assumes that it can draw a line in one case and have it hold in every case thereafter. But that would be impossible, and that expectation is not used to defeat enforcement in other contexts. As the Chief Justice noted in *NFIB v. Sebelius*, for example, "We have no need to fix a line . . . . It is enough for today that wherever that line may be, this statute is surely beyond it."[15] The Court demands too little, though, when it wholly defers to Congress to decide how much of its legislative power it can relinquish to another branch, especially to the executive.

Both errors can be resolved by looking to federal non-delegation history and to Florida's non-delegation jurisprudence. Federal non-delegation history reveals that Chief Justice Marshall formulated a workable and enforceable test, but the test was later abandoned for the misunderstood intelligible principle formula.[16] Then-Justice Rehnquist sought to revive the non-delegation doc-

12. 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

13. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

14. Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in* Clinton v. City of New York*: More Than "A Dime's Worth of Difference*,*"* 49 CATH. U. L. REV. 337, 415 (2000).

15. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2606 (2012).

16. *See infra* Parts II.A.1, II.A.3.

trine after it had been long dormant, advocating in the process for a test comparable to the Marshall test.[17] Florida state courts have also utilized a test functionally equivalent to the Marshall test in enforcing the non-delegation doctrine.[18]

Developing a good test is the first step in achieving consistent outcomes for delegation challenges. Therefore, the following section focuses on the tests that the U.S. Supreme Court and Florida courts have utilized. As discussed below, Florida has developed a fairly stable non-delegation jurisprudence because its test is harder to manipulate than the intelligible principle test. While the Florida Supreme Court's test is functionally equivalent to the Marshall test, Florida courts have more fully imbued the test with content, and thus, the two tests should be merged to provide a fuller template for contemporary federal courts. Regardless of how one characterizes the test used in Florida, that state's jurisprudence provides substantial evidence that courts can enforce the non-delegation doctrine reasonably consistently – with no subsequent parade of horribles – thus rebutting the U.S. Supreme Court's primary reason for not enforcing it.

A. Federal Non-Delegation Test

1. The Marshall Test and Schoenbrod's Definition of Legislative Power

In 1825, Chief Justice Marshall enunciated the basic idea "that Congress can[not] delegate . . . powers which are strictly and exclusively legislative."[19] He then articulated a non-delegation test distinguishing important subjects from lesser ones:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[20]

Leading administrative law scholar Gary Lawson has interpreted Chief Justice Marshall's test to mean that "Congress must make whatever decisions are important enough to the statutory scheme in question so that Congress must make them."[21]

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17. *See infra* Part II.A.6.

18. *See infra* Part II.B.

19. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

20. *Id.* at 43.

21. Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 361 (2002).

At first glance, there is a slight ambiguity concerning Professor Lawson's interpretation of Marshall's test. The Marshall test seems to create two classes of legislation. One class contains "important" objects and must be entirely regulated by Congress.[22] It is not immediately obvious what that means, but in *M'Culloch v. Maryland*, Marshall cites the power to regulate commerce as an example of a "great" power.[23] We might then assume he means that exertions of great powers should be subject to a strict non-delegation rule, while lesser powers require only a "general provision" that can leave it to another entity "to fill up the details."[24] One enumerated power, not mentioned by Marshall in *M'Culloch* as a great power, is the power to establish post offices, possibly an example of a lesser power.

If that is a proper elucidation of Marshall's test, the glaring problem is that there is no basis in the Constitution for differentiation between important and lesser powers. But Marshall himself implicitly recognized this in *M'Culloch*; he argued that a constitution "requires, that only its great outlines should be marked, its important objects designated,"[25] implying that all enumerated powers are great and important. If that is so, then the Vesting Clause of Article I's stipulation that Congress only possesses the powers enumerated in the Constitution means that Congress cannot delegate any of its powers. Marshall therefore must not have been creating two classes of legislation based on the type of legislation but rather demanding that the "important subjects" *within a statute* "be entirely regulated by the legislature itself," and the legislature can then delegate gap-filling duties to others.[26] In short, only Congress can exercise the legislative powers of Article I.

But how can one make sense of Marshall's statement that "a general provision may be made" regarding subjects "of less interest," such that "power given to those who are to act under such general provisions to fill up the details"?[27] The answer is that, while only Congress can exercise the powers afforded to it by the Constitution, the Marshall test permits Congress to delegate non-legislative power. The next step in articulating a complete non-delegation test, therefore, is to define legislative power for the purposes of an unconstitutional delegation.

Professor David Schoenbrod has proposed a "qualitative" approach to the non-delegation doctrine that necessarily defines legislative power.[28] Perhaps the simplest way to define his approach is to contrast it with what it is not: a quantitative non-delegation test asks how much power is too much for Con-

22. *Wayman*, 23 U.S. (10 Wheat.) at 43.
23. 17 U.S. (4 Wheat.) 316, 407 (1819).
24. *Wayman*, 23 U.S. (10 Wheat.) at 43.
25. *M'Culloch*, 17 U.S. (4 Wheat.) at 407.
26. *See Wayman*, 23 U.S. (10 Wheat.) at 43.
27. *See id.*
28. David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1249–52 (1984).

gress to constitutionally cede. Under Professor Schoenbrod's qualitative approach, on the other hand, even a smidgen of legislative power is too much to delegate because delegating legislative power itself is categorically forbidden.[29] As argued above, I believe the proper understanding of Marshall's test in *Wayman* also forbids the delegation of any legislative power while allowing delegation of non-legislative, or "lesser," powers to fill up the details in legislation.

Because Professor Schoenbrod favors a categorical test for the non-delegation doctrine, he must define his categories – namely, legislative power and non-legislative power. Borrowing from the political theory of Friedrich Hayek, Professor Schoenbrod defines legislative power as "[p]romulgating rules of private conduct."[30] The distinction is thus between instances where the government regulates private conduct and where it regulates itself. Again following Hayek, Professor Schoenbrod sees no liberty concern where the federal government manages public property according to *ad hoc* commands rather than rules.[31] Another aspect of his definition of legislative power is that interpretation and application of rules governing private conduct are not exercises of legislative power.[32] That leaves the basic judicial and executive functions intact, even though there can be equally reasonable constructions of a rule that severely change its scope.

Professor Schoenbrod proposes that whether a statute passes muster under a delegation challenge should depend on whether or not it is a goals statute or a rules statute.[33] Rules statutes demarcate permissible from impermissible conduct, while goals statutes "state goals, which usually conflict, and delegate the job of reconciling any such conflicts to others."[34] Goals statutes thus necessarily delegate legislative power because reconciling competing goals is a task for the policy-making branch of government. If, for example, a statute prescribed a particular schedule of tax rates, then it would be a rules statute because the text of the statute itself would distinguish permissible from impermissible conduct.[35] By contrast, a statute that empowered the IRS Commissioner to collect a certain amount of money by imposing taxes as necessary would be a goals statute.[36]

Rules statutes also have goals, but "the goals in a rules statute are not the legislative act."[37] The entire point of enacting rules statutes is to avoid the

29. *Id.* at 1251.
30. *Id.* at 1250, 1252.
31. *Id.* at 1250–51.
32. *Id.* at 1250.
33. *Id.* at 1253.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*

purposivist methods of interpretation that often are indistinguishable from policy debates had in Congress.[38] Professor Schoenbrod sees three additional benefits to statutory interpretation from rules statutes.[39] First, rules statutes provide easy answers in the most typical cases.[40] Goals statutes can dispose of easy cases, too, but easy cases are less prevalent.[41] For example, if a statute provides that an employee has a "reasonable amount of time" to appeal a decision from the EEOC, then a judge can readily conclude an appeal filed three days after the adverse EEOC decision is within a reasonable time. But what about sixty days? One hundred eighty days? Three years? By contrast, a statute that provides for an appeal within forty-five days of an adverse decision will obviously be much easier to apply – indeed, such statutes operate mechanically.

Second, the decisions made by the legislature in crafting rules give a more definite sense of the legislature's intentions than a mere listing of goals.[42] In a goals statute, the legislature can list endless goals and give no sense of their relative weight or hierarchy.[43] But a rules statute requires that the legislature make tradeoffs in specifying rules, and a judge can discern (albeit imperfectly) what the legislature prioritized in the statute.[44] Fundamentally, rules statutes should be easier to interpret and should better reflect the intentions of the legislator because rules statutes contain more definite textual clues.

Third, the basis for *stare decisis* is stronger for rules statutes.[45] When a difficult case arises that is not clearly answered by the text of the statute, a court must do its best to decide on the applicability of the statute. *Stare decisis* reduces the amount of difficult cases for a given statute because, over time, intervening court decisions should fill the cracks in a statute. *Stare decisis* thus leads to more predictability for the public. But if a judge is tasked with balancing many contradictory goals, then there is less of a reason to follow the outcome in a previous similar case. No two cases are factually similar in all respects, and even if they were, times change and the relative importance of policies changes accordingly. In 1978, for example, it may have been more important to interpret an environmental statute narrowly to encourage further energy production, while in 2016, it likely is more important to interpret the same statute broadly to protect environmental concerns and provide less of an emphasis on lowering energy costs. A rules statute should provide a discernible preference for environmental concern or energy production, and because that preference should be reasonably evident from the text, changing circumstances do not limit its application to future cases.

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38. *See id.* at 1253–54.
39. *Id.* at 1258.
40. *Id.*
41. *See id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

But Schoenbrod appears to stray from his formalism at one point. He argues "a statute that outlawed 'unreasonable' pollution could be considered a rules statute in a society with a clear understanding of what constituted unreasonable pollution."[46] A statute that distinguishes permissible from impermissible conduct is what distinguishes a rules statute from a goals statute.[47] I am less inclined to think that a statute proscribing unreasonable pollution is a rules statute, even where custom fixes the meaning of unreasonable. Because laws are difficult to repeal, the custom is likely to be outlasted by the statute. A solution to that problem is to allow courts to invalidate a statute once the custom fades and the delegation fails to delineate impermissible conduct. But permitting the same statute to be constitutional one day and unconstitutional the next is contrary to the formalism that underpins strong enforcement of the non-delegation doctrine and seeks to cabin judicial policy-making disguised as statutory interpretation. A more effective solution would be to allow such a delegation in a statute with a fairly short sunset provision – say, of five or ten years – but to invalidate the statute where it would continue indefinitely to be law. Additionally, Schoenbrod admits that customary terms of art specific in one context but general in others have been used as precedent to support concluding that a goals statute is a rules statute.[48] In any event, Schoenbrod's view would make the delegation test substantially stricter than federal law has evolved to become.

2. Contingent Legislation Under the Marshall Test

Professor Lawson argues that the Marshall test is the best way to explain why certain kinds of contingent legislation have been upheld since the beginning of the republic.[49] Contingent legislation prescribes a triggering event upon which a law takes effect.[50] Professor Lawson cites *Marshall Field & Co. v. Clark* as a straightforward example of contingent legislation.[51] Under the contested law in *Marshall Field*, the President had a duty to suspend free-trade provisions with a country if "he ascertained the fact that duties and exactions reciprocally unequal and unreasonable were imposed upon the agricultural or other products of the United States."[52] The *Marshall Field* Court emphasized that the President made no determination regarding the "expediency or the just operation" of the legislation.[53] In other words, because the President had a duty to suspend the provisions once he found certain facts, he was simply executing a law rather than determining whether a law should be executed.

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46. *Id.* at 1255.
47. *Id.*
48. *Id.* at 1259–60, 1269.
49. Lawson, *supra* note 21, at 365–66.
50. *Id.* at 363.
51. *Id.*
52. Marshall Field & Co. v. Clark, 143 U.S. 649, 693 (1892).
53. *Id.*

While *Marshall Field* was decided many years after the Marshall test was articulated, contingent legislation has been consistently upheld since 1813.[54] The Court has correctly upheld contingent legislation because deducing what constitutes a contingency and determining the facts that the contingency depends upon are "core executive and judicial functions."[55] Contingent legislation therefore does not implicate the lawmaking power because the President is not given "standardless discretion."[56] Lawson acknowledges that sometimes the determination of whether a contingency occurs can necessitate the type of judgment that comes closer to lawmaking.[57] The determination of "unequal and unreasonable" trade restrictions in *Marshall Field* is an example where reasonable people can differ on whether that is an executive function,[58] which explains why there was a dissent. The dissent in *Marshall Field* argued that the President was exercising discretionary lawmaking powers.[59] Nevertheless, contingent legislation withstands the Marshall test when the "important subject" is specified in the enacted statute.[60]

3. Beyond Contingent Legislation

In the 1928 case *J.W. Hampton, Jr., & Co. v. United States*, the Supreme Court articulated the standard that still nominally applies today.[61] The Court stated that Congress must enact laws containing "an intelligible principle to which the person or body authorized to [execute the law] is directed to conform."[62] While the intelligible principle test is important, Professor Lawson notes that another significant aspect of *J.W. Hampton* is that it went "beyond Field by permitting a scheme in which the President actually adjusts the tariff rates rather than merely determin[ing] whether pre-existing, congressionally-specified tariff schedules will take effect."[63]

Professor Lawson rightly asserts that "there need not be an unbridgeable gap" between the intelligible principle test and the Marshall test.[64] In *J.W. Hampton*, the President was constrained by the direction "to alter the amount of a duty on certain imported merchandise in order to 'equalize the . . . costs of production.'"[65] The discretion therefore was not devoid of standards, though

54. Lawson, *supra* note 21, at 363–64.

55. *Id.* at 364.

56. *Id.*

57. *Id.* at 364–65.

58. *Id.*

59. Marshall Field & Co. v. Clark, 143 U.S. 649, 699–700 (1892) (Lamar, J., dissenting).

60. Lawson, *supra* note 21, at 365.

61. 276 U.S. 394, 409 (1928); Lawson, *supra* note 21, at 368.

62. *J.W. Hampton*, 276 U.S. at 409.

63. Lawson, *supra* note 21, at 368.

64. *Id.*

65. *Id.* (alteration in original) (quoting Tariff Act of 1922, ch. 356, § 315, 42 Stat. 858, 941 (repealed 1930)).

it was somewhat nebulous. Also, there was no single triggering event, unlike the determination of unequal and unreasonable trade restrictions.[66] Furthermore, there was no single dictated response to the contingency, unlike the suspension of free trade provisions.[67] The discretion given to the President was thus a double increase: he was allowed more discretion to use the delegated power, and his use of the delegated power was less restricted. As noted by Professor Lawson, the difference between the delegations in *Marshall Field* and *J.W. Hampton* was one of degree and not of kind, but the difference in degree was nevertheless substantial.[68]

4. *Panama Refining* and *Schechter Poultry*

In *Panama Refining Co. v. Ryan*, the Supreme Court invalidated a delegation to the President.[69] In particular, an oil refining company (among others) challenged the constitutionality of section 9(c) of the National Industrial Recovery Act ("NIRA"), which stated in part:

> The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State.[70]

Section 10(a) authorized the President "'to prescribe such rules and regulations as may be necessary to carry out the purposes' of title 1 of the National Industrial Recovery Act."[71] The Secretary of the Interior promulgated regulations carrying out the President's orders pursuant to the NIRA.[72] The regulations required producers, purchasers, shippers, and refiners of petroleum to file monthly statements including various types of information, such as an attestation that no amount of petroleum in excess of the amount permitted by the state authority was produced.[73] The President claimed in an executive order that the regulations were issued under Title 1 of the NIRA.[74]

The Court began by noting that it looks at whether there is a congressionally declared policy "with respect to [the] subject [at issue]; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact

66. *See id.*
67. *Id.*
68. *See id.* at 367–69.
69. 293 U.S. 388, 433 (1935).
70. *Id.* at 406, 410–11.
71. *Id.* at 407 (quoting 15 U.S.C. § 710(a) (1934)).
72. *Id.*
73. *Id.* at 408.
74. *Id.* at 408–09.

the prohibition."[75] Finding that the statute in section 9(c) did not specify (1) circumstances or conditions that allowed the President to regulate petroleum transportation, (2) criteria to guide the President's course of petroleum transportation regulation, or (3) any required findings that enabled the President to regulate petroleum transportation, the Court stated that section 9(c) "thus declares no policy as to the transportation of the excess production [of petroleum]."[76] Further, the statute, the Court determined, gave "the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."[77]

Because the Court found no policy contained in section 9(c), the Court looked to Title 1 as part of the "context" to see if it "furnishe[d] a declaration of policy or a standard of action."[78] The first section of Title 1 contained a "declaration of policy."[79] The Court determined that the declaration's "general outline of policy" contained nothing regarding the circumstances or conditions wherein the President should prohibit the transportation of petroleum and nothing limiting regulations relating to production either.[80] In conclusion, the Court stated that "this broad outline is simply an introduction of the act, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by the subsequent sections."[81] Section 9(c) thus "commit[ed] to the President the functions of a Legislature rather than those of an executive or administrative officer executing a declared legislative policy."[82] Subsequent sections contained no limitations either.[83]

The issue, the Court emphasized, is not whether the President will act in the "public good" because "[t]he point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute."[84] Noting that the underlying issue "has a much wider application" than that involved in the case, the Court warned that if the delegation at issue were upheld, Congress could then delegate the power to create policy to anyone.[85] The Vesting Clause of Article I of the Constitution means that "Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."[86] The non-delegation doctrine, however, is not inflexible, but rather the Court conceded "legislation must often be adapted to complex conditions involving a host of details with which the national Legislature

75. *Id.* at 415.
76. *Id.*
77. *Id.*
78. *Id.* at 416.
79. *Id.*
80. *Id.* at 417–18.
81. *Id.* at 418.
82. *Id.* at 418–19.
83. *Id.* at 419–20.
84. *Id.* at 420.
85. *Id.* at 420–21.
86. *Id.* at 421.

cannot deal directly."[87] The Court stated the non-delegation analytical framework as follows:

> The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply.[88]

Interestingly, the Court did not expressly rely upon the intelligible principle test from *J.W. Hampton*. In fact, the Court only referred to the test once, and it was in the Court's recitation of the non-delegation doctrine's history.[89] While tracing the history, the Court characterized the Marshall test as requiring Congress to "establish primary standards, devolving upon others the duty to carry out the declared legislative policy" and then quoted Marshall.[90] Looking to the "four corners of the statute,"[91] the Court concluded that section 9(c) violated the non-delegation doctrine because "Congress has declared no policy, has established no standard, has laid down no rule."[92] In effect, the Court applied the Marshall test because it looked for the important policy decision to be made in the statute. When it could find no such policy decision, it invalidated the delegation.[93]

Not surprisingly, the Court followed the *Panama Refining* analytical framework in *Schechter Poultry*.[94] Only three points from *Schechter Poultry* need to be highlighted. First, the belief by Congress "that more or different power is necessary" to achieve certain goals is insufficient to endow "extra-constitutional authority" because such assertions of power "were anticipated and precluded by the explicit terms of the Tenth Amendment."[95] This is notable because it implies that the Tenth Amendment provides further and independent constitutional support for the non-delegation doctrine. The importance is limited, though, because no other federal court seems to run with this reading of the amendment. Second, like in *Panama Refining*, the Court emphasized that "we look to the statute to see whether Congress [violated the non-delegation doctrine.]"[96] Here, we again see that the quest for an important policy

87. *Id.*
88. *Id.*
89. *Id.* at 429–30.
90. *Id.* at 426.
91. *Id.* at 431.
92. *Id.* at 430.
93. *Id.*
94. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–31 (1935).
95. *Id.* at 528–29.
96. *Id.* at 530.

decision is limited to the statutory text, rather than also inquiring into legislative history.

Finally, because a code of fair competition in the live poultry industry was challenged, the Court inquired into whether the term "fair competition" had a unique definition in the law or whether its definition was wholly within the discretion of those formulating the code.[97] As an initial matter, the Court noted that "[t]he act does not define 'fair competition.'"[98] While the term "unfair competition" had a well-established reservoir of meaning at common law, the Court determined that even "in its widest range, 'unfair competition,' as it has been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act."[99] Consequently, the term was broad and new.[100] The inquiry into the meaning of fair competition demonstrates that the Court was not too demanding in its delegation analysis. If "fair competition" was a term of art, though not defined in the statute, the Court was prepared to uphold the statute.[101] After applying the analysis of *Panama Refining*, the Court concluded that the delegation was similarly unconstitutional.[102]

5. No Limits

In 1935, the Court twice invalidated statutes for excessive delegations.[103] Since then, however, the Court has upheld the statute in every delegation challenge it has considered, including statutes where the delegations were remarkably broad. In *Yakus v. United States*, for example, the Court upheld a delegation to the Price Administrator to fix commodity prices that would effectuate the purposes of the Emergency Price Control Act and that would be fair and equitable.[104] In *Lichter v. United States*, the Court upheld a delegation of authority to determine "excessive profits."[105] *American Power & Light Co. v. SEC*[106] and *National Broadcasting Co. v. United States*,[107] which are worth an extra word of explanation, are particularly emblematic of the no-limits era ushered in by the Court in the 1940s.

In *American Power & Light*, the Public Utility Holding Company Act of 1935 delegated to the SEC the power "to ensure that the corporate structure or continued existence of any company in a particular holding company system

97. *Id.* at 530–31.
98. *Id.* at 531.
99. *Id.* at 531–32.
100. *Id.* at 534.
101. *Id.* at 530.
102. *Id.* at 542.
103. *See supra* Part II.A.4.
104. 321 U.S. 414, 426 (1944).
105. 334 U.S. 742, 785–86, 789 (1948).
106. 329 U.S. 90, 105 (1946).
107. 319 U.S. 190, 225–26 (1943).

does not 'unduly or unnecessarily complicate the structure' or 'unfairly or inequitably distribute voting power among security holders.'"[108] Because that delegation was not further defined in the statute, the challengers asserted that the words were "legally meaningless."[109] And following *Schechter Poultry*, the delegation purportedly subjected regulated entities to the "unlimited whim" and "unfettered discretion" of the SEC because the words also were "no[t] historically defined concepts."[110] Relying on cases like *Yakus* and *Sunshine Anthracite Coal Co. v. Adkins*,[111] the Court upheld the "broad" delegation challenged because the "necessities of modern legislation dealing with complex economic and social problems" require such broad delegations.[112]

In *National Broadcasting*, the Court upheld the especially broad delegation to the FCC of the power to regulate broadcast licensing as "public interest, convenience, or necessity" require.[113] The Court relied on an earlier case[114] challenging the public interest standard.[115] In that earlier case, the Court rejected the notion that the standard was so vague as to confer unlimited power:

> The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services, and, where an equitable adjustment between states is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. In making such an adjustment the equities of existing stations undoubtedly demand consideration. They are not to be the victims of official favoritism. But the weight of the evidence as to these equities and all other pertinent facts is for the determination of the commission in exercising its authority to make a fair and equitable allocation.[116]

These considerations do not appear in the text of the statute but rather seem to have been invented by the Court.[117] Moreover, at the end of the passage, the Court signals that it will not even guarantee that the Federal Radio Commission ("FRC") expressly takes into account the enumerated considerations because the equitable and factual analyses that constitute the decision (about modifying

108. 329 U.S. at 104 (quoting Public Utility Holding Company Act of 1935, ch. 687, § 11, 49 Stat. 820, 821 (repealed 2005)).

109. *Id.*

110. *Id.*

111. 310 U.S. 381 (1940).

112. *Am. Power & Light*, 329 U.S. at 105.

113. Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943).

114. Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co. (Station WIBO), 289 U.S. 266 (1933).

115. *Nat'l Broad.*, 319 U.S. at 226.

116. *Nelson Bros.*, 289 U.S. at 285 (internal quotations omitted).

117. *See* Radio Act of 1927, ch. 169, § 14, 44 Stat. 1168 (repealed 1934). Indeed, there is no authority cited anywhere in or immediately after the quotation. *See Nelson Bros.*, 289 U.S. at 285.

a broadcast license)[118] belong to the FRC. In short, the Court invented restrictions on the public interest standard and then declined any authority to enforce those restrictions. The effect of such cases is that the non-delegation doctrine was wholly defanged.

6. Rehnquist's Attempted Revival and Thomas's Progression

In the early 1980s, then-Justice Rehnquist sought to reinvigorate the non-delegation doctrine by using a framework like the Marshall test to scrutinize delegations.[119] In *American Petroleum Institute*, the statutory provision at issue was section 6(b)(5) of the Occupational Safety and Health Act of 1970, which states that, in regulating toxic materials and harmful physical agents, the Secretary of Labor

> shall set the standard which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.[120]

Justice Rehnquist sought "to reshoulder the burden of ensuring that Congress itself make the critical policy decisions."[121] He then criticized Congress for "simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge."[122] Justice Rehnquist then, in near summary of the Marshall test, articulated the need for the political accountability provided by the non-delegation doctrine. He argued that the "hard choices" must be made by elected officials when it comes to "fundamental policy" because "the buck stops with Congress."[123]

The intelligible principle test need not be irreconcilable with the Marshall test. As it has been applied since the New Deal, however, the intelligible principle test has been drained of all its substance. If, since *J.W. Hampton*, the Court had instead asked the question that Justice Rehnquist asked in *Industrial Union* – whether Congress has made the fundamental policy decision – there can be no doubt that the overly broad delegations in *Lichter* and *National Broadcast*, for example, would have been invalidated. Justice Rehnquist, though, did not demand that Congress enact every detail of a policy into law,

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118. *Nelson Bros.*, 289 U.S. at 285.

119. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

120. *Id.* (emphasis added) (quoting Occupational Safety and Health Act of 1970, § 6, 84 Stat. 1590, 1594 (codified at 29 U.S.C. § 655(b)(5)).

121. *Id.* at 687.

122. *Id.*

123. *Id.*

as indicated by his comment that Congress does not have to fill gaps in statutes.[124] As further noted by Justice Rehnquist, those who ultimately pay for the Court's timidity are not the institutions of Congress or administrative agencies, but the people, who are left subject to control by distant authorities that they themselves have little control over.[125]

The only Supreme Court Justice since Rehnquist to question the Court's application of the intelligible principle test is Justice Thomas. Justice Thomas has argued that "the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms[of vesting all legislative powers in the Congress]."[126] Justice Thomas went on to note that he was "not convinced" that the intelligible principle test prevented "all cessions of legislative power" and that delegations could have an intelligible principle but be "too great" to be anything other than legislative.[127] Justice Thomas rightly attacks the intelligible principle for having much too high of a threshold to actually invalidate any delegations, as no statute has ever been invalidated while applying the intelligible principle test. But he also subtly endorses the Marshall test. By noting that sometimes a "delegated decision is simply too great" to allow the legislature to delegate it, he is effectively arguing that there are some "important subjects, which must be entirely regulated by the legislature itself."[128]

In *Department of Transportation v. Ass'n of American Railroads*, Justice Thomas took the next step and advocated for a non-delegation test that combines the Marshall test with Professor Schoenbrod's qualitative approach.[129] Justice Thomas began his argument by asserting that "[t]he allocation of powers in the Constitution is absolute,"[130] before trudging through the English and American history of delegating power to the executive.[131] After detailing that history, Justice Thomas noted that allowing the intelligible principle test to permit any delegation of policy judgment to the executive "divorce[s] that test from its history."[132] The original meaning of the non-delegation doctrine, according to Justice Thomas, is that the federal government "may create generally applicable rules of private conduct only through the proper exercise of legislative power."[133] It is not surprising that Justice Thomas repeats Professor Schoenbrod's understanding, as he cites his work several times.[134] Though he did not win over any of his fellow Justices, Justice Thomas has taken up – and

124. *Id.*

125. *See id.* at 686–87.

126. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

127. *Id.*

128. *Compare id.*, *with* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

129. 135 S. Ct. 1225, 1240–50 (2015) (Thomas, J., concurring).

130. *Id.* at 1241.

131. *Id.* at 1242–45.

132. *Id.* at 1251.

133. *Id.* at 1252.

134. *Id.* at 1247, 1249 n.6.

indeed, strengthened – the banner left by Chief Justice Rehnquist concerning the enforcement of the separation of powers.

B. Florida's Non-Delegation Test

Florida strongly enforces the non-delegation doctrine, and in doing so, it has developed a test that makes the same central inquiry as the Marshall test – namely, whether the legislature has made the important or fundamental policy decision. But Florida courts have fleshed out the Marshall test more than federal courts ever did, thereby providing an illuminating model for how federal courts could consistently enforce the doctrine and alleviate line-drawing concerns.

1. *Askew*

In *Askew v. Cross Key Waterways*, the Florida Supreme Court invalidated a statutory provision allowing an executive agency to designate an area as a "critical state concern."[135] The statute empowered the Division of State Planning to "recommend areas of critical state concern to the Governor and cabinet acting as the Administration Commission."[136] The Division of State Planning utilized the following criteria to determine whether to recommend designation of a particular area as one of critical state concern:

> (a) An area containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional or statewide importance.
>
> (b) An area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.
>
> (c) A proposed area of major development potential, which may include a proposed site of a new community, designated in a state land development plan.[137]

No other criteria could be employed by the Division.[138] Importantly, the Administration Commission could not designate more than 5% of the land within the state as an area of critical state concern.[139] Within forty-five days of receiving the recommendations from the Division, the Administration Commis-

135. 372 So. 2d 913, 914, 924 (Fla. 1978).
136. *Id.* at 914.
137. *Id.* at 914–15 (quoting FLA. STAT. § 380.05(2) (1975)).
138. *Id.* at 914.
139. *Id.* at 915.

sion needed to reject, adopt wholesale, or adopt and modify the recommendations.[140] After designating an area of critical state concern, the Administration Commission then would need to "approve[] the principles for guiding development of the designated area."[141] For areas designated of critical state concern, virtually all development is regulated, including changes to buildings, land use, water use, air use, shores, drilling, and waste deposits.[142] At issue in the case were designations in the Green Swamp and Florida Keys.[143]

The Florida Supreme Court began its analysis by quoting from article II, section 3 of the Florida Constitution, which reads: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."[144] The court then acknowledged "the modern trend in administrative law . . . to relax the doctrine of unlawful delegation of legislative power in favor of an analysis which focuses upon the existence of procedural safeguards in the administrative process."[145]

The court, however, rejected the modern trend and then described why broad delegations are problematic. Legislation that "is so lacking in guidelines" fails to permit courts to "determine whether the agency is carrying out the intent of the legislature," resulting in the agency becoming "the lawgiver rather than the administrator of the law."[146] The delegations at issue in the case were "constitutionally defective because they reposit in the Administration Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection."[147] Reviewing courts cannot ascertain whether the Administration Commission's priorities were in line with the intent of the legislature where delegations are so broad and vague.[148]

The lower court, which was tasked with deciphering whether the Administration Commission acted within its delegated authority, stated that the Act

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140. *Id.*

141. *Id.*

142. *Id.* at 916.

143. *Id.* at 916–17.

144. *Id.* at 918 (quoting FLA. CONST. art. 2, § 3). Though Florida has an express separation of powers provision in its state constitution, that fact is immaterial in comparing delegation enforcement to other states because most state constitutions also have express separation of powers provisions, and yet those states take varied approaches to enforcing the non-delegation doctrine. *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1187–1201 (1999). It is also immaterial that the Federal Constitution lacks an express separation of powers provision because the separation of powers doctrine has been implied from the Vesting Clauses of the first three articles. *See id.* at 1177.

145. *Askew*, 372 So. 2d at 918.

146. *Id.* at 918–19.

147. *Id.* at 919.

148. *Id.*

"does not establish or provide for establishing priorities or other means for identifying and choosing among the resources the Act is intended to preserve."[149] At root, the problem for the lower court was that "[t]he Act treats alike, as fungible goods, disparate categories of environmental, historical, natural and archaeological resources of regional or statewide importance and all of Florida's manifold resources within those vast categories."[150] The Florida Supreme Court, agreeing with what the lower court identified as the chief deficiency in the Act, noted that "the absence of legislative delineation of priorities among competing areas and resources which require protection in the State interest [renders the Act unconstitutional]."[151] In short, weighing and balancing incommensurable competing interests is the fundamental task of legislators, not those charged with executing the law.

The appellants in *Askew* argued that the delegation was permissible because the court had previously upheld a broader delegation, one where the cabinet could promulgate rules to curb "unfair . . . acts or practices in the conduct of any trade or commerce."[152] That case, however, merely involved "flesh[ing] out" legislative policy by executive administrators.[153] In *Askew*, by contrast, the executive administrators were not fleshing out "an articulated legislative policy" but rather were "making the initial determination of what policy should be."[154] As alternatively phrased by the court, "[T]he Administration Commission 'fleshes out' what it has in the first instance conceived."[155] The Administration Commission was tasked with creating policy *ex nihilo* through its "exercise of primary and independent discretion rather than the determination 'within defined limits, and subject to review, (of) some fact upon which the law by its own terms operates.'"[156]

Throughout the rest of the opinion, the court, channeling Chief Justice Marshall, reiterated several times that "fundamental and primary policy decisions" must be made by the legislature[157] and delegations for purposes of "expendien[cy]" are unconstitutional.[158] Administrators are confined to fleshing out policy because they have certain kinds of technical expertise – they are not are mini-legislators. Weighing and balancing incommensurable competing interests, however, does not involve technical expertise. Such questions do not have a technically correct answer. Because there is no technically correct answer for those types of questions, citizens elect legislators to prudently choose

149. *Id.* (quoting Cross Key Waterways v. Askew, 351 So. 2d 1062, 1069 (Fla. Dist. Ct. App. 1977)).

150. *Id.* (quoting *Cross Key Waterways*, 352 So. 2d at 1069).

151. *Id.*

152. *Id.* at 920 (alteration in original) (quoting Dep't of Legal Affairs v. Rogers, 329 So. 2d 257, 262 (Fla. 1976)).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* (quoting State v. Atl. Coast Line R. Co., 47 So. 969, 972 (Fla. 1908)).

157. *Id.* at 925.

158. *Id.* at 924.

among competing values. Requiring that legislators make fundamental and primary policy decisions ensures that "Florida's government will continue to operate only by consent of the governed."[159]

The court explained the test's contours more comprehensively than Chief Justice Marshall did, but the test applied in *Askew* is a carbon copy of that enunciated in *Wayman*. Most revealing is Marshall's admonition that only the details can be for the administrators to fill in.[160] Marshall is basically saying what the Florida Supreme Court said, namely that the legislature must make fundamental and primary policy decisions. While line drawing is difficult, if the law can be said to operate on some fact by its own terms, then the law likely passes muster.

The law at issue in *Askew* is similar to the law at issue in *Marshall Field* but with crucial differences that cause it to fail the Marshall test. First, the Administration Commission has guidelines, but it is not merely determining when the guidelines are met and then applying the law.[161] Because there was a 5% cap on total lands that could be designated as of critical state concern, the Administration Commission needed to weigh competing incommensurable interests.[162] In *Marshall Field*, by contrast, the executive merely had to determine whether trade duties and exactions were unequal and unreasonable in order for the law to take effect.[163] There was no cap on trade duties, and thus, the President did not have pick and choose which duties and exactions he would focus on.[164] *Marshall Field*, therefore, concerned true contingent legislation, while *Askew* required characteristically legislative interest balancing and prioritizing.

Second, the law in *Marshall Field* took effect once the executive determined certain conditions were met, while in *Askew*, the Administration Commission would first designate an area as critical state concern and then approve the principles to guide development of the area.[165] In this respect, the law was more like the law in *J.W. Hampton* because there the executive could adjust the tariff rates rather than just determine when a triggering event occurred.[166] Even so, the law in *Askew* is a significantly broader delegation than that in *J.W. Hampton* because, in the latter, the President was reined in by the command to equalize the costs of production.[167] The *Askew* law, however, provided a laundry list of different variables that the Administration Commission could consider.[168] As such, the operation of the law in *Askew* was uncertain and almost wholly within the discretion of the Administration Commission.

159. *Id.* at 925 (England, C.J., concurring).
160. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).
161. *See Askew*, 372 So. 2d at 918–19.
162. *See id.* at 915, 919.
163. Marshall Field & Co. v. Clark, 143 U.S. 649, 681 (1892).
164. *See id.*
165. *Compare id.* at 681, 693, *with Askew*, 372 So. 2d at 920.
166. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 401 (1928).
167. *Id.*
168. *Askew*, 372 So. 2d at 914–15.

The *J.W. Hampton* law, by contrast, contained a difficult-to-calculate, but nevertheless defined, limitation on the President. Experts can argue over how to calculate the costs of production, but regardless of which method is chosen, an answer always exists once that method is selected. Legislatures can, but understandably do not always, decide what method of calculation to use in achieving a legislative goal. Determining whether an area contains or has a significant impact upon regional or statewide environmental, historical, natural, or archaeological resources, however, leaves so much discretion to the executive that the discretion is no longer a difference in degree but a difference in kind. That level of discretion means the executive is making a fundamental and primary policy choice that the legislature has relinquished.

2. *Schiavo*

In 1990, Terri Schiavo suffered a cardiac arrest and never regained consciousness.[169] Shortly after her nutrition and hydration tubes were each removed in October 2003, the Florida Legislature passed Terri's Law, and the governor signed it into law.[170] The relevant part read:

> Section 1. (1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:
>
> (a) That patient has no written advance directive;
>
> (b) The court has found that patient to be in a persistent vegetative state;
>
> (c) That patient has had nutrition and hydration withheld; and
>
> (d) A member of that patient's family has challenged the withholding of nutrition and hydration.[171]

Michael Schiavo, Terri's husband and guardian, sought a declaratory judgment holding that the so-called Terri's Law was unconstitutional.[172] The Florida Supreme Court once again began its analysis by quoting article II, section 3 of the Florida Constitution.[173] First, the court analyzed whether the law impermissibly encroached upon the judiciary.[174] Subsequently, the court found the statute to be an unconstitutional delegation of legislative power to the governor.[175]

169. Bush v. Schiavo, 885 So. 2d 321, 324 (Fla. 2004).
170. *Id.* at 328.
171. *Id.*
172. *Id.*
173. *Id.* at 329.
174. *Id.* at 329–32.
175. *Id.* at 332.

Quoting *Askew*, the court reiterated that the legislature must make "fundamental and primary policy decisions."[176] Like in *Askew*, the court again emphasized the need to provide the Executive Branch with guidelines to curb "unbridled discretion" and permit "meaningful judicial review."[177] The Florida Supreme Court agreed with the lower court that the law "contain[ed] no guidelines or standards that would serve to limit the Governor from exercising completely unrestricted discretion in applying the law."[178] The court then cited and agreed with the lower court's conclusion that "[t]he Act confers upon the Governor the unfettered discretion to determine what the terms of the Act mean and when, or if, he may act under it."[179] Because the statute provided

> no criteria to guide the Governor's decision about whether to act[,] [and because] . . . there are no criteria for the Governor to evaluate in deciding whether to lift the stay[,] . . . [the Act] allows the Governor to act "through whim, show [ ] favoritism, or exercis[e] unbridled discretion."[180]

Here, therefore, the *Schiavo* court largely followed the Marshall test framework that *Askew* utilized. The primary concern in *Askew* was also the main worry for the *Schiavo* court, namely the limitless discretion that the statute gave the governor, which essentially amounted to policy-making authority.[181] Also alluded to in *Askew*, the *Schiavo* court emphasized the need for judicial review, which is impossible where a statute delegates such broad authority to the executive that any decision the executive makes will be lawful; or, in short, if there can be no as-applied challenges because the breadth and fluidity of authority delegated, then the only remedy is to invalidate the statute on its face.[182]

3. *Imhotep-Nguzo*

In *Imhotep-Nguzo Saba Charter School v. Department of Education*, a Florida intermediate appellate court upheld a statute challenged under the nondelegation doctrine.[183] The statute at issue related to establishing charter schools. It contained a section that articulated three guiding principles:

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176. *Id.* (quoting Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978)).

177. *Id.* (quoting Lewis v. Bank of Pasco Cty., 346 So. 2d 53, 55–56 (Fla. 1976) (per curiam)).

178. *Id.* at 334 (internal quotations omitted).

179. *Id.* (internal quotations omitted).

180. *Id.* at 336 (seventh and eighth alterations in original) (quoting *Lewis*, 346 So. 2d at 56).

181. *Compare id.*, *with Askew*, 372 So. 2d at 920.

182. *Compare Schiavo*, 885 So. 2d at 332, *with Askew*, 372 So. 2d at 918–19.

183. 947 So. 2d 1279, 1284 (Fla. Dist. Ct. App. 2007) (per curiam).

> 1. Meet high standards of student achievement while providing parents flexibility to choose among diverse educational opportunities within the state's public school system.
>
> 2. Promote enhanced academic success and financial efficiency by aligning responsibility with accountability.
>
> 3. Provide parents with sufficient information on whether their child is reading at grade level and whether the child gains at least a year's worth of learning for every year spent in the charter school.[184]

It also had five required purposes charter schools had to fulfill:

> 1. Improve student learning and academic achievement.
>
> 2. Increase learning opportunities for all students, with special emphasis on low-performing students and reading.
>
> 3. Create new professional opportunities for teachers, including ownership of the learning program at the school site.
>
> 4. Encourage the use of innovative learning methods.
>
> 5. Require the measurement of learning outcomes.[185]

Finally, there were four recommended purposes in the statute:

> 1. Create innovative measurement tools.
>
> 2. Provide rigorous competition within the public school district to stimulate continual improvement in all public schools.
>
> 3. Expand the capacity of the public school system.
>
> 4. Mitigate the educational impact created by the development of new residential dwelling units.[186]

In addition to the guiding principles and purposes, there were also five lengthy requirements for charter school applications.[187] Two charter schools appealed

184. *Id.* (quoting FLA. STAT. § 1002.33(2)(a) (2005)).
185. *Id.* (quoting FLA. STAT. § 1002.33(2)(b)).
186. *Id.* (quoting FLA. STAT. § 1002.33(2)(c)).
187. *Id.* at 1283. The five requirements stated:

> 1. Demonstrates how the school will use the guiding principles and meet the statutorily defined purpose of a charter school. 2. Provides a detailed curriculum plan that illustrates how students will be provided services to attain the Sunshine

decisions by the State Board of Education and county school board "to deny charters to the two proposed schools."[188] The statute was challenged for providing insufficient guidance to local school boards regarding which charter school applications should be denied and which granted.[189] In short, the delegation challenge alleged that the state legislature impermissibly delegated legislative power to local school boards, although "it is the legislature's job to say what the law is, not that of a local school board."[190]

Like in *Schiavo*, the court here emphasized the discretion, or lack thereof, the statute affords the delagatee.[191] For example, the court noted that "[t]he 'crucial test' is whether the statute 'contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature's intent.'"[192] Insufficient guidance effectively renders the statute an "attempt[] to grant to the administrative body the power to say *what the law shall be*."[193]

The court held that "the 'Guiding Principles; Purpose' section of the statute, when coupled with the mandatory application requirements, save the legislative delegation from separation of powers problems."[194] Because the court relied on both the Guiding Principles section and the mandatory application requirements, the implication is that, without either, the statute would have been an impermissible delegation. When combined, though, the court was able to understand the "entire statutory scheme" and decipher the primary legislative policy, which was "legislative concern with the quality of the academic and financial performance of charter schools and the ability of the applicant to

> State Standards. 3. Contains goals and objectives for improving student learning and measuring that improvement. These goals and objectives must indicate how much academic improvement students are expected to show each year, how success will be evaluated, and the specific results to be attained through instruction. 4. Describes the reading curriculum and differentiated strategies that will be used for students reading at grade level or higher and a separate curriculum and strategies for students who are reading below grade level. A sponsor shall deny a charter if the school does not propose a reading curriculum that is consistent with effective teaching strategies that are grounded in scientifically based reading research. 5. Contains an annual financial plan for each year requested by the charter for operation of the school for up to 5 years. This plan must contain anticipated fund balances based on revenue projections, a spending plan based on projected revenues and expenses, and a description of controls that will safeguard finances and projected enrollment trends.

Id. (quoting FLA. STAT. § 1002.33(6)(a)).

188. *Id.* at 1280.

189. *Id.* at 1282.

190. *Id.*

191. *Id.*

192. *Id.* at 1282–83 (quoting Dep't of Ins. v. Se. Volusia Hosp. Dist., 438 So. 2d 815, 819 (Fla. 1983)).

193. *Id.* at 1283 (quoting Sarasota Cty. v. Barg, 302 So. 2d 737, 742 (Fla. 1974)).

194. *Id.* at 1284.

meet the high standards set by the statute."[195] The statute thus passed the "crucial test" cited earlier because there was a discernible legislative policy that could be derived from the standards and guidelines contained in the law.[196] The final step in the court's analysis was to determine if the school board's policy for assessing charter school applications adhered to the standards and guidelines of the statute, which it did.[197] The law was upheld because, in brief, the statute, by its own terms, enunciated a discernible policy, and the only tasks then left for the school board were genuine gap filling.[198]

C. Other States

Florida is not alone in embracing the Marshall test. Several other states do so with varying degrees of commitment and success.[199] California, for instance, has adopted the Marshall test but has interpreted its limits so broadly that it provides no real check on the distribution of power.[200]

The Supreme Court of California describes the non-delegation test as follows: "The Legislature must make the fundamental policy determinations, but after declaring the legislative goals and establishing a yardstick guiding the administrator, it may authorize the administrator to adopt rules and regulations to promote the purposes of the legislation and to carry it into effect."[201] In 1976, the Determinate Sentencing Act ("DSA") was enacted.[202] The DSA created a sentencing system where there were three possible sentences for each offense.[203] Moreover, the DSA required courts to impose the middle of the three sentencing terms "unless there are circumstances in aggravation or mitigation of the crime."[204] The legislature directed an administrative body to adopt rules that would provide criteria to trial judges for imposing the upper or lower prison term.[205] The delegation stated that the administrative body was to adopt rules "to promote uniformity in sentencing."[206]

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195. *Id.*

196. *Id.* at 1282–83, 1284.

197. *Id.* at 1284.

198. *See id.* The case also demonstrates that the legislature has taken cues from the courts about how to draft statutes, as the statute here included a section titled "Guiding Principles." *See id.*

199. *See, e.g.*, C & S Wholesale Grocers, Inc. v. City of Westfield, 766 N.E.2d 63, 67 (Mass. 2002); *In re* Initiative Petition No. 366, 46 P.3d 123, 129 (Okla. 2002); *In re* Blizzard, 42 A.3d 791, 795 (N.H. 2012).

200. *See* People v. Wright, 639 P.2d 267, 271 (Cal. 1982).

201. *Id.*

202. *Id.* at 268.

203. *Id.* at 268–69.

204. *Id.* at 269 (quoting CAL. PENAL CODE § 1170.3(b) (West 2017)).

205. *Id.*

206. *Id.* at 269 n.1 (quoting CAL. PENAL CODE § 1170.3(a)).

That delegation was challenged in *Wright*, where the Supreme Court of California upheld the DSA as constitutionally valid.[207] First, the court determined that the legislature made the fundamental policy choice to change from very discretionary sentencing to a system with three fixed sentencing terms for each offense.[208] Next, recognizing that the constraint of promoting uniformity was rather weak, the court stated, "While promotion of 'uniformity' in some circumstances may not provide a sufficient standard, the Legislature established the standard in [a] correlative provision . . . that the criteria be based on the absence or presence of aggravating or mitigating circumstances."[209] Thus, like in *Imhotep-Nguzo*, the *Wright* court looked to other standards in the statute to see if the delegation was narrowed. The problem, though, is that unlike *Imhotep-Nguzo*, the delegation in *Wright* was not really narrowed by any other parts of the statute. The aggravating or mitigating circumstances language simply referred to what the administrative body was charged with adopting uniform rules for. In other words, the delegation was to adopt uniform rules for when a judge should impose the higher or lower prison term (rather than the middle term). Therefore, the only constraint in the delegation was that the rules be uniform.

What seemed to save the delegation was that the administrative body included judges with "extensive experience in determining sentences," and thus the body was "uniquely situated to implement the legislative policy."[210] The court went even further, noting that "it would be questionable, if not unwise, to reject the experience and qualifications of the agency and insist that the Legislature impose the detailed criteria when it chose to adopt the new method of sentencing."[211] Who was being delegated power (i.e., those who had expertise in sentencing) thus seemed to trump the lack of standards in the delegation. That is a flawed application of the Marshall test because simply changing to a more determinate method of sentencing is not a fundamental policy choice, at least not a complete one. A complete policy choice would give some direction to the administrative body about what the criteria for imposing a higher or lower sentence should be. For example, the legislature could have said that the administrative body is to adopt uniform rules that mitigate a sentence if someone is from an economically disadvantaged background. The administrative body would then be tasked with determining what constitutes an economically disadvantaged background. As summed up by the dissent, "[T]he Legislature failed to make the general policy decisions necessary to determine what factors justify a variance from the middle term."[212]

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207. *Id.* at 271.
208. *Id.*
209. *Id.*
210. *See id.*
211. *Id.*
212. *Id.* at 273 (Bird, C.J., dissenting).

As a rebuttal, one might argue that any reasonable judge (i.e., those making up the administrative body) would take a defendant's economically disadvantaged background into account when adopting rules. But that is beside the point. The non-delegation doctrine is a doctrine focused on formalities. The *Wright* court's non-delegation analysis was flawed because it focused on who would be making the sentencing rules. Having experts inform rules within their field of expertise is undoubtedly a good thing, but it is irrelevant to the non-delegation inquiry because that is a substantive – not a formal – aspect of the law. As discussed below, the non-delegation doctrine is not too rigidly formalistic, but the *Wright* court threw all formality out the window and fudged the fundamental policy inquiry based on what the court thought was a substantively reasonable judgment about who should make sentencing rules. The focus on who was carrying out the delegation is especially pernicious because the bedrock concern underlying the non-delegation doctrine is adherence to the rule of law, and the rule of law is inherently undermined when more latitude is given depending on *who* is in front of the court.

The key takeaway from the brief discussion of California's non-delegation jurisprudence is that the Marshall test is not perfect. Like all legal standards, it requires a judge to exercise good judgment in applying it. Although the test is flawed, the response to this fact is not to look for another test that can mindlessly be applied perfectly – no such test exists. The better response is to build up clear, well-reasoned non-delegation jurisprudence using the Marshall test, like Florida has attempted to do. Florida's test and its application of its test are lacking in some ways, but, for those who are concerned about enforcing the dictates of the Constitution, it is a step in the right direction.

III. COMPLEX AND TECHNICAL ISSUES IN A CHANGING SOCIETY

The second reason that the U.S. Supreme Court has declined to enforce the non-delegation doctrine over the last eight decades is that the Court thinks enforcement would be too rigid. The following statement from the majority in *Mistretta* briefly encapsulates this argument: "Applying [the] 'intelligible principle' test to congressional delegations, our [non-delegation] jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[213] The *Mistretta* majority relied on *Opp Cotton Mills* in arguing that Congress lacks the technical expertise needed for more precise statutes, but that reliance shows this argument is flawed even at its roots.[214] In *Opp Cotton Mills*, the Court stated that "[i]n an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the

213. Mistretta v. United States, 488 U.S. 361, 372 (1989).
214. *See id.*

facts subsidiary to the basic conclusions which support the defined legislative policy."[215]

While it is readily conceded that members of Congress are mostly generalists and those in administrative agencies are specialists, it does not follow that Congress can merely delegate to the agency to act in the public interest. Furthermore, the Marshall and *Askew* tests firmly support the statements above from *Opp Cotton Mills*. Those tests specifically contemplate that "facts subsidiary to the basic . . . defined legislative policy" can be found by executive agencies, and thus the Court seems to be arguing against a straw man.[216] Those tests only require that Congress does indeed enact a defined legislative policy, whereupon it is possible for administrative agencies to then merely execute the policy and find the relevant facts. The Marshall and *Askew* tests effectively say the same thing as the Supreme Court did in *Opp Cotton Mills*.

The problem, however, is that the *Mistretta* majority recasts and broadens the statement in *Opp Cotton Mills*. While the *Opp Cotton Mills* Court specified that Congress must have a "defined legislative policy," the *Mistretta* majority states that "broad general directives" are sufficient.[217] Broad general directives, however, undermine the mere subsidiary fact-finding and application of defined policies that the *Opp Cotton Mills* Court stressed. The *Mistretta* majority further reveals its misreading of past precedents by relying upon[218] the statement in *American Power & Light* that the Court has deemed it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[219]

Delegations such as those to regulate "in the public interest" do not delineate general policy – or any policy at all – nor do they set boundaries to delegated authority. The delegation in *Mistretta* was more defined than the *National Broadcasting* public interest delegation, but the Court nevertheless errs in recasting the test for delegation as basically non-existent in light of the fact that society has become more complex. The underlying error the Court commits is assuming that the non-delegation is wholly inflexible, such that it would either break if bent or that modern government would collapse if it does not bend. States like Florida that strongly enforce the non-delegation doctrine have not, however, regressed into feudal societies. Rather, Florida jurisprudence demonstrates that the non-delegation doctrine can indeed bend without breaking by employing a sliding scale that adjusts the threshold for the test based upon the technical difficulty of the problem being confronted.

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215. Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div. of Dep't of Labor, 312 U.S. 126, 145 (1941).

216. *Id.*

217. *Compare id.*, *with Mistretta*, 488 U.S. at 372.

218. *Mistretta*, 488 U.S. at 372–73.

219. Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

A. Avatar

In *Avatar Development Corp. v. State*, a corporation challenged the constitutionality of a statute penalizing the willful violation of permit conditions issued by the Department of Environmental Protection for the purpose of preventing or controlling pollution.[220] The corporation was alleged to have willfully violated special conditions while conducting dredge and fill operations in some man-made canals that were tributaries to an intracoastal waterway.[221] The relevant section of the challenged statute stated:

> It is declared to be the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies, for the propagation of wildlife and fish and other aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses and to provide that no wastes be discharged into any waters of the state without first being given the degree of treatment necessary to protect the beneficial uses of such water.[222]

After discussing major non-delegation cases like *Askew* and addressing delegations in the criminal context, the Florida Supreme Court noted that "the sufficiency of adequate standards depends on the complexity of the subject matter and the 'degree of difficulty involved in articulating finite standards.'"[223]

The court then heavily stressed the "highly technical, scientific regulatory schemes" needed to ensure proper protection of the environment and fulfill the dictates of legislative policy.[224] Emphasizing that it would be "difficult, if not impossible, to require the Legislature to enact such rules, regulations and procedures [to protect the environment,]" the court stated that the legislature should be allowed to defer to a "specialized administrative body" to fill in gaps after it has already made the fundamental and primary policy decisions.[225] The court ended its analysis by again highlighting that the Department of Environmental Protection "employs persons equipped with the knowledge and expertise necessary to handle such highly technical and intricate matters in the endless variety of real-life situations that are presented to the agency."[226] Accordingly, the statute "strike[s] a practical and proper balance" between the legislature making a fundamental policy decision and deferring to the Department of Environmental Protection to wield its expertise.[227]

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220. 723 So. 2d 199, 200 (Fla. 1998).

221. *Id.*

222. *Id.* at 206 (quoting FLA. STAT. § 403.021(2) (1997)).

223. *Id.* at 207 (quoting Askew v. Cross Key Waterways, 372 So. 2d 913, 918 (Fla. 1978)).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

The roughly 250-word section of the statute declaring the legislative policy clearly meets the *Askew* test. The legislative command to "improve . . . the propagation of wildlife and fish and other aquatic life" is rather broad but is nevertheless a clearly delineated policy.[228] The law, for example, may independently operate on an individual whose practices inhibit the propagation of aquatic life. If an individual was not inhibiting aquatic life (or in contravention of any of the other articulated policies), a regulation promulgated under the statute that targeted that person would be invalid, which demonstrates that the delegation is not so broad or vague as to leave unbridled discretion to the Department of Environmental Protection or prevent meaningful judicial review. While the statute gives wide discretion to the Department, that discretion is necessary in light of the highly technical expertise needed to adequately maintain air and water quality and to sustain such quality over a period of time.

The case is distinguishable from *Askew* because the statute in *Askew* merely directed the agency to designate an area of critical concern if it had a significant impact upon or affected a wide range of different interests. It is hard to imagine any area in a populous state that does not have some resource (historical, natural, archeological, etc.) of regional concern or the *potential* to be developed. Improving aquatic life or preventing injury to animal life, on the other hand, are broad but defined goals. Furthermore, the overall goal is to improve air and water quality, which can be coherently pursued all at once. Designating a finite number of areas as of critical state concern based on factors ranging from historical resources to economic potential is precisely the type of weighing and balancing of broad goals that the legislature is tasked with doing. In short, the statute in *Avatar* had one interest that the Department must pursue; the statute in *Askew*, by contrast, had myriad types of interests that often conflict and must be weighed against each other. Therefore, the primary work of the Department in *Avatar* was to utilize its expertise to find facts about what types of activities will further the state's interest in improving air and water quality. The agency in *Askew*, on the other hand, had to make a number of policy decisions, some as basic as what type of impact it is concerned with – a positive or negative impact. That would be like if the statute left it to the discretion of the Department to determine if air and water quality should be degraded or improved, which is clearly a fundamental policy decision.

The sliding scale test's threshold for constitutionality was lowered in *Avatar* because of the technical nature of the issue. The statute at issue in *Askew* was not afforded that lower threshold because there is no such thing as expertise in weighing competing general interests in things like historical value versus environmental value. Those are quintessential legislative policy judgments and thus must be decided by the legislature. It likely does take a PhD in marine biology, however, to determine what level of mercury would degrade the aquatic habitat of the blue marlin. Because no one expects generalist legislators to immerse themselves so deeply in the nitty-gritty of environmental regulations, the court rightly determined that the legislature made the fundamental

228. *See id.* at 206–07 (quoting FLA. STAT. § 403.021(2) (1997)).

policy choice and could delegate the remaining details to administrative experts.

B. Southern Alliance

The Florida Supreme Court upheld a delegation and again stressed the flexibility of the doctrine when Southern Alliance for Clean Energy challenged a statute for unconstitutionally delegating legislative authority to the Florida Public Service Commission.[229] Partially quoting the statute, the court found that the legislature "made the fundamental and primary policy decision to 'promote utility investment in nuclear or integrated gasification combined cycle power plants and allow for the recovery in rates of all prudently incurred costs.'"[230] The statute directed the Public Service Commission to establish alternative cost recovery mechanisms and stated the mechanisms were "for the recovery of costs incurred in the siting, design, licensing, and construction of a nuclear power plant, including new, expanded, or relocated electrical transmission lines and facilities that are necessary thereto, or of an integrated gasification combined cycle power plant."[231] Furthermore, the statute stipulated that the mechanisms

> shall include, but not be limited to . . . [r]ecovery through the capacity cost recovery clause of any preconstruction costs . . . [and] through an incremental increase in the utility's capacity cost recovery clause rates of the carrying costs on the utility's projected construction cost balance associated with the nuclear or integrated gasification combined cycle power plant.[232]

Southern Alliance for Clean Energy argued that the term "prudently incurred costs" was not an objective standard or one that provided any meaningful guidance to the Public Service Commission.[233] In response, the court asserted that "statutes and caselaw routinely apply the prudence standard in the PSC context" and provided several statutes and cases as support.[234] The court then noted that the "standard for determining prudence is well documented in our past Orders" and proceeded to explain the standard.[235]

After discussing the limitations on agency discretion in the statute, the court asserted that "[t]he specificity with which the legislature must set out statutory standards and guidelines may depend upon the subject matter dealt

229. S. All. for Clean Energy v. Graham, 113 So. 3d 742, 745 (Fla. 2013) (per curiam).

230. *Id.* at 748 (quoting FLA. STAT. § 366.93(2) (2010)).

231. *Id.* at 748–49 (quoting FLA. STAT. § 366.93(2)).

232. *Id.* at 749 (alterations in original) (quoting FLA. STAT. §§ 366.93(2)(a)–(b)).

233. *Id.*

234. *Id.* at 749–50.

235. *Id.* at 750 (internal quotations omitted).

with and the degree of difficulty involved in articulating finite standards."[236] Because of the "arcane complexities of utility rate-making," the legislature had more leeway to craft a broad delegation.[237] Establishing alternative cost recovery mechanisms was not a fundamental legislative task because "subordinate functions like those at issue here 'may be transferred by the legislature to permit administration of legislative policy by an agency with the expertise and flexibility needed to deal with complex and fluid conditions.'"[238] Because "the legislative policy-making function has [not] been usurped by or improperly transferred to the PSC," the delegation was held to be constitutional.[239] Therefore, the delegation was upheld on a two-pronged basis: (1) the "prudently incurred cost" phrase was vague on its face but not in reality, where case law had built up a concrete definition of the term[240] and (2) the complex and technical nature of the subject matter necessitated slightly easing the strictures of the non-delegation doctrine.[241]

As cases like *Avatar* and *Southern Alliance* show, Florida's non-delegation jurisprudence is sensitive to "our increasingly complex society, replete with ever changing and more technical problems."[242] The Florida Supreme Court has often upheld cases challenging delegations specifically on that basis, as the two cases above demonstrate. However, it should also be noted that the two cases above gave only a bit more leeway to the legislature – they did not hold that classifying a statute as addressing complex and technical problems means the delegation is subject to no scrutiny at all. The U.S. Supreme Court in *Mistretta* therefore overstated the concerns with enforcing the non-delegation doctrine. The parade of horribles that the Court envisioned turned out to be a fiction. Furthermore, the broad general directives, at least as the Court apparently conceived them, were so broad as to effectively allow agencies to usurp the policymaking function of the legislature. The directives in *Avatar* and *Southern Alliance* were broad but still provided enough precision that a court could identify when an agency was acting within the bounds of its delegated authority. The *Mistretta* Court thus misinterpreted the non-delegation doctrine as demanding too much from Congress and solved the problem by demanding nothing at all. That solution is no longer justified because states such as Florida have demonstrated that there is a way to enforce the non-delegation doctrine without stifling effective legislation and administration.

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236. *Id.* (quoting *In re* Advisory Op. to the Governor, 509 So. 2d 292, 311 (1987)).

237. *Id.* (quoting Fla. Power & Light Co. v. Albert Litter Studios, Inc., 896 So. 2d 891, 896 (Fla. Dist. Ct. App. 2005)).

238. *Id.* (quoting Microtel, Inc. v. Fla. Pub. Serv. Comm'n, 464 So. 2d 1189, 1191 (Fla. 1985)).

239. *Id.* at 751 (quoting AT & T Commc'ns of the S. States v. Marks, 515 So. 2d 741, 743 (Fla. 1987)).

240. *Id.* at 749–50.

241. *Id.* at 750.

242. Mistretta v. United States, 488 U.S. 361, 372 (1989).

C. Not a Death Knell

One of the background assumptions of the argument that society is too complex to enforce the non-delegation doctrine could be that invalidating a statute on delegation grounds is effectively a death knell for the statute.[243] Though limited, there is evidence that this is not so. In a study of a thirty-year period where the Illinois Supreme Court vigorously enforced the non-delegation doctrine, only one statute of the roughly fifteen that were invalidated was not subsequently enacted, and it was largely unnecessary to rewrite and enact again because it was duplicative of another statute.[244] In the thirteen other instances (one other statute was wholly repealed), the legislature narrowed the discretion in the statute and passed it again.[245] While it is difficult for Congress to enact legislation, there is no reason to think it is harder to do than at the state level. It may happen that there is a new Congress by the time that a statute is invalidated, but the same situation could have happened in Illinois. Illinois state representatives have a two-year election cycle,[246] like Congress, yet the Illinois General Assembly still managed to pass thirteen statutes that had been wholly or partially invalidated. Alternatively, the possibility that an invalidated statute will not be passed again is not thought to weigh against its unconstitutionality in any other sphere of constitutional law, so there should not be a special rule just for non-delegation challenges.

D. Agency Efficiency

The primary assumption underlying the complex and changing society argument is that broad delegations aid agencies by giving them flexibility to solve problems. But there is also some evidence that indicates that broad delegations actually inhibit agencies from efficiently and effectively regulating. A 1993 report by the Minnesota Commission on Reform and Efficiency determined that the biggest cause of delay in rulemaking was broad or vague statutes that amounted to delegating policymaking authority to agencies.[247] To solve the problem, the Commission proposed that the legislature resolve basic policy

243. There is general support for this theory, as "certain features of the national lawmaking process, such as bicameralism and the Senate filibuster, hinder efforts to enact legislation at the federal level even when the national majority favors the same policy." Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1684 (2007).

244. George Bunn, Kathleen Irwin & F. Kyra Sido, *No Regulation Without Representation: Would Judicial Enforcement of a Stricter Nondelegation Doctrine Limit Administrative Lawmaking?*, 1983 WIS. L. REV. 341, 366, 368.

245. *Id.* at 366.

246. ILL. CONST. art. IV, § 2(b).

247. THE MINN. COMM'N ON REFORM & EFFICIENCY, REFORMING MINNESOTA'S ADMINISTRATIVE RULEMAKING SYSTEM 19, 21 (Mar. 1993), http://archive.leg.state.mn.us/docs/pre2003/mandated/930381/detailed.pdf.

issues before delegating authority to agencies.[248] Rules made by agencies pursuant to vague statutes are worse than laws made by the legislature for the same reason that such rules are often delayed: making policy is not within agencies' expertise.

The Commission's findings and recommendations comport with the foundational premises of the administrative state. For instance, a premise of effective administration is that experts should utilize their expertise in the areas where it is relevant. It is within the expertise of a chemist to determine how many parts per million of chlorine there are in a given stream. It is not within a chemist's expertise to ban in-ground pools due to chlorine seepage, because that judgment requires assessing and balancing considerations like the economic and social interests against health interests. Legislators – not administrative agencies – are experts in assessing the popular will and balancing competing interests to advance the welfare of the whole. As the *Askew* non-delegation test recognizes, that assessment and balancing are the two constitutive elements of policymaking and thus appropriately reside in and ought to be exercised by the legislature.

IV. FLORIDA'S STEP IN THE RIGHT DIRECTION

Florida's approach to the non-delegation doctrine is largely a positive development for those concerned about the separation of powers, but it is not a perfect model. One apparent problem with the Marshall-*Askew* test is that courts must elucidate a legislative policy from a regulatory scheme that might be very complicated. Trying to discern a policy in some situations where there is no clear purpose would amount to little more than re-writing the statute to find a coherent policy. In other words, the Marshall-*Askew* test affords judges significant discretion to decide what a statute's purpose is. In determining whether a legislature made the fundamental and primary policy decision, it seems that judges must draw on sources outside of the Constitution and statutory text and, ultimately, make policy judgments themselves. That opens judges up to Justice Souter's criticism of the majority in *United States v. Lopez*, where he asserted that the Court was returning to the "activism" of the early twentieth century[249] – there, the Court was resuscitating the long-dead restrictions on regulating under the Commerce Clause, so it is a natural parallel to the non-delegation doctrine.[250]

While such malleable judicial discretion could be a problem, there are some easy cases where the Florida method produces results different than what current federal jurisprudence would. *National Broadcasting* is a clear example where Congress made no policy whatsoever.[251] *American Petroleum Institute*

248. *Id.* at 21.

249. 514 U.S. 549, 605–06 (1995) (Souter, J., dissenting).

250. *See id.* at 567–68 (majority opinion).

251. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943); *see also supra* Part II.A.5.

is in some ways a more egregious example because, there, Congress seemingly avoided making the fundamental policy choice due to fears of political repercussions for its decision.[252] *Schiavo* is yet another clear example because the legislature left the governor with a wholly discretionary decision, and thus the legislature made no policy choice at all.[253] What distinguishes easy cases like *National Broadcasting* and *Schiavo* from harder cases is that the former two delegated completely discretionary authority. A bright-line test thus may be for a judge to ask whether a certain action and the exact opposite action would both be permitted by the statute's text. In *Schiavo*, for example, it was equally within the delegation's scope for the governor to issue the stay as it was for the governor not to issue the stay.[254] Additionally, there were no findings or guidelines that restricted the governor's discretion.[255] Therefore, no reasonable judge could say that the statute in *Schiavo* did not delegate the fundamental and primary policy decision to the governor.

Ultimately, all constitutional provisions require a judicially constructed test. The problem seems to be more acute with the non-delegation doctrine and the Marshall-*Askew* test because deciding what is a fundamental policy choice is more political than decisions by courts in other types of cases. As the Court stated in *Lopez* when confronting the limits of the even-more-malleable Commerce Clause test: "These are not precise formulations, and in the nature of things they cannot be."[256] Enforcing the non-delegation doctrine requires prudence, just as enforcing any other constitutional provision does. There is no need to single out the non-delegation doctrine for differential treatment when the problem of murky standards and possibly inconsistent enforcement applies whenever a judge is working with a standard rather than a bright-line rule. The problem is less acute with the Marshall-*Askew* test because the more complicated a regulatory scheme is, the more deference an agency interpretation is entitled to. The sliding scale test is another discretionary aspect of the test, but it can be argued that it makes the test stronger, not weaker, by affording more deference where the legislature intends to create a more complex regulatory apparatus.

Florida's jurisprudence demonstrates that federal courts can have their cake and eat it, too, on non-delegation enforcement. Florida's approach is not rigidly formalistic. Rather, it allows for judicial discretion and permits a more lenient standard depending on the complexity of the regulated subject. For a federal government that has grown increasingly dependent on a sprawling administrative state, the Florida approach presents a workable option focused on flexibility. Ultimately, federal courts cannot shirk their duty to enforce the

252. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring).

253. Bush v. Schiavo, 885 So. 2d 321, 334 (Fla. 2004).

254. *Id.*

255. *Id.*

256. United States v. Lopez, 514 U.S. 549, 567 (1995).

non-delegation doctrine because of concerns about the practical effects of doing so,[257] but they can adopt Florida's sliding scale test to lessen any potential problems that might arise from strongly enforcing the separation of powers.

Following in Florida's footsteps would not solve all of the problems relating to the non-delegation doctrine, and there is reason to believe that the Marshall-*Askew* test could become as hollow a test as the intelligible principle doctrine. It is not difficult to imagine that the exception carved out in *Avatar* and *Southern Alliance* will swallow the rule, leaving nearly any subject matter delegated to the executive to be deemed too complex and technical to require the legislature to enact the generally applicable rules concerning it. Yet even with these obvious problems, Florida's jurisprudence provides a model for enforcing the delegation principle. Perhaps more importantly, Florida's jurisprudence illustrates that the parade of horribles following any insistence of reviving the non-delegation doctrine to be illusionary. At a minimum, Florida should be credited for taking a step in the right direction by taking delegation concerns seriously. The state's jurisprudence has stumbled in its application of the doctrine, but, unlike the federal courts, it has not given up its constitutional duty.

V. A FEDERAL TOEHOLD: NON-DELEGATION IN THE CRIMINAL CONTEXT

Florida's approach to enforcing the separation of powers is more faithful to the text of the respective constitutions than the current federal approach, but it is not entirely faithful. To fully adhere to the Federal Constitution's mandate, the ideal model is a combination of Florida's enforcement of the non-delegation doctrine in the criminal context and two opinions by leading federal appellate court judges who take separation of powers concerns seriously when evaluating criminal statutes. The model reflects Professor Schoenbrod's qualitative approach to defining legislative power that prevents the legislature from delegating any of its power to the executive. As the opinions in this section reflect, there is a special need to protect citizens from arbitrary power when their life and liberty are at stake. For that reason, federal courts are more likely to find a toehold for resuscitating the non-delegation doctrine in the criminal context, rather than civil context, because the stakes of getting the law right are so high.

257. *See id. See also* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) ("There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President.").

A. Florida's Criminal Delegation Enforcement

Under provisions securing the separation of powers and due process, Florida courts have held that "criminal statutes must be strictly construed according to their letter, and . . . this rule of strict construction emanates from article I, section 9 [the due process provision] and article II, section 3 [the separation of powers provision] of the Florida Constitution."[258] The Florida Supreme Court has further explained that the non-delegation doctrine is directly at issue in broad criminal delegations because "the power to create crimes and punishments in derogation of the common law inheres *solely in the democratic processes of the legislative branch*."[259]

In *B.H.*, the defendant challenged a statute that made escaping from any secure detention facility of restrictiveness level VI or above a third degree felony.[260] Restrictiveness levels were not defined in the statute.[261] Rather, the Department of Health and Rehabilitative Services had the power to define the levels.[262] The only standards or guidance provided in the statute were that "there shall be no more than eight levels."[263] The Florida Supreme Court concluded that the statute violated both the due process provision and the separation of powers provision of the Florida Constitution.[264] Those two provisions require that a statute itself provide "adequate notice of the prohibited conduct."[265] Admitting that no "single bright-line test" could apply to all non-delegation challenges, the court emphasized the unique context of criminal law: "The delegation of authority to define a crime, for example, is of such a different magnitude from noncriminal cases that more stringent rules and greater scrutiny certainly is required." [266]

The Court rightly found there to be no "meaningful limitations" on the Department's ability to define crimes.[267] The Department did not have to define any restrictiveness level below a VI, which would mean escaping any commitment facility would qualify as a severe felony.[268] Nor did it have to define any restrictiveness level at or above a VI, in which case the law would effectively be null because it would be impossible to commit the crime.[269]

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258. Jeffries v. State, 610 So. 2d 440, 441 (Fla. 1992) (per curiam).

259. B.H. v. State, 645 So. 2d 987, 992 (Fla. 1994) (per curiam) (quoting Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991) (per curiam)).

260. *Id.* at 989.

261. *Id.*

262. *Id.* at 989–90.

263. *Id.* at 990 (quoting FLA. STAT. § 39.01(61) (Supp. 1990)).

264. *Id.* at 993–94.

265. *Id.* at 993.

266. *Id.*

267. *Id.* at 994.

268. *Id.*

269. *Id.*

B. Carter *and* Nichols

Two recent decisions by federal judges have acknowledged the potential for enforcing the non-delegation doctrine in the criminal context.[270] In *Carter*, the Sixth Circuit held that a policy statement promulgated by the Department of Housing and Urban Development was not entitled to deference and thus was not binding on the defendants in the case.[271] If the policy statement were binding, the defendants would have been subject to criminal prohibitions.[272] Judge Jeffrey Sutton, in a concurring opinion, relied upon the rule of lenity to negate the typical deference accorded to an administrative agency.[273] As part of the rule of lenity analysis, Judge Sutton argued that federalism arguments may have special weight in the criminal context.[274] Singling out the non-delegation doctrine as especially relevant, Judge Sutton wrote that "[t]he Supreme Court has suggested that 'greater congressional specificity [may be] required in the criminal context.'"[275] He further submitted that "the Constitution may well also require Congress to state more than an 'intelligible principle' when leaving the definition of crime to the executive."[276] The rule of lenity and due process concerns, when coupled with the independent non-delegation arguments, should be sufficient to persuade federal courts to develop a more stringent test, like the Marshall-*Askew* test, when a delegation challenge arises in the criminal context.

Like Judge Sutton, then-Judge Neil Gorsuch acknowledged the delegation problems presented in a criminal statute,[277] namely section 16913(d) of the Sex Offender Registration and Notification Act ("SORNA") – while dissenting from a failed petition to rehear a case en banc.[278] As might be deduced from its name, the Act requires sex offenders to register their location or face criminal penalties.[279] For sex offenders convicted after the SORNA was enacted, the requirements are set out over twenty-two pages.[280] But for those convicted

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270. Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 724, 734 (6th Cir. 2013) (Sutton, J., concurring); United States v. Nichols, 784 F.3d 666, 670, 676–77 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

271. *Carter*, 736 F.3d at 724.

272. *Id.* at 725.

273. *Id.* at 729 (Sutton, J., concurring).

274. *Id.* at 733–34.

275. *Id.* at 734 (second alteration in original) (quoting Touby v. United States, 500 U.S. 160, 166 (1991)). Judge Sutton also referred to *Yakus v. United States*, 321 U.S. 414, 423–27 (1944), as another source of authority on the matter. *Carter*, 736 F.3d. at 734 (Sutton, J., concurring).

276. *Carter*, 736 F.3d at 734 (Sutton, J., concurring).

277. United States v. Nichols, 784 F.3d 666, 672 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

278. *Id.* at 667–77; 42 U.S.C. § 16913(d) (2012).

279. §§ 16913(a), (e).

280. *Nichols*, 784 F.3d at 668 (Gorsuch, J., dissenting from denial of rehearing en banc).

before, the Attorney General has the authority to determine whether the requirements apply and, if so, which requirements will apply to which offenders.[281] Judge Gorsuch highlighted the centrality that the constitutional Framers placed on separating lawmaking and law enforcement functions, especially in the context of criminal law.[282] Moreover, criminal penalties are the "ultimate intrusion[]" on liberty, carrying "the stigma of the community's collective condemnation," and thus justifying a stricter inquiry.[283] Overcriminalization also elevates the need for effective judicial enforcement of the separation of powers.[284]

Like Judge Sutton, Judge Gorsuch relied on *Touby* as precedent for stricter criminal delegation enforcement. Specifically, Judge Gorsuch distilled three delegation limitations from *Touby*: (1) Congress provides a clear and generally applicable rule; (2) the executive makes a factual determination; and (3) the executive makes its finding based on the criteria provided in the statute.[285] The features of the delegation – that the nation's top prosecutor was effectively tasked with creating a new crime to be applied to half a million people in countless possible ways – required more congressional direction than other situations.[286] The SORNA delegation contained none of the *Touby* limitations, so Judge Gorsuch indicated that he would have invalidated it.[287]

The *Touby* limitations provide a requirement for true contingent legislation. For that reason, Judge Gorsuch's formulation satisfies the strictures of Professor Schoenbrod's test because Congress is providing the rules, and the executive is merely executing them. There can be some debate about whether Schoenbrod would approve of Judge Gorsuch's delegation test, as a lot of work is being put on the requirement that Congress establish criteria in the statute that restrict the executive's discretion. But the requirement that the executive make a factual determination indicates that the rules are set and the executive merely determines what actions fit within the rules. In short, Judge Gorsuch has proposed a non-delegation test that would comport with early federal delegation history and satisfy the separation of powers concern of Professors Lawson and Schoenbrod. And Judge Gorsuch has provided persuasive reasons why the test should be applied in the criminal context, despite the Supreme Court's seeming lack of interest to fully enforce the separation of powers when considering civil statutes.

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281. § 16913(d).

282. *Nichols*, 784 F.3d at 670 (Gorsuch, J., dissenting from denial of rehearing en banc).

283. *Id.* at 672–73.

284. *See id.* at 673.

285. *Id.*

286. *Id.* at 674, 676.

287. *Id.* at 676.

VI. CONCLUSION

Even accepting that one of the tests described above would resolve the two major doubts about enforcing the doctrine, one might ask why the non-delegation doctrine is worth resuscitating. Some might argue that courts are merely deferring to the democratically elected legislature in upholding broad delegations. But that deference comes at a price – namely, shifting the balance of power among the three branches. Others might respond that Congress could simply write narrower statutes if it wanted to guard its powers. As the Supreme Court has noted, however, "The fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the judiciary remove itself from the controversy."[288] Moreover, "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers . . . [and, therefore, t]hat a congressional cession of power is voluntary does not make it innocuous."[289]

The non-delegation doctrine is what ensures the first three articles of the Constitution are not blended together when it might be expedient to do so. Arbitrary power arises when power, rather than being discretely parceled out, is concentrated and amalgamated.[290] The Constitution "impose[s] burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."[291] Preventing Congress from avoiding its duty to be the lawmaking branch ensures that the ultimate check on the federal government – the will of the people – remains because the lines of accountability between lawmakers and citizens will be clear. The judiciary has admirably enforced other doctrines of the separation of powers, but it should recommit to enforcing the non-delegation doctrine by adopting the Marshall-*Askew* test or at least strictly apply the doctrine when a delegation permits the use of legislative power to create a crime.

Adopting either test is a limited approach to resuscitating the non-delegation doctrine. The Marshall-*Askew* test is a compromise solution between formalists like Professors Lawson and Schoenbrod and Justice Thomas and the non-enforcement of the current federal approach. The virtues of that test are that it provides for judicial discretion and flexibility when analyzing delegation challenges. Of course, the flip side of those benefits is also the test's vices.

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288. United States v. Munoz-Flores, 495 U.S. 385, 393 (1990).

289. Clinton v. City of New York, 524 U.S. 417, 450, 452 (1998) (Kennedy, J., concurring).

290. *See* THE FEDERALIST NO. 47, at 301 (James Madison) (C. Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny.").

291. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983).

But those vices can be overcome as a wealth of case law builds up that cabins judicial discretion and that ensures the complex and technical subject matter exception does not become the default characterization of legislation. The formalist approach taken in Florida and advocated by Judges Sutton and Gorsuch for delegation challenges in the criminal context also has its pros and cons. The benefits include faithful adherence to the text of the Constitution and the fundamental separation of powers principles that are especially vital to governmental legitimacy when life and personal liberty are at stake. Yet the negative aspect to adopting that approach in the criminal context would be to effectively admit that the judiciary is interpreting the same words of the Constitution to mean two different things, depending on the subject of the delegation – possibly undermining the legitimacy of constitutional interpretation.

Though neither approach is perfect, the one more faithful to the separation of powers principles embedded within the Constitution requires strongly enforcing the non-delegation doctrine in the criminal context. First, the government's power to deprive citizens of their life and liberty is the most significant power wielded by the State. Accordingly, and as recognized by the rule of lenity, the government should not be allowed to wade into the gray area when criminal penalties are at issue. Rather, the government's authority to enforce criminal penalties should be entirely clear, so that the legitimacy of the government's actions is beyond question. As has been shown, there is at least doubt about whether the current federal jurisprudence concerning delegation accurately reflects the text and history of the Constitution. Eighty years of precedent might be enough of a reason to decline enforcing the non-delegation doctrine in civil matters, but *stare decisis* is a poor excuse to allow liberty to be taken away when no legislative enactment sanctions it. Second, enforcing the non-delegation doctrine in the criminal context would be a limited experiment to test whether judges could develop coherent case law concerning the limits of the doctrine. If federal judges find that enforcing the delegation principle is not impractical and does not frustrate the aims of Congress and the American people, then the endeavor could be expanded to the civil context as well. But if enforcing the non-delegation doctrine turns out to be as unworkable as the Supreme Court has feared, then the project can be either abandoned or limited to an area where delegation is less prominent.

Limiting the doctrine's enforcement to the criminal context is also the way that reviving it is most likely to happen. Both liberal and conservative scholars and jurists should favor adhering to strict non-delegation principles in the criminal context. For liberals, there is greater protection of criminal defendants from the power of prosecutors. And for conservatives, fidelity to the text of the Constitution is an inherent good. Thus, from either a functionalist or formalist viewpoint, not permitting the executive to prescribe rules of general applicability in the criminal context would yield net benefits. Both individual freedom and the rule of law would profit the change in jurisprudence – one can only hope the long-dead doctrine has not already been interred.