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LAW AND PUBLIC CHOICE

A Critical Introduction

THREE

Economic Regulation and the Constitution

The most dramatic proposals to apply public choice have involved basic principles of constitutional law. Since the New Deal, the Supreme Court has given Congress a free hand in economic regulation. Some public choice scholars, however, have argued that the Court should reverse course. They believe judges should sharply limit the scope of economic regulation by both the states and the federal government.[1] The doctrines formerly used to limit government regulation are now defunct. Advocates of "economic activism" seek to resurrect pre–New Deal constitutional rules dealing with economic liberty, restrictions on federal power, and limits on administrative agencies.[2]

Expanded judicial review would inevitably limit the power of the more democratically responsive branches of government in favor of the judiciary. In a society that values democracy—as ours does, despite the concerns of some public choice theorists about the defects of majority rule—any expansion of the power of the courts requires powerful justifications. The basic issue in this chapter is whether public choice can furnish such justifications. A great deal is at stake here. Economic activism could lead courts to strike down minimum wage laws as restrictions of economic freedom. It could prevent Congress from using the Environmental Protection Agency to write pollution regulations, on the ground that Congress cannot delegate "legislative" power. Finally, it could invalidate federal discrimination laws in both the name of states' rights and that of economic freedom.

As we will explain at some length, we strongly reject these radical proposals for revamping constitutional law on the basis of public choice theory. Some of our criticisms are directed at the underlying public choice theory, but we also present objections based on institutional concerns about the role of courts. These two kinds of objections are interrelated. For example, if regulatory statutes invariably involved rent-seeking, courts could adopt

1. At the risk of being unduly repetitious, we should note again that the definition of public choice is disputed; some political scientists would prefer not to apply the term, as we and other legal scholars do, to encompass concerns about rent-seeking.

2. Most of these proposals are discussed in PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS (J. Gwartney & R. Wagner eds. 1988). A brief summary of this viewpoint can be found in Epstein, *The Mistakes of 1937,* 11 GEO. MASON U. L. REV. 5 (1988). For an overview of the constitutional issues discussed in this chapter, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW chs. 5 & 7 (2d ed. 1988).

sweeping (and easily applied) rules to invalidate them. Because the economic model of legislation has only limited validity, however, courts would have to distinguish rent-seeking from public interest statutes, and we argue that judges would find this an unmanageable distinction.

This chapter should not be read as suggesting that we view public choice theory as irrelevant to public law. Quite the contrary. In the final two chapters of the book, we will devote considerable space to developing some more supportable applications of public choice to law. Before discussing those proposals, however, we first need to consider the more radical alternatives.

I. Economic Rights and the Constitution

Because of the Warren Court, we have come to associate judicial activism with the zealous defense of civil rights and civil liberties. Until fifty years ago, however, one of the Supreme Court's main activities was protecting economic interests from government regulation. The most famous example of economic activism was the *Lochner* case, in which the Court struck down a maximum hour law for bakers.[3] The Court considered the law an unconstitutional infringement of the bakers' freedom of contract. The *Lochner* era culminated in the Court's abortive effort to halt the New Deal in the early 1930s.

After Roosevelt's court-packing threat, the Supreme Court retreated from its former role as the guardian of economic liberty. Economic regulations were given a very strong presumption of validity—so strong that in the early seventies scholars questioned whether economic rights still enjoyed any real constitutional protection. Since 1976, however, the tide seems to have turned again. Economic rights still receive much less judicial protection than freedom of speech or other traditional civil liberties. Yet, in the last ten years there has been something of a revival in the Court's activism in the economic area.[4]

Before 1937 the Court used the due process clause to protect economic rights. Today, when the Court strikes down an economic regulation, it usually relies on a different clause: the taking clause of the fifth amendment. (Although this clause directly applies only to the federal government, it has been applied to the states by way of the due process clause of the fourteenth amendment.) The taking clause prohibits the government from taking private property "for public use without just compensation." The clause was designed for condemnation cases in which the government seizes property

3. Lochner v. New York, 198 U.S. 45 (1905).

4. For a recent review of the history of judicial protection of property rights, see Schwartz, *Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?*, 37 AM. U.L. REV. 9 (1987). The recent cases under the taking clause are insightfully summarized in Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988).

for roads and the like. In Justice Holmes's famous opinion in *Pennsylvania Coal v. Mahon,*[5] however, the Court held that a taking could exist if the government "went too far" in regulating private property. In *Mahon* the Court struck down a Pennsylvania law that effectively destroyed the economic value of certain mineral rights. Until 1975, however, the Court infrequently decided taking cases.

In recent years, the Court has applied the taking clause to a variety of government regulations, blocking these regulations in the absence of compensation to property owners. In one case, the federal government demanded that a developer give access to use a private marina, which the developer had connected with a public waterway. The Supreme Court held that requiring public access to the marina would be an unconstitutional taking of the developer's property.[6] In another case, Congress was trying to help Indians manage their lands more effectively. Some Indian lands had so many owners that land management became impractical. To consolidate land holdings, a federal statute mandated that some of the tiniest interests would revert to the tribe on the owners' deaths. This, too, was an unconstitutional taking.[7] To take another example, the Court also found a taking when New York required landlords to give their tenants access to cable television. The reason was that a cable box would "take" some of the space on the building's roof.[8]

A 1987 case best exemplifies the Court's revived interest in protecting property rights.[9] The case involved a California couple, the Nollans, who wanted to build a larger beach house. As a condition for issuing a building permit, the California Coastal Commission required them to allow the public to walk along the beach. The Nollans apparently had no serious objection to pedestrian traffic. In fact, the portion of the beach in question was separated from their yard by a seawall. But they did object in principle to the permit condition. With the help of the Pacific Legal Foundation, a conservative "public interest" group, they took the case to the Supreme Court. The Court said that the permit condition was a taking.

The majority opinion was written by Justice Scalia, who has quickly emerged as the most activist conservative on the Rehnquist Court. Scalia was willing to concede, at least for purposes of argument, that California could have banned the Nollans' construction entirely to preserve the public's right to see the ocean from the street. California could also have required the Nollans to let people walk from the street to the back of their house, as another way to preserve the public's right to see the ocean. But because the government had chosen to give the public access along the beach, rather than

5. 260 U.S. 393 (1922).
6. Kaiser Aetna v. United States, 444 U.S. 164 (1979).
7. Hodel v. Irving, 481 U.S. 704 (1987).
8. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
9. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

from the street, Justice Scalia held the permit condition unconstitutional. The reason was that lateral access wasn't closely enough related to the government's right to protect the view of the ocean.

Justice Scalia seemed quite suspicious of the government's motives in imposing the permit condition, at one point referring to similar permit conditions as a form of "extortion." This distrust of government regulators is, of course, reinforced by some strands of public choice scholarship.

The taking clause does not seem like a particularly apt method of controlling government regulation. It focuses on property, yet special interests are as likely to seek limitations on other economic activities. The taking clause would lead courts to strike down rent controls while upholding minimum wages, just because one involves property and the other involves labor. Moreover, the taking clause directs our attention solely to the effects of the government's action on the property owner. But the real concerns relate more to the motivations of the government. It might make more sense to focus more on the decisionmaking procedures used by the government, rather than the result.

Another problem confronts those who would use the taking clause as a vehicle for attacking government regulation. It is true that the Supreme Court has become somewhat more activist in recent taking cases. So far, however, this activism has taken place in only one category of cases. Government regulations of property most often limit the ways in which the owner can use the property. Although the Court has made it clear that such regulations potentially constitute takings, in recent years it has never actually found a regulation that "went too far." It has struck down only statutes belonging to another category: those in which the government gives somebody else the right to use the property. For example, in *Nollan* the public got the right to use the Nollans' beach; in the Indian case the tribe got the right to use the property after the owner's death; and in the cable case, the cable company got the right to use the landlord's roof. Indeed, even in the old Holmes opinion, the taking occurred because the owners of the surface land were given the right to use the underlying minerals for support.[10]

The current round of takings cases are only a toehold for economic activism. The cases could be readily confined to a discrete category. This does not mean that they cannot be read more broadly, and the opinions do contain broad language about property and government regulation. Later judges

10. Actually, these cases can be narrowed even further, because each of them involved the transfer of a classic property interest familiar to generations of lawyers. For example, *Nollan* and some of the other cases involved easements (the right to enter another person's property). It does not take too much of a stretch of the imagination to call the forced transfer of a recognized property right a "taking." But such a requirement is quite distinct from most forms of government regulation, which address the owner's activities rather than transferring a traditional legal interest to someone else.

may treat these cases as involving only a special category of government regulations, or they might read the language of the opinions as having much broader implications.

Public choice might well encourage judges not only to read these cases broadly, but even to apply them by analogy to areas in which no "property" was taken, when economic benefits have been allocated in ways that public choice theory finds suspicious. Some lower courts, for example, have used the taking doctrine to protect utilities from excessive regulation, with generally unfortunate results.[11] Skepticism about legislative motivations and outcomes, which is such a strong strand in public choice theory, makes judicial protection for such economic rights more attractive. Largely because of public choice theory, prominent scholars have recently argued for a renewed judicial activism in scrutinizing economic legislation. Although the most notable of these scholars is Richard Epstein, a prominent conservative,[12] others are centrists or liberals.[13]

The argument for renewed economic activism comes in two forms. One argues that legislation should be struck down unless it is at least arguably justified by some kind of market failure. Thus, all rent-seeking legislation should be struck down by the courts. A less activist approach would allow the legislature to promote some "public values" that extend beyond economic efficiency, with laws outside of this range being subject to invalidation.

Although this focus on rent-seeking might lead to results not unlike *Lochner*, there is an important difference. The *Lochner* Court considered maximum hours legislation to be a violation of the rights of the bakers and their employers. The rent-seeking theory accuses the legislation of raising the price of bread to the detriment of consumers. Thus, it protects freedom of

11. *See* Pierce, *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?*, 77 GEO. L.J. 2031 (1989). As Pierce points out, maltreatment by state utility commissions has actually had an unexpected benefit because it has led the companies to support federal deregulation.

12. *See* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984). Professor Bernard Siegan is another outspoken libertarian advocate of *Lochnerism*. *See* B. SIEGAN, THE SUPREME COURT'S CONSTITUTION: AN INQUIRY INTO JUDICIAL REVIEW AND ITS IMPACT ON SOCIETY ch. 3 (1987); B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1985); Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453 (1985). Siegan was nominated for the U.S. Court of Appeals by President Reagan, but was not confirmed by the Senate. On the other hand, one outspoken critic of the attempt to resurrect *Lochner* is another prominent conservative. *See* Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

13. *See* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 68–85 (1985); Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980).

contract for instrumental reasons, not because it views this freedom as an intrinsically important value.

There are three major flaws in the proposal to have courts stamp out rent-seeking. First, it is based on a simplistic model of the political process. We all know that special interest groups make a difference in the legislative process, but the idea that they are generally decisive is a caricature. As we saw in chapter 1, empirical studies by political scientists and economists have shown that legislators' views of the public interest do matter. Probably the most dramatic evidence against the rent-seeking model is found in recent legislation deregulating crucial industries. The passage of such legislation is difficult, though not completely impossible, to square with the model.[14] Moreover, arguments about the public interest, often deriving from the work of prominent economists, played a crucial role in obtaining these reforms.[15] Thus, in presuming that statutes are normally the result of self-serving influence, the rent-seeking model is too cynical about the legislative process.

Second, the rent-seeking model, if taken seriously, would require much broader judicial review than even the *Lochner* Court ever contemplated. To begin with, even in the *Lochner* era, most regulatory statutes were upheld. Moreover, regulatory legislation is far from being the only potential form of rent-seeking. Recognizing this, Epstein broadens his attack to include such matters as the progressive income tax, which he regards as a taking of private property without just compensation.[16] Many tax exemptions would also presumably be vulnerable to charges of rent-seeking.[17] But this is only the beginning. The risk of rent-seeking is also found in legislation involving tariffs, defense contracts, public works projects, direct subsidies, government loans, and a host of other activities.

For control of rent-seeking to be effective, *all* these diverse government activities would have to be subject to rigorous judicial scrutiny. Leaving some areas such as tariffs or the defense budget untouched would simply encourage special interest groups to concentrate their efforts there. If strict judicial scrutiny were limited to regulatory programs, the amount of rent-seeking in other government programs would increase, largely cancelling out the reduction in rent-seeking regulatory programs. Thus, courts would have to assume the task of supervising virtually everything the government

14. *See* Kelman, *Public Choice and Public Spirit,* PUB. INTEREST, Spring 1987, at 80. *See generally* Peltzman, *The Economic Theory of Regulation After a Decade of Deregulation,* in MICROECONOMICS 1989 (Brookings) at 1; *id.* at 48–58 (comment of Roger Noll).

15. *See* Nelson, *The Economics Profession and the Making of Public Policy,* 25 J. ECON. LITERATURE 49, 60–64 (1987).

16. *See* R. EPSTEIN, *supra* note 12, at 303. *See also id.* at 322–24 (tax and transfer programs unconstitutional).

17. *See* Doernberg & McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform,* 71 MINN. L. REV. 913, 953–60 (1987) (giving examples).

does. They would have to pass on everything from international trade policy to tax reform. This would be judicial activism on a truly heroic scale.

Third, limiting government to the pursuit of economic efficiency unacceptably eliminates other valid public goals. Major government programs, many of them with broad popular support and deep historical roots, are premised on a variety of other goals. Besides economic efficiency, the government may promote environmentalism, racial equality, or redistribution of income.[18] The rent-seeking model would require radical shifts in our social institutions. It would thereby drastically alter existing expectations about government action.

The other variant of heightened judicial scrutiny, which focuses on "public values," is less radical. Rather than specifying economic efficiency as the exclusive legitimate goal of government regulation, this model would allow government to implement a broader range of values. Courts would only strike down rent-seeking laws that fell outside this range, so more scope would be left for government action. Nevertheless, this model, too, has its problems.

To begin with, the notion of public values is very far indeed from being self-explanatory. For example, classic rent-seeking legislation is often supported by reference to noneconomic values. Restrictions on advertising by lawyers, for example, were said to rest on the values of professionalism.[19] Subsidies for farmers, which some consider a classic example of a "raid on the Treasury,"[20] are said by others to be justified by the inherent value of the family farm. If judges accept goals like these as public values, then the public value model will have little impact. On the other hand, judges might

18. As Frank Michelman explains: "To apply with any semblance of judicially principled rigor the economics-inspired, market failure condition on the validity of legislation—the rule that legislation is invalid unless it can somehow be seen as aimed at maximizing wealth by realizing potential gains from trade that the market may be failing to realize—would, as Justice Linde argued, be to rule out, or at any rate call into serious question, a great deal of legislation whose constitutionality many would not care to think the least bit questionable whatever we may think of its merits. Clouds of constitutional doubt would hang over legislation transferring wealth to the needy or to other favored groups such as veterans; over legislation aimed at ends lacking true economic exchange value such as preservation of endangered animal species, or of municipal sanctuaries for family values; over legislation expressing 'a sense of the fitness of things' as by forbidding ungrateful lawsuits by injured automobile guests, or inhumane treatment of animals, or consanguineous intermarriages; over legislation groping towards the redefinition of values in flux or ferment, a good example being laws which, by forbidding discrimination against the interests of women, or the handicapped, or racial minorities, inevitably seem to call for some form and degree of special solicitude for those interests." Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 508 (1979).

19. *See* Bates v. State Bar, 433 U.S. 350, 368–72 (1977) (discussing this rationale).

20. *See* Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 218 (1984) (dairy price supports are "a fairly stark payoff to a favored group").

attempt to give the model "bite" by narrowing the class of acceptable public values. If so, they may be unable to articulate any generally acceptable standards.[21] As we saw in the first chapter, one person's special interest is often another person's public value.[22]

The practical benefits of a public value approach are also dubious. Special interest groups often have the greatest effect, not on overall legislative programs, but on the details of statutes.[23] In one common situation, a "public interest" statute contains exemptions sought by powerful interest groups. For example, employment discrimination statutes may exempt seniority plans, or an environmental statute might exempt the steel industry. Judges have two choices, neither desirable, in applying the public value model to this situation. First, they could strike down the entire statute on the theory that it is tainted by the special interest provisions. This approach is unattractive. It would eliminate legislation that the court considers to have legitimate purposes overall, merely because some of the details were flawed. It would also allow groups to kill legislation by attaching special interest riders, inviting courts to strike down the entire statute.

Alternatively, the court could simply strike down the special interest provisions. This is also problematic. The special interest aspects of the legislation may involve changes in the basic statutory language rather than separate exemptions. If so, considerable judicial rewriting would be required. Moreover, this approach would make it more difficult to pass legislation with genuine public values.[24] If we approve of tax reform, civil rights legislation, deregulation, or other major legislative initiatives, we cannot afford to tie the political hands of the sponsors. An exemption for a

21. This point is discussed more extensively in Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 909–11 (1987).

22. Although it is perhaps impossible to define public values, it might seem easier to describe a small category of "nonpublic values"—that is, judicially defined prohibited ends of legislation. Even here, though, any noncontroversial articulation is likely to be vacuous. For example, Cass Sunstein has suggested that a variety of constitutional provisions express a policy against "naked preferences" granted by the legislature on the basis of private political power. See Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984). For us, problems of proof and fears about judicial capacity to make such evaluations render the "naked preferences" theory attractive largely at the aspirational level only. At most, this approach seems to identify an underenforced constitutional norm, see Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978), that may well be binding upon legislators, administrators, and judges, but because of institutional differences has far more practical relevance outside the judiciary.

23. *See* K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 8, 163–64, 311, 392, 394–95 (1986).

24. Whereas a politically powerful special interest can now be brought along by granting it a complete or partial exemption, this would become impossible if the exemptions were judicially invalidated. Any adversely affected special interest group would have only one choice: fight the entire legislation.

special interest, even if unprincipled, may be the necessary political price of a valuable reform.

The "public values" approach requires heightened judicial scrutiny of the reasonableness of a broad range of legislation to insure that the purported public value is indeed plausibly related to the legislation. Essentially all legislation would be subjected to this reasonableness test. This is a vast quantitative increase in the scope of judicial review, because serious judicial scrutiny is currently limited to discrete categories of statutes.[25] The framers of the Constitution rejected the idea of making federal judges part of a Council of Revision with veto power over new legislation. Allowing judges to decide the reasonableness of *all* legislation seems uncomfortably close to a Council of Revision. What is at stake here is more than an arcane historical detail. The Supreme Court should not duplicate the presidential veto power. Giving the Supreme Court a general veto power violates our basic constitutional scheme.

Thus, a revival of *Lochner* is an unappealing prospect. In its Chicago School, "rent-seeking" form, serious implementation would involve a revolutionary restructuring of both our government and our economy. In its milder form, the public values model, it would still significantly alter the institutional role of the judiciary, while probably achieving relatively little.[26]

Whatever its theoretical appeal, the idea of a return to *Lochner* is rejected by the overwhelming majority of lawyers, and seems to have no realistic prospect of judicial adoption. Indeed, this is itself consistent with public choice theory. It is not easy to imagine a public choice theory of judicial selection that would lead the Senate to pass regulations and the President to sign them—only for the President to nominate and the Senate to confirm judges inclined to strike all such laws down. Nor is a public choice theory of judicial behavior available that would explain why judges would be motivated to strike down most government regulations. (What's in it for the judges?)

Public choice does not provide an adequate basis for a broadscale judicial attack on special interest legislation. Can public choice provide any help with the narrower problems presented by traditional takings law? Virtually everyone agrees that the Court has never articulated a clear test for when a land-use regulation becomes a taking, and illumination from any source would certainly be welcome. Despite some preliminary work in the area, a

25. *See* Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U.L. REV. 191, 215 (1987).

26. Our focus in this section has been on federal constitutional law. State courts have in fact been more activist on economic matters than the federal courts. Since state judges are often elected, and since state constitutions are more easily amended than the federal Constitution, this activism may be less objectionable.

general public choice theory of the subject is still far away.[27] A less ambitious use of public choice theory would be to establish some "safe harbors"—that is, to provide a test for establishing that some regulations are clearly not takings. As a preliminary step in that direction, we would like to suggest one possible safe harbor.

Public choice suggests that diffuse groups will generally find it difficult to obtain legislation that benefits them at the expense of more compact groups, even where the legislation creates much greater benefits than costs. We can assume that requiring compensation will make such legislation harder to pass (otherwise, the legislature would have provided the compensation voluntarily). Given the fact that diffuse beneficiary/concentrated cost legislation is already excessively hard to pass, applying taking law would only create an additional barrier to much-needed legislation. Thus, where the beneficiaries are substantially more diffuse than those regulated by a statute, a safe harbor might well be desirable.

Some examples might illustrate how this safe harbor would function. Consider *Loretto,* the cable TV case discussed earlier.[28] Superficially, the cable access rule benefits tenants (a relatively diffuse group) over landlords, so this rule would appear to fall within the safe harbor. But this assumes that when the cable company obtains free access, the entire saving is passed along to cable consumers, and there is no reason to expect this to happen. Realistically, at least part of the saving will be absorbed by the cable companies, who are a much more compact group than the landlords. So, the safe harbor does not apply. In contrast, consider the *Keystone* case.[29] *Keystone* was in many respects a 1987 replay of the 1922 *Pennsylvania Coal* decision that began the law of regulatory takings. *Keystone* involved another state law requiring coal mines to provide support for the land overhead, including homes, businesses, and public property such as schools. The statute benefitted a broad range of property owners. The burdened class consisted of coal-mining companies. This case falls squarely within the safe harbor, because the burdened class is far more compact than the beneficiaries of the regulation. Hence, as the Supreme Court concluded (albeit in a 5-4 vote), there was no taking.

The application of public choice theory to such problems of land-use regulation seems promising. Further work along these lines is more likely to be more productive than broad-ranging attacks on the general problem of rent-seeking.

27. Levmore, Just Compensation and Just Politics (VIRGINIA LAW & ECONOMICS WORKING PAPER # 89–3, 1989), makes a promising start on this project by linking taking law with concern about unprotected minorities, but does not provide a coherent test for political powerlessness.

28. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

29. Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987).

If public choice theory is to make a contribution to the more general problem, its advocates will have to devise a less radical legal approach to controlling rent-seeking. One possibility, which we will discuss in chapter 5, is to approach the problem indirectly. Rather than scrutinizing the results of the legislative process for signs of taint, it may be better for the courts to police the process itself. An analogy may help explain the appeal of structural as opposed to substantive solutions. In the early 1960s, state legislatures were badly malapportioned in favor of rural districts. As a result, legislation tended to favor agricultural interests over urban interests. One way of dealing with the problem would have been heightened judicial review for statutes favoring rural interests. Judges could scrutinize such statutes in order to determine whether the discrimination against urban interests was clearly justified. Determining what statutes were guilty of this form of geographical discrimination would have been difficult, however, and assessing the justifications for the statutes would have involved courts in myriad policy decisions. A much simpler approach—and the one actually adopted by the Supreme Court—was to deal directly with the structural problem by ordering reapportionment. Similarly, rather than trying to apply special scrutiny to rent-seeking legislation, it may be more fruitful for courts to deal directly with some of the political conditions that foster rent-seeking.

II. Federalism

The drive to repeal the New Deal has also sought to restrict the power of the federal government. Much of the argument has focused on the commerce clause, because today it is the most important source of legislative power for Congress.

Before the New Deal, the commerce clause was given a relatively narrow reading. Until around 1890, the clause mostly functioned as a restriction on the authority of the states. The Court's theory (roughly speaking) was that if interstate commerce was *within* congressional jurisdiction then it must be *outside* state jurisdiction. Under this so-called "dormant commerce clause" doctrine, even if Congress had not legislated, the states were forbidden to regulate interstate commerce. But drawing a rigid line between state and federal jurisdiction proved unworkable in practice. Today, although the basic doctrine survives, its application is much more pragmatic. State regulations are only struck down if they discriminate against or unreasonably burden out-of-state firms.[30] In many circumstances, the states and the federal government can now regulate the same transaction.

Most of the early judicial decisions involved the "dormant commerce clause" because Congress rarely exercised its authority over commerce.

30. For a brief survey and critique of current doctrine, see Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMM. 395 (1986).

Most of the controversies involved situations in which Congress had been silent and states had stepped in to regulate. The Civil War began a trend toward greater congressional activity which has continued to the present.

The initial judicial reception to this new legislation was hostile. From 1890 until 1937, the Supreme Court adopted a restrictive view of congressional power under the commerce clause. For example, in *United States v. E.C. Knight Co.*,[31] the Court held that Congress lacked the power to stop the formation of a nationwide monopoly in sugar manufacturing. The rationale was that manufacturing sugar (unlike shipping it interstate) was an inherently local concern, reserved to the states under the tenth amendment. Any effect of the manufacturing monopoly on later sales across the nation was only "indirect" and therefore insufficient to give Congress jurisdiction. In an important later case, the Court ruled that Congress could not ban child labor in factories that sold goods in interstate commerce.[32] Even during this period, however, the Court did not consistently rule against Congress, leading some commentators to criticize its decisions as unprincipled.

In the first half of the 1930s, the Court applied its expansive view of the tenth amendment to strike down important portions of the New Deal, including labor legislation and agricultural price supports. These decisions led to a constitutional crisis in 1937. After the President threatened to pack the Court, a crucial Justice changed his views (perhaps coincidentally) and began to vote to uphold New Deal legislation. In key decisions in 1937, the Supreme Court upheld the National Labor Relations Act and the Social Security Act.[33]

Since 1937 the scope of congressional power under the commerce clause has steadily expanded. In *Wickard v. Filburn*,[34] the Court held that Congress could regulate the amount of wheat a farmer grew for his own use. The rationale was that when farmers divert grain for their own use, there is a cumulative effect on interstate commerce. In an even more striking application of the commerce clause, the Court held in *Heart of Atlanta Motel v. United States*[35] that Congress could use the commerce clause to prohibit racial discrimination by private businesses. The Court's theory was that racial discrimination has a significant cumulative effect on the national economy. Today, Congress regulates pollution, worker safety, discrimination, and virtually everything else imaginable, without serious constitutional challenge.

Since 1937 the Supreme Court has never struck down any federal regulation of private conduct as a violation of the tenth amendment or as exceeding congressional power under the commerce clause. But in one important case,

31. 156 U.S. 1 (1895).
32. Hammer v. Dagenhart, 247 U.S. 251 (1918).
33. This history is reviewed in L. Tribe, *supra* note 2, at 297–310.
34. 317 U.S. 111 (1942).
35. 379 U.S. 241 (1964).

National League of Cities v. Usery,[36] the Court did hold that Congress lacked the power to impose minimum wage requirements on positions in state and local governments that perform "essential state functions." This federal legislation was held to be an undue intrusion on state sovereignty. In a series of later cases, the Court struggled to define the contours of this doctrine. It became increasingly obvious that the outcome in tenth amendment cases turned largely on the views of Justice Blackmun, who was usually the decisive swing vote. By 1985 he was apparently convinced that no principled way to apply *League of Cities* could be found. In another case involving the minimum wage, this time in the context of local transit workers, Justice Blackmun wrote the opinion overruling *League of Cities*.[37] The four dissenters protested vigorously and hinted that the *League of Cities* decision would be resurrected as soon as new appointments joined the Court.

The current law, then, is that Congress can regulate any conduct by private parties under the commerce clause, and almost any economic transactions by state governments. Inspired in part by public choice theory, however, some scholars have recently argued for a return to a much more restricted national role. They seek to reactivate the Court as a guardian of federalism.

There are several traditional arguments for federalism. Federalism allows local communities to experiment with different approaches to social problems; it allows for communities to pursue their own social visions rather than homogeneous social norms; it disperses power and therefore makes abuse less likely.[38] These arguments can all be restated in economic jargon. Doing so may well be intellectually fruitful. Economic analysis might illuminate the interconnections between these arguments and clarify the conditions under which they hold.[39] But the basic lines of argument are old hat. If the traditional arguments themselves were insufficient to persuade the Court to limit federal power, it seems unlikely that dressing the same arguments up in economic language will have much effect.

Public choice theory has, however, added one distinctively new argument—or rather, has turned an old argument on its head. One traditional reason for federal intervention has been that interstate competition effectively limits the regulatory powers of the states. For example, suppose a state

36. 426 U.S. 833 (1976).

37. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

38. These traditional arguments are summarized in Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988).

39. For a thoughtful review of the public choice literature as it bears on the traditional arguments for federalism, see McConnell, Book Review, 54 U. CHI. L. REV. 1484, 1491–1511 (1987) (reviewing R. BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)). *See also* Shannon, *Competition: Federalism's 'Invisible Regulator,'* TAX NOTES, April 3, 1989 at 93; Wagner, *Morals, Interests, and Constitutional Order: A Public Choice Perspective*, 67 ORE. L. REV. 73, 90–91 (1988).

decided to raise the minimum wage. The higher minimum wage laws would raise the labor costs of local firms, putting them at a disadvantage in the national marketplace. This economic effect harms a state that takes the initiative in regulating business. Over time, local industry will dwindle, as existing firms either fail to thrive against unregulated out-of-state competitors or else relocate in less regulated jurisdictions. Thus, even if the state governments unanimously wish to impose a minimum wage, they may find themselves unable to do so, because of the difficulty of coordinating group action and the substantial competitive benefit to laggards.

It is obvious why this inability of the states to regulate interstate competition effectively has traditionally been an argument for federal intervention. Some public choice scholars have innovatively inverted this argument, using it as a justification for limiting federal authority. For example, regarding child labor regulation, Professor Richard Epstein argues:

> There is no obvious reason to approach the . . . question with the assumption that child labor laws are intrinsically good, if only we knew how to enact them. Their strength, far from being a given, should be tested in competition between states. Such competition would show the true importance of child labor laws to the state: Will a state impose the restriction even when local firms may be hampered in interstate competition?[40]

The basic idea is that interstate competition limits the ability of states to pass inefficient, rent-seeking statutes. This is a useful barrier since such statutes are undesirable, so it should be respected rather than circumvented by Congress.

Although clever, this argument ultimately cannot be sustained. Interstate competition hampers inefficient regulation, but it can also hamper efficient regulation as well. Consider an industry that creates a local pollution problem. Having the industry might be a net social benefit for the state, but the benefit would be even greater if pollution controls were imposed. If the harm done by the pollution exceeds the cost of control, pollution regulation is economically efficient. Nevertheless, state authorities may be unable to impose the controls, since the industry can always move elsewhere to avoid them.[41] Other flaws in the market can also justify government intervention, but such intervention may be frustrated if the regulated party can make a credible threat to relocate.

Interstate competition can also be harmful if there are differences in mobility. If some resources are relatively mobile (for example, financial

40. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1431 (1987).

41. In theory, the state could cope with this problem by taxing its citizens to finance the firm's pollution controls. But this is politically unrealistic and may be rejected for distributional reasons as well.

capital) while others are less mobile (individual workers) and some are fixed (land and other natural resources), governments will compete for the mobile resources at the expense of the interests of owners of less mobile resources. For example, a real property tax will be preferred over a corporate income tax, regardless of the true desirability of the two forms of taxation, because real property is comparatively immobile.

The market for local regulation is subject to the same flaws as other markets. Unrestrained regulatory competition among the states may not lead to efficient results if local regulations have appreciable effects elsewhere, if the information needed to regulate is costly, or if there are economies of scale in regulation.[42] And why should efficiency be the only permissible goal of government regulation? Redistribution of wealth is clearly handicapped by interstate competition: all things being equal, rich people will prefer not to live in states where they pay higher taxes for the benefit of the poor.

Ultimately, the interstate competition argument is little more than a sophisticated restatement of economic libertarianism. If government regulation is bad, anything that makes it more difficult is good; and interstate competition does hinder state regulation. Epstein, for example, makes no bones about the fact that his support for federalism is directly linked with his rejection of government regulation. By his own admission, he "looks with suspicion" on child labor restrictions,[43] while he explains the Court's acceptance of national regulation as being based on a naive faith in the virtue of legislatures.[44] If we put aside Epstein's "democracy bashing" and assume that democratic government is on balance benign—or at least that courts are institutionally barred from adopting the contrary conclusion—his argument for a return to nineteenth-century constitutionalism goes up in smoke.

Nevertheless, with regard to federalism concerns, public choice may have a useful impact on public law. While public choice may not add a great deal of substance to the argument for federalism, it does rephrase the stock arguments in a new and more appealing vocabulary. Even in modern garb, we do not believe that these arguments justify serious revisions in constitutional law. Federalism is also relevant, however, in nonconstitutional settings. For example, in statutory interpretation, the courts may sometimes construe a federal statute narrowly in an area of traditional state concern. Although the Court often pays lip service to federalism when construing federal statutes, federalism is more often honored in the breach as a factor in statutory in-

42. Sometimes these effects may be obvious: there is a clear externality when a state regulates interstate pollution. The existence of other impacts may be quite controversial. For example, if the states regulate the local level of borrowing, credit, consumption, or wages, different macroeconomic theories may have different implications about whether the national economy is affected. Courts are in a very poor position to assess such arguments.

43. Epstein, *supra* note 40, at 1430.

44. *Id.* at 1451–53.

terpretation. Public choice suggests that courts might do well to interpret ambiguous federal statutes so as to preserve these areas of state autonomy.

III. The Delegation Doctrine

In its abortive attack on the New Deal, one of the instruments used by the Court was the delegation doctrine. This doctrine finds its roots in article I of the Constitution, which vests "the legislative power" in Congress. Since the legislative power must reside in Congress, it is said, any attempt to vest that power elsewhere is unconstitutional. Thus, according to this theory, Congress cannot delegate its lawmaking powers to administrative agencies.[45] This sounds fine in theory, but in practice Congress is often forced to write broad guidelines, leaving it up to an administrative agency to issue detailed regulations.

The delegation question has a long history. As early as 1825, the Court was faced with (and rejected) a claim of unconstitutional delegation.[46] In later cases, the Court struggled to define the permissible limits of congressional delegation. A major 1928 case upheld a broad grant of power to the President to regulate tariffs.[47] The test emerging from these cases is that Congress need only provide an "intelligible principle" governing the administrator. Notably, although the delegation issue was often raised in the first 150 years of the Republic, the Court never struck down a statute on this basis. Most of the delegations involved international affairs, an area in which a congressional delegation merely augments the President's own inherent constitutional powers.

The bark of the delegation doctrine is much worse than its bite. The Court has struck down federal statutes as unconstitutional delegations only twice. Both cases were decided in 1935, so it is arguable that the delegation doctrine has actually only been in effect for one year in American history.

The first case was *Panama Refining Co. v. Ryan,*[48] better known as the "hot oil" case. The National Recovery Act, a key piece of early New Deal legislation, contained a provision authorizing the President to prohibit interstate shipment of "hot oil" (that is, petroleum products produced in violation of state law). The statute contained no explicit standards governing the President's exercise of this power. The Court struck down the statute as an unconstitutional delegation of legislative power. Later that year, the Court struck down other crucial provisions of the National Recovery Act,

45. For a thorough recent review of the literature on the delegation doctrine, see Farina, *Statutory Interpretation and the Balance of Power in the Administrative State,* 89 COLUM. L. REV. 452, 476–88 (1989).

46. The Brig Aurora, 23 U.S. 1 (1825).

47. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

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

which authorized the President to establish "codes of fair competition" for particular industries. The codes were actually adopted by trade associations and then reviewed by the President. In *Schechter Poultry Corp. v. United States,*[49] the famous "sick chicken" case—there seems to be something about these delegation cases that lends itself to amusing nicknames—the Court struck down the code established for the poultry industry. The Court could find no adequate statutory standard to restrain the rulemaking discretion of these private industry groups.

The Court quickly retreated from the rigidity of the 1935 cases. Less than ten years later, the Court upheld a very broad delegation of power to establish price controls during World War II. The Court still purported to be following the "intelligible principle" test, but seemed willing to settle for vague congressional platitudes about the public interest.[50] Since then, courts have invariably managed to discern an intelligible principle in every delegation, no matter how sweeping the congressional grant of power.

Yet, it would be a mistake to view the doctrine as wholly moribund. On occasion, it has served as a justification for narrowly construing a grant of authority to an administrative agency.[51] Moreover, at least two Justices have recently invoked the delegation doctrine. They argued that the toxic chemical provision of the Occupational Safety and Health Act (OSHA) was unconstitutional because Congress defaulted on the fundamental policy judgment, leaving it to the agency to decide how much industry should be required to spend to save lives. Chief Justice Rehnquist has been the leading judicial proponent of the delegation doctrine in recent times.[52]

Public choice scholars have strongly endorsed Rehnquist's effort to revive the delegation doctrine. Professor Jonathan Macey, for example, recently said that current legislative delegations to administrative agencies are "[p]erhaps the greatest departure from the system of government envisioned by the framers."[53] There are two lines of public choice arguments in favor of reviving the delegation doctrine. One line of argument is based on interest

49. 295 U.S. 495 (1935).

50. Yakus v. United States, 321 U.S. 414 (1944). The *Yakus* approach was recently reaffirmed in Skinner v. Mid-America Pipeline Co., 109 S. Ct. 1726 (1989), and Mistretta v. United States, 109 S. Ct. 647 (1989).

51. See, for example, our discussion in chapter 5 of *Kent v. Dulles,* the decision narrowly construing the State Department's authority to withhold passports on ideological grounds.

52. *See* now-Chief Justice Rehnquist's dissents in Industrial Union Dept. v. American Petroleum Institute, 448 U.S. 607 (1980), and in American Textile Mfrs. Inst., Inc., v. Donovan, 452 U.S. 490 (1981), where he was joined by then-Chief Justice Burger. An excellent review of the history of the delegation doctrine can be found in H. BRUFF & P. SHANE, PRESIDENTIAL POWER 64–88 (1988).

53. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory,* 74 VA. L. REV. 471, 513 (1988).

group theory; the other relies on the notion of "structure-induced equilibrium."

The "interest group" analysis attributes a variety of nefarious motivations to congressional delegations.[54] One theory is that legislators dislike distractions from their primary vote-getting activity, which consists of providing individual service to constituents. Hence, they prefer not to devote time to setting specific regulatory standards. Indeed, passing vague standards puts more of their constituents at risk of administrative action, thus creating more opportunities for members of Congress to earn their gratitude by intervening on their behalf.

It is true that legislators devote much of their time—probably too much—to constituent service.[55] But narrowly written statutes would not necessarily help. The Internal Revenue Code is more narrowly drafted (and correspondingly more complex) than most regulatory statutes. But legislators can still seek to influence the exercise of the IRS's discretion in the enforcement process. Moreover, as the 1986 Tax Reform Act shows, legislators can benefit specific constituents through exemptions and individually tailored "grandfather" provisions.[56]

Morris Fiorina suggested the constituent-service explanation for broad delegation some years ago, but he now believes that this motivation is probably important only in the House, because Senators are more issue-oriented and less casework-oriented.[57] In any event, even if legislators do unduly delegate power in order to free their time for constituent service, judicial revival of the delegation doctrine might do very little good. If constituent services are now at their desired level, legislators can be expected to counter efforts to limit the "market" for these services. For example, if the delegation doctrine were seriously enforced, legislators could leave the actual drafting of detailed laws either to the executive or to congressional staff, then serve their constituents by intervening with the drafting body for exemptions. Like

54. The interest group theory is most extensively developed in Aranson, Gelhorn, & Robinson, *A Theory of Legislative Delegation,* 68 CORNELL L. REV. 1, 55–63 (1982). *See also* Macey, *supra* note 53, at 513; Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?,* 83 MICH. L. REV. 1223, 1243–46 (1985). Although he does not argue for a revival of the delegation doctrine, a similar descriptive view of delegation is presented in Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation,* 74 VA. L. REV. 275, 285–301 (1988). The descriptive model is discussed at greater length and critiqued in Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions,* 1 J.L. ECON. & ORG. 81, 82–91 (1985); Pierce, *The Role of Constitutional and Political Theory in Administrative Law,* 64 TEX. L. REV. 469, 489–504 (1985).

55. For extensive discussion, see B. CAIN, J. FEREJOHN, & M. FIORINA, THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE (1987).

56. *See* Doernberg & McChesney, *supra* note 17, at 936–45, 953–59.

57. *See* M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 116 (2d ed. 1989).

many efforts to prevent willing buyers and sellers from reaching mutually advantageous deals, enforcement of the nondelegation doctrine will be costly and of limited effectiveness. If the legislature is indeed a market, and if constituent service is the product, then conservative public choice scholars ought to be skeptical of the prospects of successful regulatory intervention. After all, what other markets do they believe the government can successfully regulate?

According to another variant of the interest group theory, members of Congress also prefer broad delegations so they can "pass the buck" and avoid taking responsibility for the consequences of legislation. If there is a conflict between important political groups, the last thing a legislator wants to do is to take sides, thereby making political enemies. If one of the two groups is in a better position than the other to monitor administrative action, the legislator can have the best of both worlds. The group with higher monitoring costs is pleased by the passage of apparently constructive legislation, but cannot monitor the ultimate administrative outcomes. The more observant group is mollified by the knowledge that the administrative action will actually work to its advantage. So everyone goes away happy.

It is not at all clear that broad delegations actually correlate with disparities in monitoring costs. The President has been delegated broad power regarding tariffs, for example. Yet, the industry groups who are likely to be hurt by actual presidential decisions are well organized, while the consumers who benefit from the presidential commitment to free trade are not. The National Labor Relations Board has a very broad delegation, but both of the affected groups (industry and labor unions) have similar monitoring costs.

There are also theoretical difficulties with the idea that delegations result from informational disparities. If consumers are rational, they should know they have poorer monitoring abilities than industry. (If, on the other hand, consumers aren't rational, economic theory won't work, and all bets are off.) Rational consumers will then predict that delegations will result in unfavorable administrative decisions. Hence, they shouldn't be fooled by congressional delegations. Instead, they should favor administrative mechanisms that lower their monitoring costs. One way of reducing monitoring costs would be to concentrate more authority in the White House, because it is cheaper to monitor the President than a multitude of agencies. Another possibility would be greater reliance on formalized administrative rules rather than ad hoc adjudicatory decisions. It is easier to monitor one rulemaking procedure than a host of adjudications. Admittedly, it may not be worthwhile for individual consumers to attend to the legal details of each individual statute, so we can expect the pressure from consumers to be intermittent. Nevertheless, over time, disparities in information costs should be eroded by such innovations in the "legal technology."

In short, as Donald Wittman has observed, "[a] model that assumes that voters or consumers are constantly fooled and that there are no entrepreneurs to clear them up in their confusion will, not surprisingly, predict that decision-making process will lead to inefficient results."[58] But economists should be chary of the underlying assumptions of voter stupidity and entrepreneurial laxity.

In our view, the "information cost" theory is not an adequate basis for revitalizing the nondelegation doctrine. Nevertheless, it may have some other important implications for the courts. As we have seen, changes in legal "technology" may be important in restraining undue delegation and in giving voters a better ability to control public policy. Courts can do a great deal to encourage such changes. For example, in reviewing administrative agency decisions, courts can foster procedures that make it less costly for the public to monitor the behavior of agencies. To the extent that voters have trouble monitoring the details of a statutory delegation, courts can help prevent legislators from misrepresenting themselves to voters. Judges can encourage honest statutes by putting less weight on the fine details of the language, and more weight on the announced overall purpose of a statute when they interpret it. Although, unlike Professor Susan Rose-Ackerman, we are not persuaded that courts should invalidate statutes that lack clear statements of purpose, we agree with her that well-drafted purpose provisions serve useful purposes and should be encouraged by the courts.[59] These changes in public law are not as striking as a revival of the nondelegation doctrine might be, but they probably have more potential for making Congress more responsible. Thus, public choice may have some useful implications for public law theory, but as a basis for fundamental constitutional changes, the "information cost" theory has too many problems to be viable.

A third theory of congressional motivation avoids some of those problems, but only by relying on a dubious assumption about the preferences of

58. Wittman, *Why Democracies Produce Efficient Results*, 97 J. POL. ECON. 1395, 1402 (1989).

59. *See* Rose-Ackerman, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 352 (1988). One way that courts might encourage such purpose statements would be to refuse to consider unarticulated purposes when laws are subjected to "rational basis" review. Courts might also announce a policy of narrow construction of statutes that lack meaningful purpose sections.

Professor Rose-Ackerman also suggests that statutes should be reviewed for "budgetary" inconsistency by striking down statutes if Congress later failed to provide adequate funding. *Id.* at 353–54. Again, we are dubious about judicial enforcement. One beneficial result of Gramm-Rudman, however, may be to force greater accountability on Congress by requiring Congress to identify specific funding sources at the time a new program is passed. As the recent uproar over catastrophic care for the elderly indicates, requiring the use of identified tax sources can act as a serious discipline on Congress.

the contending groups. If interest groups are "risk accepting," they may like the idea of gambling on outcomes before the agency. Even if they are just as likely to lose as win, they may prefer to buy into an "administrative lottery" as opposed to having no legislative action at all. Legislators then make everyone happy by enacting a broad delegation of power.

The major problem with this theory is its dubious postulate. Why assume that interest groups are eager to gamble? Economists usually assume that consumers are risk averse. Risk aversion explains why people buy insurance: they are willing to pay additional premium to avoid the uncertain prospect of a severe financial loss. Consumer groups, being risk averse, should oppose broad delegations. Industry groups should be risk neutral. Stock prices should reflect a risk neutral appraisal of a firm's probable future earnings.[60] To the extent that corporations are managed to maximize the returns to shareholders, firms themselves will also behave as if they were risk free. All of this is a matter of elementary finance theory. If firms are risk neutral, and individuals are risk averse, where do the risk-seeking interest groups come from?[61]

These theories of delegation really come down to this: Most legislation is rent-seeking, therefore bad. If Congress isn't allowed to delegate, there will be less legislation, so society is better off.[62] As we saw in chapter 1, however, this is a questionable appraisal of the legislative process. The political process is not a simple contest between special interests to extract largess from the public at large. Instead, there is a significant public interest component. Moreover, the "rent-seeking" label is either purely descriptive or, if it is intended to carry normative weight, makes the questionable assumption that economic efficiency is the only standard for assessing legislation. In short, the arguments based on interest group theory merely rehash the general argument for enhanced judicial review of rent-seeking statutes.

Another line of argument against delegation is based on the other major strand of public choice theory. As we saw in chapter 2, legislative outcomes can be as much a product of legislative structures and procedures as of legis-

60. Any deviation from risk neutrality in the determination of share prices creates opportunities for arbitrage. For example, if a stock's price reflects risk acceptance by shareholders, they are paying a premium over the firm's probable earnings in order to gain the opportunity to gamble. On average, then, they will obtain a subnormal return on their investment; the stock's value will on average decline on the "morning after" when the gamble fails to pay off. Arbitragers can make a profit, then, by selling such stocks short. In an efficient capital market, such opportunities for arbitrage cannot endure.

61. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 405–13 (3d ed. 1986).

62. For a discussion of this strand of the delegation literature, see Pierce, *supra* note 54, at 497–99. Another argument for the delegation doctrine is that the framers designed the Constitution to "minimize the amount of lawmaking to which the public would be subjected." *See* Bruff, *Judicial Review and the President's Statutory Powers,* 68 VA. L. REV. 1, 28 (1982). (Bruff is not, nevertheless, enthusiastic about rekindling the delegation doctrine.)

lators' preferences. Structural constraints play a crucial role in disciplining what might otherwise be an unstable and capricious process. When the legislature delegates authority to an agency, however, the agency can "make law" without complying with the Constitution's procedural rules (passage by both Houses and signature by the President). Hence, Professor Macey argues, "the very existence of such agencies is a glaring contradiction of the carefully constructed lawmaking procedures articulated in article I [of the Constitution]."[63]

Macey's argument gathers some force from the *Chadha* decision, in which the Supreme Court struck down the legislative veto because it circumvented the article I procedures.[64] But there is a crucial difference between delegation and the legislative veto. When Congress delegates power, it pays an institutional price because power is shifted from Congress to an agency. It is unthinkable, for instance, that Congress would attempt to delegate all of its legislative authority to the President, since to do so would leave Congress impotent. Whether legislators are dedicated public servants or rapacious political hacks, they cannot expect much benefit from their offices if they give all their power away.[65] In contrast, the legislative veto increases Congressional power, and unless checked from outside, would be used without restraint.

Any exercise of "lawmaking" must follow the proscribed procedures in article I. But what is lawmaking? If lawmaking means "anything within the constitutional power of Congress," then Macey's argument proves too much. Congress passes a wide range of private bills, offering citizenship to particular individuals, augmenting pension rights, and conferring other benefits. If these activities are "lawmaking," then presumably only Congress can engage in them. Do all grants of citizenship, government pensions, and other benefits have to be individually provided through the legislative process, rather than being left to administrative agencies? Obviously not. No one believes that Congress is required to administer the social security system on its own. Obviously, some actions Congress could take on its own can nevertheless be delegated.

Thus, the article I legislative procedures must be mandatory only for some

63. Macey, *supra* note 53, at 514. *See also* Schoenbrod, *supra* note 54, at 1245–56.

64. *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983). The literature on *Chadha* is summarized in Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 MINN. L. REV. 1237 (1986). We do not find the Court's rationale in *Chadha* convincing. In chapter 5, we develop an alternative rationale, one that does not support Macey's thesis.

65. The distinction between self-aggrandizing congressional enactments and other statutes affecting the separation of power is stressed in the special prosecutor decision, Morrison v. Olson, 108 S. Ct. 2597, 2620–21 (1988), but was explored in earlier commentary. *See* Frickey, *supra* note 64, at 1273–76. *See also* Bowsher v. Synar, 478 U.S. 714, 753–59 (1986) (Stevens, J., concurring in the judgment).

narrower category of legislative activity, falling short of Congress's full legislative power. But where do we draw the line?

Public choice theory suggests no answer—or if anything, it suggests the wrong answer. Particularized decisions allow more permutations of results, thereby increasing the likelihood of cycling and the importance of institutional constraints. Generalized decisions, on the other hand, restrict the possible patterns of outcomes, so cycling is less likely and procedures are less important. Thus, the article I procedures would be most important for particularized decisions and the least so for basic policy determinations. On this theory, the more basic the policy decision, the less reason there is to worry about delegation!

Obviously, public choice theory gives us no help in distinguishing between proper and improper delegations. But this is the nub of the problem. Everyone can agree that Congress should not delegate excessive legislative power, but how much is excessive?

The most common example of improper delegation is the OSHA provision governing toxic chemicals in the workplace. This was the provision condemned by Chief Justice Rehnquist as a standardless delegation of authority.[66] But the statute actually sets rather clear standards. It does contain a general provision defining the agency's power to make rules "reasonably necessary or appropriate to provide safe or healthful employment or places of employment."[67] But the statute also contains a much more specific directive governing toxic chemicals. The toxics provision directs the agency to set the standard "which most adequately assures, to the extent feasible, that no employee will suffer material impairment of health or functional capacity."[68] Employee health is the first priority, with the burden on the employer a secondary consideration. True, the statute could have been even more specific in defining "feasibility," but Congress made an unmistakable policy decision to favor health over economics.

If this is too broad a delegation, as supporters of the delegation doctrine contend, the problem cannot be that Congress is ducking basic policy decisions. The critics must want Congress not only to make the basic policy decision, but also to draft detailed regulations providing numerical standards for various industries. Even assuming that this is feasible, it is hard to see why it would be more conducive to good government than the present legal framework. Once Congress has established a goal, the agency's rulemaking is constrained by the possibility of review in the courts under the Administrative Procedure Act. The agency is required to give a reasoned explanation for its decision based on an evidentiary record. Congress, on the

66. *See* text accompanying note 52 *supra*.
67. 29 U.S.C. § 652(8).
68. 29 U.S.C. § 655(b) (5).

other hand, need give no explanation at all. How would having Congress provide the numerical standards lead to more principled or deliberative decisionmaking, or reduce illicit rent-seeking? As we mentioned in chapter 1, a classic example of rent-seeking was the Smoot-Hawley tariff, in which the statute provided enough numerical certainty to satisfy the most dedicated opponent of delegation. The arduous task of developing the numbers was largely left to the industries themselves, which had a field day writing the statute.

Much of modern government is designed around the administrative agency. A world with a strong delegation doctrine would be a world that differed in many other respects from our own. Congress would be organized differently. States would have taken on different regulatory powers where the inability to delegate prevented congressional involvement. Congress might also have adopted nonregulatory methods such as tax incentives where the inability to delegate made direct regulation impractical. This hypothetical world might have been better than the one in which we actually live. But the transition costs of developing a new legal framework would be large, and the benefits uncertain.

In this chapter, we have seen several efforts, partially inspired by public choice theory, to dismantle the modern regulatory state. By protecting economic liberty, resurrecting states' rights, and banning broad administrative delegation, some scholars seek to undo much of the New Deal. Perhaps the New Deal was a bad idea, but there are severe limits on our ability to unscramble eggs.

Science fiction stories have been written on the "what if Lee had won at Gettysburg" theme; if more lawyers were science fiction fans, we might see novels about hypothetical worlds in which the 1937 "switch in time that saved Nine" never took place. What would such a world look like? Would there have been a constitutional amendment to validate the New Deal? Would the free market, left unmolested by government intervention, have turned the Great Depression into the Great Boom? Would alternate institutions have developed to deal with the nation's problems within the confines of the pre–New Deal judicial doctrines? For that matter, would the government have survived at all, and how would World War II have come out?

The one thing we do know is that none of these events took place. There *was* a "switch in time," and our governmental system has grown up around it. If public choice is ultimately the application of economic reasoning to politics, its ultimate counsel should be to avoid the pursuit of abstractions without a sharp eye on the resulting costs. The long-run effects of undoing the New Deal might be beneficial, but the transition costs would be enormous—and as Keynes said, in the long run we are all dead anyway.

We do not wish to be misunderstood as devaluing the contribution of public choice theory to public law. We think public choice can make a real, if

less dramatic, contribution to the legal system—not at the level of revolutionary new constitutional doctrines, but more modestly, by improving the implementation of existing statutes and the process for enacting future legislation. These form the topics of our final two chapters.