A New Approach to Delegation

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The non-delegation doctrine is almost a complete failure. It has not prevented the delegation of legislative power. Nor has it accomplished its later purpose of assuring that delegated power will be guided by meaningful standards. More importantly, it has failed to provide needed protection against unnecessary and uncontrolled discretionary power. The time has come for the courts to acknowledge that the non-delegation doctrine is unsatisfactory and to invent better ways to protect against arbitrary administrative power.

The non-delegation doctrine can and should be altered to turn it into an effective and useful judicial tool. Its purpose should no longer be either to prevent delegation of legislative power or to require meaningful statutory standards; its purpose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power. The focus should no longer be exclusively on standards; it should be on the totality of protections against arbitrariness, including both safeguards and standards. The key should no longer be statutory words; it should be the protections the administrators in fact provide, irrespective of what the statutes say or fail to say. The focus of judicial inquiries thus should shift from statutory standards to administrative safeguards and administrative standards. As soon as that shift is accomplished, the protections should grow beyond the non-delegation doctrine to a much broader requirement, judicially enforced, that as far as is practicable administrators must structure their discretionary power through appropriate safeguards and must confine and guide their discretionary power through standards, principles, and rules. The requirement should extend not only to delegated power but also to undelegated power, including especially the extremely important power of selective enforcement, which probably engenders more injustice than delegated power but which has always been almost altogether beyond the reach of the non-delegation doctrine and of all other judicial doctrine designed to prevent or check arbitrariness.

The proposed changes are sweeping ones, for they will involve the

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courts in new and difficult undertakings. But the proposals are deeply conservative in that they are designed to enlarge the judicial function of protecting private parties against injustice. In the entire legal and governmental system, the strongest need and the greatest promise for improving the quality of justice to individual parties are in the areas where decisions necessarily depend largely on discretion. In those areas the role of the courts has been deficient. The essence of the proposed changes is correction of the deficiency.

What follows is a discussion of (1) the failure of the non-delegation doctrine, (2) three recent cases of major administrative policy-making without meaningful statutory guidance, (3) why the non-delegation doctrine has failed, (4) judicial acquiescence in administrative exercise of ungranted power, without safeguards or standards, and in contravention of legislative intent, (5) how to alter the non-delegation doctrine to make it effective and useful, and (6) the future—non-delegation, due process, and common law.

I. The Failure of the Non-Delegation Doctrine

The original purpose of the non-delegation doctrine was to prevent the delegation of legislative power. As recently as 1932 the Supreme Court declared: "That the legislative power of Congress cannot be delegated is, of course, clear."[1] With only a little realism the Court could have said that for a century and a half it had been, of course, clear that legislative power of Congress could be delegated and that it often had been delegated. Delegated power was then being exercised throughout the government. What was shortly to become the huge Code of Federal Regulations was obviously a product of delegated legislative power.

The 1932 statement was an anachronistic statement of an earlier attitude. The later purpose, already well along in its life cycle, was to require meaningful standards when power was delegated: "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard."[2] The doctrine has clearly failed to accomplish this later purpose. For instance, when a lower court faithfully applied the Supreme Court's supposed requirement of meaningful standards to a statute which was wholly empty of standards even

1 United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932). This article does not undertake a systematic statement of the law of delegation. For that, see 1 K.C. Davis, Administrative Law Treatise ch. 2, §§ 2.01-.16 (1958, Supp. 1965). Beyond the scope of the present discussion is the combination of the non-delegation doctrine with other principles, such as those growing out of the first amendment, as in Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

2 United States v. Chicago, Mil., St. P. & P.R.R., 282 U.S. 311, 324 (1931).

though administrators were imposing a death sentence on a sizable business, the Supreme Court reversed, *without pretending to find statutory standards.*[3] The Supreme Court apparently knew that an insistence upon meaningful statutory standards was no longer feasible.

II. Three Recent Cases of Major Administrative Policy-Making Without Meaningful Statutory Guidance

The failure of the non-delegation doctrine can best be seen in cases that do not directly deal with delegation problems. *Major* governmental policy is often administratively made without significant statutory guidance. Perhaps three hundred cases could be summarized to show the existence of this phenomenon. Three outstanding ones have been selected, each of which shows exercise of regulatory power over a vital subject matter of large dimensions, even though Congress at the time of the enactment knew nothing of the subject and could have had no intent of any kind with respect to it. In each of the three cases the whole policy of the government on the particular subject was made by the agency without guidance from Congress.

The three cases are *United States v. Southwestern Cable Co.*,[4] upholding the Federal Communications Commission's CATV regulations, *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway*,[5] upholding the Interstate Commerce Commission's "piggyback" regulations, and *Permian Basin Area Rate Cases*,[6] upholding the Federal Power Commission's area price fixing for natural gas.

The *Southwestern Cable* case upheld the FCC's regulation of CATV

3 Fahey v. Mallonee, 332 U.S. 245 (1947), *rev'g* 68 F. Supp. 418 (S.D. Cal. 1946). Even at an early time, delegations without standards were sustained. St. Louis, Iron Mountain & S. Ry. v. Taylor, 210 U.S. 281 (1908); McKinley v. United States, 249 U.S. 397 (1919). The Immigration and Nationality Act contains scores of delegations of discretionary power, most of them without standards of any kind. 8 U.S.C. §§ 1101-1503 (1964). So do many other statutes.

An argument that the non-delegation doctrine must be deemed successful because nearly all delegations are in fact accompanied by standards or clarification of legislative purpose is unconvincing because the reason that legislative bodies usually state standards or clarify their purpose is that they choose to govern to that extent, not that the non-delegation doctrine so requires. The test of success or failure of the non-delegation doctrine is what happens when the legislative body is unable or unwilling to state standards or to clarify its purpose.

For an excellent presentation of the view, here rejected, that presence or absence of standards is and should be the crucial consideration on all problems of delegation, see Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 Neb. L. Rev. 469 (1968).

4 392 U.S. 157 (1968).

5 387 U.S. 397 (1967).

6 390 U.S. 747 (1968).

(community antenna television), which did not exist when the Communications Act was enacted in 1934. The Commission during the early period of CATV took the position that it had no power to regulate it, and unsuccessfully sought a congressional grant of authority. Then, beginning in 1960, it gradually asserted authority to regulate, and it finally issued elaborate rules, pursuant to which it issued an order restricting expansion of a particular CATV service. The Ninth Circuit struck down the order on the ground that the Commission lacked authority to regulate CATV, but the Supreme Court unanimously reversed. The Court found the necessary authority in a provision that the Act was applicable to "all interstate and foreign communication by wire or radio,"[7] and in a requirement that the Commission endeavor to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service,"[8] even though the Court granted that "Certainly Congress could not in 1934 have foreseen the development of community antenna television systems."[9]

Addressing itself to the scope of the Commission's authority, the Court said the authority to regulate CATV was "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.' 47 U. S. C. § 303(r)."[10]

The reality seems abundantly clear that the Commission has power to regulate CATV in any reasonable way it finds to be in the public interest. The resulting law stems from the Commission, not from Congress and not from the courts, except that congressional committees may supervise and the courts may keep the Commission within constitutional and statutory limitations. The congressional power has been effectively delegated to the Commission, without meaningful standards.

A half-hearted argument by Southwestern Cable that "the attempted delegation is unconstitutional for lack of standards"[11] was not even mentioned by the Court. The argument apparently was deemed so lacking in merit as not even to deserve a judicial statement that it was rejected.

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7 392 U.S. at 167.

8 *Id.*

9 *Id.* at 172.

10 *Id.* at 178.

11 Brief for Respondents at 36, 392 U.S. 157.

The *American Trucking* case dealt with the ICC's regulation of the "piggyback" system (trailer on flatcar). The Commission's policy for twenty-five years had been to interpret the Interstate Commerce Act and Motor Carrier Act as withholding power to require railroads to carry the trailers or containers of their competitors, the motor carriers. During that period the ICC unsuccessfully sought authorization from Congress so to require. Then the Commission assumed the necessary power and issued comprehensive rules. The Court held, with seemingly the greatest of ease, that the Commission had the necessary authority, including the authority to change its position. The Court declared that "we agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice."[12]

Of course, Congress had not laid down meaningful standards to guide the regulation of "piggyback" service, for Congress had not even dealt with that subject. But the Court held that the National Transportation Policy was "the yardstick by which the correctness of the Commission's actions will be measured."[13] The result is that the system must be "fair and impartial"[14] and must be "adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."[15] Within that exceedingly broad framework, the whole policy with respect to "piggyback" service has to come from the Commission, not at all from the statutes.

The *Permian Basin* case is even more impressive in showing that the most vital administrative determinations may be made without meaningful statutory guidance. From the time the Natural Gas Act was enacted in 1938, the Federal Power Commission assumed that it had no authority to regulate sales by independent producers to interstate pipelines. But the Supreme Court held in *Phillips Petroleum Co. v. Wisconsin*,[16] that the Commission had such authority, and the Commission then tried to regulate under what the Court in the *Permian* opinion called "an ill-suited statute."[17] The traditional system of regulation of individual companies under a costs-of-service standard proved unworkable. Then, with no statutory guides other than the term "just and reasonable," the Commission in 1960 started a program of fixing maximum rates for each of the major producing areas. The statute contained

12 387 U.S. at 416.
13 *Id.* at 421.
14 *Id.*
15 *Id.*
16 347 U.S. 672 (1954).
17 390 U.S. at 756.

nothing about area rate fixing. The entire system had to be created by the Commission. The Court held that area rate fixing was not inconsistent with the statute, that it was constitutional, that the rate structure adopted by the Commission was valid, and that the Commission's action was valid in other challenged particulars. The Court sensibly emphasized that "the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties."[18] The Court even explicitly acknowledged that "neither law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders."[19] The Court went on to create its own law as to the criteria for review—whether the Commission abused or exceeded its authority, whether each of the order's essential elements was supported by substantial evidence, and "whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable."[20] If the statute lacks the criteria for area rate regulation, the Commission must invent them, and the Court will then invent the guides for judicial review of what the Commission establishes! Despite the silence of the statute on issue after issue, the Court's 101-page opinion is filled with such conclusions as "we are constrained to hold that this was a permissible exercise of the Commission's discretion."[21]

The basic approach of the Court was to make the overall judgment that Congress intended comprehensive regulation of natural gas, and then to reason from that judgment to the conclusion that area rate regulation must have been authorized. This approach became explicit on one point when the Court declared: "We are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes."[22] That this proposition reaches beyond the natural gas field is shown by the Court's quotation of it in its *Southwestern Cable* opinion to sustain the CATV regulations.[23] Essentially the same thought was expressed in the "piggyback" case: "In the absence of congressional direction, there is no basis for denying to the

18 *Id.* at 790.
19 *Id.*
20 *Id.* at 792.
21 *Id.* at 798.
22 *Id.* at 780.
23 392 U.S. at 177.

ICC the power to allocate and regulate transportation that partakes of both elements [rail and truck] . . . ."[24]

Of course, even though in each of the three cases no power over the specific subject matter had been expressly delegated, and even though no meaningful standards were applicable to the specific subject matter in any of the three instances, still the established framework of regularized procedural protections and judicial review was necessarily a major force in each of the three cases. Within such a framework, the exercise of delegated power on vital subjects without meaningful standards may be good government. At all events, the Supreme Court shows very clearly that it thinks it is.

III. Why the Non-Delegation Doctrine Has Failed

The original objective of preventing the delegation of legislative power and the later objective of requiring every delegation to be accompanied by meaningful statutory standards had to fail, should have failed, and did fail.

The courts should never have aimed at either objective. Not only is delegation without meaningful standards a necessity for today's governments at all levels but such delegation has been deemed a necessity from the time the United States was founded, as anyone can quickly confirm by examining the statutes enacted by the 1st Congress, which was made up largely of the same men who wrote the Constitution. The 1st Congress did not bother with standards when it delegated to the courts the power "to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States,"[25] when it delegated to district courts power to impose "whipping, not exceeding thirty stripes," without a guiding standard,[26] when it provided for military pensions "under such regulations as the President of the United States may direct,"[27] when it authorized the President to fix the pay, not more than prescribed maxima, for military personnel wounded or disabled in the line of duty,[28] when it conferred discretionary power upon the Secretary of the Treasury to mitigate or remit fines and forfeitures in designated circumstances, without requiring him to mitigate or remit.[29] Nor did the 1st Congress define the

24 387 U.S. at 421.

25 Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

26 *Id.* at 77.

27 Act of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95.

28 Act of April 30, 1790, ch. 10, § 11, 1 Stat. 119, 121.

29 Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 123.

word "proper" in authorizing superintendents to license "any proper person" to engage in trade or intercourse with the Indian tribes; it provided no standard to guide the President in providing that such superintendents "shall be governed in all things touching the said trade and intercourse, by such rules and regulations as the President shall prescribe."[30]

Of course, today's governmental undertakings are much more complex and the need for delegated power without meaningful standards is much more compelling. A modern regulatory agency would probably be an impossibility if power could not be delegated with vague standards. Typically, a regulatory agency must decide many *major* questions that could not have been anticipated at the time of the statutory enactment; typically, legislators are unable to write meaningful standards that will be helpful in answering such major questions; and typically, the protections lie much less in standards than in frameworks of procedural safeguards plus executive, legislative, or judicial checks.

The main facts about any regulatory agency can be used to illustrate what has just been said. Let us choose the Civil Aeronautics Act of 1938, as modified by the Federal Aviation Act of 1958.[31] Congress left open the fundamental problem of the extent to which competition should be allowed or required, by directing the Board to "consider," among other items, "competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."[32] The statutory words did not answer the question whether or when to allow monopoly, whether or when to certificate two carriers for one route, or whether or when to certificate more than two.

Congress also left open many other *major* questions of policy. A mere listing of samples of such questions will show how much discretionary power was necessarily conferred upon the Board: Of the eleven domestic trunklines, the big four at first had about 70 per cent of the business; should they be further strengthened or should the smaller trunklines be strengthened? Should new trunklines be allowed entry, or should all major routes be divided among the existing eleven? Should trunklines be allowed to provide local service? Should they be required to? Should the Board compel service which a carrier does not voluntarily provide? Should local-service lines be allowed to compete with trunklines? Should the service of local-service lines and of trunk-

30 Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137.

31 49 U.S.C. §§ 1301-1542 (1964).

32 *Id.* § 1302(a).

lines be kept separate or should it be mixed? Should certificates for local-service lines be for limited periods only or should they be permanent? Should all-cargo carriers be certificated to compete with the trunklines which carry cargo? Should all-cargo carriers be eligible for subsidies? Should they be authorized to carry mail? Should the all-cargo carriers have the exclusive right to sell "blocked space" (reduced rates for specified space for designated periods)? Should nonscheduled carriers be exempt from regulation? Can an unregulated system of nonscheduled carriers be made compatible with a regulated system of scheduled carriers? What activities should be classified as nonscheduled? What consolidations, mergers, and acquisitions of control are "consistent with the public interest"? What are the factors that should determine what transfers of certificates of convenience and necessity are in the public interest? In the statutory system of basing air mail pay on "need" of the carrier, does a carrier's profit from sale of a route reduce its "need"? Does profit from nontransportation service reduce a carrier's "need"? In finding "need," what rate of return on investment should be allowed? To what extent may mail pay rates be made retroactive? Should mail rates be of two kinds—a rate based on "need," and a rate based on cost of service when subsidy is inappropriate? When two or more carriers of mail between two cities have different rates, may the Post Office Department allocate mail to the carrier whose rates are lowest, or must the Board make the mail rates the same for carriers whose "need" differs? May the Board fix mail rates for classes of carriers or must the rates be fixed for each carrier separately? In what circumstances should the Board fix minimum rates to check competition which causes operating losses? When may promotional or developmental rates below the cost of service be justified? Should the rate base be actual investment or cost of reproduction? Should the rate of return be the same for fixing mail pay as for fixing fares? Can fares be varied so as to stabilize annual earnings? If the fare level is fixed on the basis of earnings of the whole industry, should high-cost carriers receive mail subsidies or should they raise fares on noncompetitive lines above the industry level?

The foregoing questions do seem to involve *major* policy. Yet Congress in the statute gave no clear answer to any of these questions. Statutory provisions and legislative history have some bearing on many of the questions but in no instance enough to foreclose administrative discretion.

The reason for committing *major* policy questions to the Board's discretion was that someone had to answer them, the courts were ill-equipped to do so, and Congress was neither equipped nor willing. A

statute requiring judges to make regulatory policies would probably unconstitutionally violate the principle of separation of powers. Although Congress could not conceivably anticipate all the major policy questions, it could conceivably legislate on each question as it arose. But Congress has neither time nor inclination for that. As for time, Congress during 1938 enacted public laws filling 1,258 pages of the statutes at large, and the provisions on air carrier economic regulation fill only 18 pages; Congress or its committees considered ten or twenty times as much proposed legislation that was not enacted. As for inclination, should any authority other than the electorate try to require Congress to legislate in greater detail than it is inclined to? The degree of delegation should depend upon legislative appraisals of the need for delegation and of comparative qualifications of legislators and administrators. Even the Internal Revenue Code, said to be our most detailed federal legislation, contains more than a thousand express delegations, and through vague or inadequate language perhaps thousands more.

Staffs attached to committees of Congress could conceivably do all that the CAB and its staff now do, and everything that is done could be put through the legislative mill, so that all policies would be determined by statutory enactments. Even if such a system were feasible for one or a few fields of governmental activity, it could not be feasible for all. An individual congressman could not possibly follow even the general nature of more than a tiny portion of all the discretionary action now taken by more than 2,500,000 federal civilian employees.

IV. Judicial Acquiescence in Administrative Exercise of Ungranted Power, Without Safeguards or Standards, and in Contravention of Legislative Intent

Extremely incongruous is the non-delegation doctrine when placed alongside a dominant feature of the American legal system—the prevalence of the ungranted and usually uncontrolled power of selective enforcement. The courts keep repeating and repeating that the exercise of delegated power must be guided by meaningful safeguards even when the delegated power is carefully circumscribed and even when the intent to delegate is based upon a fully-considered judgment that the delegation is necessary and desirable, but at the same time the same courts acquiesce in the assumption by police, prosecutors, regulatory agencies, licensing agencies, and other administrators of the enormous power of selective enforcement, which is (a) not only unguided by statutory standards but often exercised in direct violation of clearly expressed legislative intent, (b) typically unguided even by

administrative standards, (c) typically unprotected by procedural safeguards, (d) typically exercised by subordinate officers with little or no supervision, and (e) typically immune to judicial review even when denial of equal justice can be readily shown.

The discretionary power to enforce or not to enforce is one of the most crucial powers of all, even though it is typically unprotected either by standards or by safeguards or by judicial review. When the evidence against a potential respondent is clear, the choice of the enforcement officer to act or not to act may be the only one that counts, because a decision to enforce may almost automatically lead to application of sanctions, and a decision not to enforce is likely to be final for it is likely to be neither administratively nor judicially reviewable.

Yet the discretionary power to enforce or not to enforce seems to be of little or no concern to the courts, which characteristically acquiesce when a prosecutor fully enforces one statute, never enforces a second statute, and picks and chooses in enforcing a third. The courts have no concern for either standards or safeguards when such agencies as the Antitrust Division and the Federal Trade Commission enforce some facets of the antitrust laws but not others; they may even prosecute for slight violations and let the serious ones go. No requirement of standards or of safeguards or of equal justice prevents the Antitrust Division from moving against one conglomerate because of its reciprocity power and undue concentration, while doing nothing about a half-dozen much larger conglomerates with greater reciprocity power and more concentration. And the courts even seem to be indifferent to the denial of equal protection when the police capriciously arrest one out of six violators, even if he can prove that he is the one of the six who is least deserving of arrest.

Such power to enforce or not to enforce is not limited to prosecutors and police. A state public service commission or a federal regulatory agency may institute a proceeding against Company X for a rate reduction but not against Company Y, and the crucial determination may be protected neither by standards nor by safeguards. Similarly, a licensing agency may reprimand a big violator but institute revocation proceedings against a small one. A public housing manager may overlook offenses by some tenants but quickly move to evict others. Administrators of many other kinds exercise the largely unnecessary and mostly uncontrolled power of selective enforcement.

The kind of injustice that is easiest to identify as injustice may be unequal treatment of like cases, or treatment of one whose offense is greater more favorably than one whose offense is less. For instance, if A is much more deserving of prosecution than B, if carrying out the

legislative will clearly requires the prosecution of A, and if equal justice is flagrantly violated by prosecuting B and letting A go, the prosecuting agencies, under the established system in which the courts customarily acquiesce, are nevertheless typically free to prosecute B but not A. The failure to prosecute A is not a defense in B's case, even if the denial of equal justice is flagrant, even if it is motivated by political or personal or other ulterior influence, and even if the failure to prosecute A is in direct contravention of what the legislative body clearly intended. Typically, the discretionary determination to prosecute B but not A is unguided by standards and unprotected by safeguards, and yet it is almost always judicially unreviewable.[33] Neither the non-delegation doctrine nor any other doctrine will help B, even though the power has been arbitrarily exercised, even though B has been denied equal justice, even though no statutory or other standards guide the determination to prosecute B but not A, and even though the discretionary determination is wholly unprotected by procedural or other safeguards.

What a queer system in which (a) the judges in hundreds of opinions keep paying lip service to the proposition that delegations of power are unlawful unless guided by meaningful statutory standards and (b) at the same time enforcement officers of many kinds at all levels freely exercise an ungranted discretionary power to move against those who are less deserving of prosecution and to do nothing about those who are more deserving of prosecution, even when the discretionary power is unguided by statutory or other standards and directly violates clearly expressed legislative intent. More sensible would be a system that in both respects would be exactly the opposite—allowing delegations without meaningful statutory standards, but disallowing the unguided and unchecked power of selective enforcement. Still more sensible would be a system designed for proper control of all discretionary power.

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[33] Systematic discrimination, if it can be shown, may be a ground for review. Yick Wo v. Hopkins, 118 U.S. 356 (1886). But capricious action is not enough. *Cf.* Edelman v. California, 344 U.S. 357 (1953). *See* W. LAFAVE, ARREST 161-3 (1965); Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961) (containing a good collection of authorities and a skillful analysis).

Decisions to prosecute or not to prosecute are almost always unreviewable. *See, e.g.*, Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967). Of course, a judicial trial is an acceptance of a prosecutor's decision to prosecute, not a review of it. A rare case of review of a decision to prosecute is Universal-Rundle Corp. v. FTC, 352 F.2d 831 (7th Cir. 1965), *rev'd on other grounds*, 387 U.S. 244 (1967); another such highly exceptional case, emphasizing the tradition, is People v. Walker, 14 N.Y.2d 901, 252 N.Y.S.2d 96, 200 N.E.2d 779 (1964), *conviction rev'd*, 50 Misc. 2d 751, 271 N.Y.S.2d 447 (Sup. Ct. 1966).

For an argument that prosecutors' decisions should be judicially reviewable, see K.C. DAVIS, DISCRETIONARY JUSTICE 207-14 (1969).

The foundations of the system into which we have drifted are much in need of reexamination.

V. How to Alter the Non-Delegation Doctrine to Make It Effective and Useful

Five principal steps should be taken to alter the non-delegation doctrine and to move toward a system of judicial protection against unnecessary and uncontrolled discretionary power: (a) the purpose of the non-delegation doctrine should no longer be either to prevent delegation or to require meaningful statutory standards; the purpose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power; (b) the exclusive focus on standards should be shifted to an emphasis more on safeguards than on standards; (c) when legislative bodies have failed to provide standards, the courts should not hold the delegation unlawful but should require that the administrators must as rapidly as feasible supply the standards; (d) the non-delegation doctrine should gradually grow into a broad requirement extending beyond the subject of delegation—that officers with discretionary power must do about as much as feasible to structure their discretion through appropriate safeguards and to confine and guide their discretion through standards, principles, and rules; (e) the protection should reach not merely delegated power but also such undelegated power as that of selective enforcement. Each of these five proposals will now be elaborated.

(a) The basic purpose of the traditional non-delegation doctrine is unsatisfactory and should be changed. It should no longer be either to prevent delegation of legislative power or to require meaningful statutory standards. The purpose should be to do what can be done through such a doctrine *to protect private parties against injustice on account of unnecessary and uncontrolled discretionary power.*

Looking backwards, one may appreciate an observation by the Supreme Court in 1825 in an opinion by Chief Justice Marshall:

> Congress may certainly delegate . . . powers which the legislature may rightfully exercise itself. . . . The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[34]

The most important questions are for the legislature, and its purpose

[34] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

must be discernible either through what it says or from the nature of the subject and circumstances, but when those requirements are satisfied, delegation is permissible, says the 1825 Court. That formulation may be sounder than what has come later—the overworked notion that in any and all delegations some "standards" must be stated.

The purpose spun in recent opinions is unfortunate both in what it attempts and in what it fails to attempt. The courts should assert that legislative bodies do and should delegate, not that they are forbidden to. They should assert that putting the content of the Code of Federal Regulations through the congressional enacting process would mean worse government, not better government, because Congress is and should be geared to major policies and main outlines, and administrators are better able to legislate the relative details, sometimes including even major policy determinations. The courts should recognize that administrative legislation through the superb rule-making procedure marked out by the Administrative Procedure Act often provides better protection to private interests than congressional enactment of detail.

Affirmatively, the courts need to do much more than they have been doing through the non-delegation doctrine to provide protection against arbitrariness. This observation will be fully implemented in the ensuing discussion.

(b) Safeguards are usually more important than standards, although both may be important. The criterion for determining the validity of a delegation should be the totality of the protection against arbitrariness, not just the one strand having to do with statutory standards.

For instance, a delegation *without standards* of power to make rules in accordance with proper rule-making procedure and a delegation *without standards* of power to work out policy through case-to-case adjudication based on trial-type hearings should normally be sustained, whenever the general legislative purpose is discernible. The risk of arbitrary or unjust action is much greater from informal discretionary action, but even there the protection from safeguards is likely to be more effective than protection from standards. For instance, if one administrator in exercising discretionary power without hearings uses a system of open findings, open reasons, and open precedents, but another who is also acting without hearings never states findings or reasons and never uses precedents as a guide, the delegation to the first administrator is much more deserving of judicial support than the delegation to the second.

During the past decade the courts have been moving toward the use of safeguards and away from the use of standards as the test for valid-

ity of delegations. This movement seems to stem from a 1958 analysis of the law of delegation, emphasizing procedural safeguards rather than standards.[35] One of the earliest cases to use the new approach was *Warren v. Marion County*,[36] asserting without qualification:

> There is no constitutional requirement that all delegation of legislative power must be accompanied by a statement of standards circumscribing its exercise. It is true that a contrary view has frequently been expressed in the adjudicated cases, particularly the earlier ones, but the position taken in such cases is not defensible. It is now apparent that the requirement of expressed standards has, in most instances, been little more than a judicial fetish for legislative language, the recitation of which provides no additional safeguards to persons affected by the exercise of the delegated authority. . . . As pointed out in Davis on Administrative Law, the important consideration is not whether the statute delegating the power expresses *standards*, but whether the procedure established for the exercise of the power furnishes adequate *safeguards* to those who are affected by the administrative action.[37]

A good many state courts have been following that lead in emphasizing safeguards instead of standards.[38] One basic need of the non-

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35 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.08, 2.15 (1958).

36 222 Ore. 307, 353 P.2d 257 (1960).

37 *Id.* at 313-4, 353 P.2d at 261.

38 A few examples: The California Supreme Court has emphasized that the need is usually for safeguards rather than for standards, but the opinion also contains a good deal of unrealism, such as the statement that legislative power "is vested exclusively in the legislature, and cannot be delegated by it." Kugler v. Yocum, — Cal. 2d —, 445 P.2d 303, 306, 71 Cal. Rptr. 687, 690 (1968). Upholding a delegation, the Iowa court declared: "We have always held to the adequate standards or guidelines test . . . but we agree the presence or absence of procedural safeguards is important . . . ." Elk Run Tel. Co. v. Gen. Tel. Co., — Iowa —, 160 N.W.2d 311, 317 (1968). In Butler v. United Cerebral Palsy, Inc., 352 S.W.2d 203 (Ky. 1961), a statute with no standards authorizing establishment and operation of schools for "exceptional children" was sustained, on the basis of what the court called an examination "in terms of safeguards against abuse and injustice." *Id.* at 208. The holding was relied upon in sustaining a statute without standards delegating authority to grant or refuse permission "to place or receive a child" for adoption. Commonwealth v. Lorenz, 407 S.W.2d 699 (Ky. 1966). A New Jersey court found standards adequate and then declared: "Additionally, a defendant has the benefit of adequate procedural safeguards. It has been said that standards are not as important as are procedural safeguards and outside checks upon discretionary power." The court went on to analyze the safeguards. Dep't of Health v. Owens-Corning Fiberglas Corp., 100 N.J. Super. 366, 385, 242 A.2d 21, 31 (Super. Ct. 1968). The court emphasized "presence or absence of procedural safeguard" in upholding a delegation in Schmidt v. Dep't of Resource Dev., 39 Wis. 2d 46, 58, 158 N.W.2d 306, 313 (1968).

Sustaining a standard as adequate, a federal court realistically said that "The Constitution does not prohibit delegation. . . . [I]t would be impossible for Congress to determine beforehand those drugs to which it wishes a particular policy to be applied

delegation doctrine is for further spread of this movement. What is needed is not simply a substitution of a requirement of safeguards for a requirement of standards but a consideration of both safeguards and standards in order to determine whether the total protection against arbitrary power is adequate.

(c) The crucial consideration is not what the statute says but what the administrators do. The safeguards that count are the ones the administrators use, not the ones mentioned in the statute. The standards that matter are the ones that guide the administrative determination, not merely the ones stated by the legislative body. The test should accordingly be *administrative* safeguards and standards, not *statutory* safeguards and standards.[39]

Accordingly, the proposal has recently been advanced that "the courts should continue their requirement of meaningful standards, except that when the legislative body fails to prescribe the required standards the administrators should be allowed to satisfy the requirement by prescribing them within a reasonable time."[40]

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and to formulate specific rules for each situation," and that "Another suggested approach, perhaps a similar one, is that the validity of delegation be tested more on the basis of safeguards rather than standards." Iske v. United States, 396 F.2d 28, 31 (10th Cir. 1968).

39 A recent Illinois decision, Chicago v. Pennsylvania R.R., 41 Ill. 2d 245, 242 N.E.2d 152 (1968), is a good one for illustrative purposes. The statute prohibited signs or billboards on any state highway "other than as may be directed by the authority having jurisdiction over such highway." ILL. REV. STAT. ch. 121, § 9-112 (1965). The authority with such jurisdiction was the City of Chicago. Speaking of "a naked grant of discretionary power unaccompanied by any standards," 41 Ill. 2d at 254, 242 N.E.2d at 156, the court held the statute "an impermissible delegation of legislative authority." *Id.* at 256, 242 N.E.2d at 157. The result is that the legislative intent to prohibit signs on highways was thwarted until the legislature could act again. Should not the court have saved the statute and at the same time have protected against arbitrary exercise of the delegated power? The court might have held that power of city officers, unguided either by statutory standards or by their own announced standards or rules, is impermissible, but that if officers do about as much as they feasibly can do in adopting standards or rules to guide determinations in particular cases, that is all that is required. The subject matter the legislature has intended to regulate thus would not go unregulated, but at the same time affected parties would be protected against what the court called "arbitrary power to make exceptions." *Id.* at 252, 242 N.E.2d at 156.

Whatever awkwardness might be involved in disposing of the specific case along the line suggested would usually be avoided as soon as the law would become clear that the court would allow either the legislative body or the administrators to supply the required standards. Any administrator, threatened with a challenge on the ground of invalid delegation, would normally supply the required standards before the court so orders. As soon as the new system would become fully operative, all the significant interests would be amply protected: The legislative body would not be required to write standards it is ill-prepared and disinclined to write; the standards or rules would be formulated by the administrators, under threat of judicial compulsion; private parties would be protected from arbitrary action which can and should be guided by standards; and normally litigation to produce these desirable results would be unnecessary.

40 K.C. DAVIS, DISCRETIONARY JUSTICE 58 (1969) (italics in original omitted).

When an administrator is making a discretionary determination affecting a private party, standards which have been adopted through administrative rule-making are just as effective in confining and guiding the discretionary determination as would be standards stated in the statute. They are not only as effective but in one important aspect they are better. The weakness of a judicial requirement of *statutory* standards is that legislators are often unable or unwilling to supply them. The strength of a judicial requirement of *administrative* standards is that, with the right kind of judicial prodding, the administrators can be expected to supply them. To the extent that the objective is to require standards to guide discretionary determinations in cases affecting particular parties, that objective can be better attained through judicial insistence that administrators create the standards through rule-making than by judicial insistence upon statutory standards. Legislative bodies should clarify their purposes to the extent that they are able and willing to do so, but when they choose to delegate without standards, the courts should uphold the delegation whenever the needed standards to guide particular determinations have been supplied through administrative rules or policy statements.[41]

(d) Another strength in the idea that the courts should require administrative standards whenever statutory standards are inadequate is that the idea opens the way for courts to give more attention to the manner in which administrators confine and structure their discretionary power. The requirement of administrative standards will and should naturally grow into a somewhat larger requirement—that administrators must do what they reasonably can do to develop and to make known the needed confinements of their discretionary power through not only standards but also principles and rules. In other words, the non-delegation doctrine will evolve into a broad system of judicial protection against unnecessary and uncontrolled discretionary power. The judicial undertaking will be a large and difficult one, but the courts have often accepted other such self-assigned tasks and have seen them through.

(e) Shifting the non-delegation doctrine to a judicially-enforced requirement that administrators must do what they reasonably can do to develop and to make known the needed confinements of their discretionary power through standards, principles, and rules, as well as

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41 A provocative idea is that a legislative body may properly choose to delegate discretionary power to one agency, to be exercised in conformity with standards and procedures to be prescribed by a second agency. Somewhat more complex is a federal statute along this line, providing that the Water Resources Council "shall establish . . . principles, standards and procedures for Federal participants in the preparation of comprehensive regional or river basin plans . . ." National Water Commission Act, 42 U.S.C. § 1962a-2 (Supp. IV, 1969).

to structure their power through procedural safeguards, will open the way for a judicial requirement that will reach not only delegations of power but also assumptions of undelegated power, including especially the enormous power of selective enforcement.

In broad perspective, the American legal system has become one in which courts usually strive to protect citizens against injustice at the hands of any public officers except enforcement officers. No one has planned the exception. No one would. It is the product of long-term drift. Injustice at the hands of *any* public officer should be subject to judicial correction, whenever the issues are appropriate for judicial determination. This means, more specifically, that injustice from police, prosecutors, regulatory agencies, licensing agencies, and any other administrators in the exercise of initiating and prosecuting powers should be subject to judicial correction.

The ideal of "equal justice under law" can and should be extended to the initiating and prosecuting functions, so as to correct an outstanding flaw in the basic system of American justice.

VI. The Future—Non-Delegation, Due Process, and Common Law

As the courts shift the non-delegation doctrine from a requirement of statutory standards to a requirement of administrative standards and safeguards, then shift further to a broad requirement that administrators do what they reasonably can do to structure and confine their discretionary powers through safeguards, standards, principles, and rules, and as that requirement in turn is extended to apply to the huge powers of initiating and prosecuting, including selective enforcement, what has started out as a non-delegation doctrine will grow into something that will reach well beyond delegation. The non-delegation doctrine will merge with the concept of due process and may perhaps move from a constitutional base to a common-law base.

Although what has just been suggested may seem to involve more imagination than facts, the basic movement has already begun. Some courts have already ignored the absence of statutory standards and have held that due process forbids the administrators to exercise their discretionary power in particular cases without first creating administrative standards or guides. The further development of this idea seems inevitable, because as soon as it is understood, it has strong appeal.

Let us examine three illustrative cases. The outstanding one is *Holmes v. New York City Housing Authority*.[42] The Authority re-

[42] 398 F.2d 262 (2d Cir. 1968).

ceived 90,000 applications annually but could admit only 10,000 families to public housing. Except for some preference candidates, "Applications . . . are not processed chronologically, or in accordance with ascertainable standards, or in any other reasonable and systematic manner."[43] Each application expired after two years, a renewed application stood no better than a first application of the same date, no open waiting list was used, determinations of ineligibility were not made known to applicants, and many applications were never considered by the Authority. The complaint charged that "these procedural defects increase the likelihood of favoritism, partiality, and arbitrariness."[44] The court held that "due process requires that selections among applicants be made in accordance with 'ascertainable standards,' . . . and, in cases where many candidates are equally qualified under these standards, that further selections be made in some reasonable manner such as 'by lot or on the basis of the chronological order of application.' "[45]

Although the *Holmes* opinion was quite properly written in terms of due process, it could also have been properly written in terms of a non-delegation doctrine. Either way, the key factor is not the failure of the statute to control or guide the determination of which applications to grant or deny; the key factor is the *administrative* failure to control or guide that determination. The court's assumption was entirely sound that absence of either a substantive or a procedural system in the statutory framework would be permissible if the administrators provided such a system. So the court might properly have held that the delegation was unlawful unless or until the requisite procedural and substantive system was worked out through administrative action.

An earlier case—a rather important one—was *Hornsby v. Allen*.[46] The suit was for deprivation of civil rights under 28 U.S.C.A. § 2201, on the ground that the mayor and aldermen of Atlanta had denied an application for a liquor license on the basis of "a system of ward courtesy"[47] under which licenses were granted only upon approval of one or more aldermen of the ward. The court declared: "The public has the right to expect its officers to observe prescribed standards and to

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43 *Id.* at 264.

44 *Id.*

45 *Id.* at 265.

46 326 F.2d 605 (5th Cir. 1964). A still earlier case is United States v. Atkins, 323 F.2d 733, 742 (5th Cir. 1963): "The testimony of the Registrars reveals that they have no set standard for the 'grading' of questionnaires. . . . The Board [of Registrars] . . . must adopt uniform objective standards."

47 326 F.2d at 607.

make adjudications on the basis of merit. . . . [A]bsolute and uncontrolled discretion invites abuse."[48] The idea comes out quite clearly that the standards may come from the officers and need not come from the ordinance. The court repeated this important idea when it made the vital assertion that the guides may be in rules and regulations: "If there are too many qualified applicants, then the proper remedy is for the Board of Aldermen to adopt reasonable rules and regulations which will raise the standards of eligibility or fix limits on the number of licenses which may be issued in an area; the solution is not to make arbitrary selections among those qualified. . . . If it develops that no ascertainable standards have been established by the Board of Aldermen by which an applicant can intelligently seek to qualify for a license, then the court must enjoin the denial of licenses under the prevailing system and until a legal standard is established and procedural due process provided in the liquor store licensing field."[49]

Again, although the court was thinking in terms of due process, it might properly have held the delegation unlawful unless rules and regulations supplied the standards of eligibility. Due process and nondelegation seem to merge.

Another such case—an especially good one—is *Smith v. Ladner*.[50] A statute conferred on the Governor absolute power, with no guides or standards, to grant or deny non-profit corporate charters. Instead of holding that the statutory delegation of what the court properly called "absolute and arbitrary discretion"[51] was valid, and instead of holding that it was invalid for lack of either safeguards or standards, the court granted relief on the ground that "neither the statute nor any administrative regulation provides any constitutionally sufficient procedure for the denial of charters."[52] The clear implication is that an administrative regulation establishing procedural safeguards and providing standards to guide discretion could correct the deficiencies. If so, *Smith v. Ladner* may be a harbinger of the future. It deserves to be.

The three cases—*Holmes, Hornsby,* and *Ladner*—all involve judicial creativeness of the kind that is both natural and timely. Perceptive judges have long realized the unreality of the requirement of meaning-

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48 *Id.* at 610.

49 *Id.* at 610, 612.

50 288 F. Supp. 66 (S.D. Miss. 1968).

51 *Id.* at 68.

52 *Id.* at 70. The court departed from its theory—the theory here emphasized—when it remarked that "any denial of a charter, otherwise lawful, to the plantiffs under the statute as presently written violates the Due Process Clause . . . ." *Id.* Consistently with the rest of its opinion, it might well have said that any denial of a charter is a denial of due process unless the Governor provides adequate standards and safeguards.

ful statutory standards and at the same time have been uneasy about the extent of unnecessary discretionary power, whether delegated or undelegated. The judges in the three cases turned away from the unrealism of the non-delegation doctrine, but they felt that justice required judicial intervention to correct the unnecessary and uncontrolled discretionary power. The handiest tool was due process, and the easiest means of correction was a judicially-enforced requirement that the administrators create their own standards. The approach of the three cases will spread. It should.

Perhaps the non-delegation doctrine will gradually turn into a facet of due process, as in the three cases. But in the longer term, perhaps the constitutional base will give way to a common-law base. Either way, the reality will be that the law requiring administrative development of standards and safeguards to control discretionary power will be judge-made law. A good deal of our administrative law, much more than is usually realized, is common law. The uncodified law requiring administrative findings, for instance, is almost entirely common law, as is a good deal of the law of judicial review of administrative action. Probably the law the courts will fashion to require administrators to develop standards, principles, and rules to confine discretionary power should be subject to legislative change; if so, the courts might well regard it as common law rather than as constitutional law.

The ideal, which probably can never be fully achieved, was stated by the Supreme Court in 1886 in the great case of *Yick Wo v. Hopkins*:[53]

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . . For, the very idea that one man may be compelled to hold his life, or the means of his living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails . . . .[54]

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[53] 118 U.S. 356.

[54] *Id.* at 369-70.