

Administrative LAW

The Sources
and Limits of
Government
Agency Power

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Non-Delegation Doctrine: “Agencies Cannot Make Laws” (Ostensibly)

WHY STUDY ADMINISTRATIVE LAW?

Citizens and students who want to understand American government tend to look first to courses on constitutional law or to Congress. But agencies execute most of the governing. So, in order to understand most of our government, look at administrative law, the law that sets forth the logic of agency power: the sources of that power, and the limits of that power.

Many readers of this book will spend a good part of their professional lives working in government agencies. If you are among that group, you will find that administrative law explains many of the procedures you follow and creates the framework of law that structures much of your work. Indeed, you may find yourself turning to administrative law to explain why you cannot do something your political leadership has commanded.

Government operates primarily through agencies. When you attend a public school or university, pay your taxes, get protected or arrested by the police, look for “grade A” beef or eggs, you are interacting with the work of a government agency. Since administrative agencies serve so many different purposes—from delivering the mail; to fighting wars; to issuing parking tickets; to educating children; to sending social security checks—they necessarily vary in structure. Except for a small minority mandated by the U.S. Constitution, a state constitution, or the charter of a local government, these agencies owe their origin to laws enacted by Congress, state legislatures, or local legislative bodies (i.e., “statutes”). All agencies have some leadership format: a Cabinet secretary, a director, a commissioner, or some other officer or group of leaders, like a board or a commission. Most state and federal agencies employ civil servants who may have done well on merit examinations or survived some other kind of competitive process, and enjoy some degree of job protection under civil service laws that, for example, prevent them from being fired solely to make room for political patronage hires. All have units that perform executive functions, for instance any of the tasks listed at the beginning of this paragraph, among thousands of other tasks. Sometimes, the leadership of the agency devises rules (“regulations”) to clarify or implement the mandate of the legislation originally empowering the agency; often an office of counsel or another unit of the agency will prepare such regulations. Many agencies also

have units that hear and resolve arguments (“adjudications”) between the executive personnel of the agency and individuals, businesses, or other entities who challenge their decisions.

One way or another, elected executive officials, such as presidents, governors, county executives, and mayors appoint agency leaders, and usually can replace them as well, giving those officials power and influence they can exercise over those agency leaders. Elected legislators can enact, repeal, and amend the legislation that empowers the agencies. Citizens who may feel that they have been abused can appeal agency adjudicative decisions. Citizens, businesses, and other government officials may also bring the judicial power to bear on questionable agency rulemaking or other agency actions, which often entails using the federal Administrative Procedure Act (APA), first enacted in 1946 and amended often thereafter. In later chapters, we explore in detail how the APA requires agencies to adhere to certain principles of fairness and due process in their adjudications, to a lesser extent in rulemaking, and to an even smaller extent in their executive functions. Every state also has an administrative procedure act, usually mirroring, at least to some extent, one of the Model State Administrative Procedure Acts (MSAPAs), especially that of 1961. Later chapters include frequent reference to the 2010 MSAPA, and one can presume that over time more states will adopt provisions of this more current MSAPA.

Survey results released in 2010 showed that about a fifth of American adults “faced a legal issue that could have involved hiring a lawyer” in the past year.¹ Another statistic is that less than half of American adults have “contacted a U.S. Senator or Representative” between 2004 and 2008²; however, virtually every adult American deals with government agencies many times a year.

While Congress in recent years³ enacts three or four hundred bills each two-year session, and Pew Research suggests even fewer are meaningful,⁴ federal agencies issue ten times as many rules and regulations in the same period.⁵ Internal Revenue Service regulations determine far more decisions on individuals’ tax returns (albeit usually smaller decisions), than Internal Revenue Code provisions enacted by Congress. National Labor Relations Board (NLRB) rulings determine the outcome of thousands more labor cases than the National Labor Relations Act itself.⁶ A federal statute that is four pages limits compensation to executives of financial institutions “bailed out” in 2008; yet, there are 123 pages of Treasury Department regulations in the *Federal Register* detailing those limitations.⁷

The federal courts decide about 400,000 cases a year.⁸ One law professor has claimed that “federal agencies complete more than 939,000 adjudications” annually, while “federal judges conduct roughly 95,000 adjudicatory proceedings, including trials.”⁹ The Social Security Administration alone completes about twice as many hearings in an average year as all the federal courts put together.¹⁰ At the state government level as well, agencies generate far more rules and decisions than courts or legislatures.

The point is that agencies, not courts or legislatures, are responsible for most of the governance in the United States (as well as in other nations). For

any citizen, and especially for citizens who look toward careers in government, administrative law answers many fundamentally important questions¹¹: By what right do government agencies exercise power? What are the sources of their powers, and the limits on those powers? If they exceed those limits, what can citizens do about it?

At its core, administrative law is about basic value conflicts: fairness versus efficiency versus representativeness. Do you want to complain that the bureaucracy moves so slowly that it is driving you out of business, or do you want to complain that it does not give you a sufficient chance to prove that you are right? Do you want your taxes to go up, or your Social Security check or Medicare payments to go down so that government can afford the personnel cost of giving everyone an opportunity to fight agency decisions in court; or do you want to be told that you don't meet the technical legal requirements to get a court to listen to your argument about why the government agency should not have done what they did to you? Do you want all policy judgments to be made by your elected representatives—people you can fire if they don't represent your point of view—or do you want the bureaucracy to continue to operate? How much representative democracy do you need? Let's start with the last question.

THE NON-DELEGATION DOCTRINE

The second sentence of the Constitution reads “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”¹² Therefore, in effect in a document agreed to by their representatives in 1789, the people of the United States said “The first rule is that Congress does the lawmaking.”

Also in 1789, however, Congress said that veterans' benefits should be based on service in the Revolutionary War “under such regulations as the President of the United States may direct.”¹³ Immediately, this produced certain problems: what if the veteran had been hurt tripping over a sack of flour, off duty, not in uniform? Congress did not have the time to pass a different law for each such question; soon, judges realized that they also had too many other things to do.¹⁴ In 1820, after the press had exposed various scandalous abuses, Congress finally fully handed such decisions to the Secretary of War.¹⁵ A bureaucrat began making policy decisions.

Theory versus Practice

But, didn't this contradict the principle that Congress was supposed to do the lawmaking? The Secretary, and then his clerks, began to make rules as to who was eligible for veterans' benefits and who was not. This would seem to have been in direct violation of the 1789 constitutional agreement that Congress would make the rules, and “the Government of the United States, or . . . any Department or Officer thereof,”¹⁶ would merely carry them out.

The people gave up their own power to Congress to make laws. They elect Congress to represent them, and can replace Congress every two years

(with one-third of the Senate also replaceable every two years). If they don't like what their representatives in Congress do, they can replace them. But, if Congress gives its power to someone else (i.e., a civil servant, a bureaucrat, a clerk), the people might not even know, and certainly cannot fire them the way they could "fire" Congress. Clearly, the people have less control over this third party than they have over Congress.¹⁷

Thus, legal tradition says that when the people choose to give, or "delegate," their powers to someone, that individual or entity cannot then give the powers to someone else. This dates back to ancient Roman law, and passed down to John Locke in the 17th century. The Supreme Court first cited the principle, presumably based on Locke, in a decision in 1831.¹⁸ Consequently, how could Congress so casually have delegated its power to make rules to the president, or in reality to his agents in the War Department?

This seemingly nit-picking debate, which has provided grist for the administrative law mill for a long time, in fact has serious reverberations, and probably lacks a fully satisfactory resolution.

The obvious response is that Congress could not possibly make every petty rule needed to guide every bureaucratic decision. The theory used to justify the grant of authority to agencies to make such rules was that agencies were merely to "fill up the details"¹⁹ (i.e., that Congress would set out the broad policies with its legislation, and that agencies' rules would simply fill in the necessary administrative details).

It was not such a long step from the theory that agencies could "fill up the details" to the theory that Congress could actually delegate legislative authority so long as it prescribed "standards" to limit the agency's use of the power. The Interstate Commerce Commission (ICC) imposed certain requirements on a railroad company undergoing reorganization before they allowed it to issue stock. The Court, once again, gave lip service to the non-delegation doctrine, but this time explicitly okayed actual delegations as long as they were limited by a "prescribed standard," such as if the ICC's enabling statute said that it should protect the public against financial failure by railroads.²⁰

Broader Delegations

The Court approved broader and broader delegations imposing such "limits" or so-called standards as prohibiting "unfair" competition,²¹ and regulating the airwaves as the "public convenience, interest or necessity requires."²² With the vast expansion of federal agency power in the National Industrial Recovery Act (NIRA), in 1935 the Court at last saw standards it found impermissibly broad. In *Panama Refining Co. v. Ryan*,²³ the Court rejected as no real restriction the "limit" on the President's power to ban interstate shipments of oil produced in violation of state law to when the oil was shipped in an "unfair competitive practice" or failed to "conserve natural resources." Justice Cardozo, dissenting, pointed out broader delegations the Court had permitted.²⁴

But, no one dissented in *Schechter Poultry Corp. v. United States*, famously known as the "sick chicken" case.²⁵ NIRA gave the President the

power to prescribe “codes of fair competition” for any industry if the President thought the industry’s own code was anticompetitive, or the power to approve industry codes. Under NIRA’s Live Poultry Code for the New York City area, wholesale chicken dealers were not allowed to let their customers (butchers and retailers) select individual chickens; rather, they were required to accept whichever chickens came out of the coops.²⁶ The Schechter brothers were charged with criminal offenses (!) for permitting their customers to select individual chickens and thereby avoid buying sick ones. They challenged the constitutionality of Congress giving the President the power to tell them how to sell chickens. (In reality, dominant forces within industries often wrote codes to their own liking, with New Deal officials often unable to monitor or even understand the implications of some of these types of codes). The Poultry Code, for example, favored wholesalers over retailers. (The Schechters were trying to attract retailers with the fairer deal that they had historically offered.²⁷)

Justice Cardozo, concurring this time, agreed that here Congress had given the Executive, in effect, a “roving commission to inquire into evils and then, upon discovering them, do anything he pleases.”²⁸ Since the President, on recommendation of a trade association, could impose codes that could do “anything that Congress may do within the limits of the Commerce Clause for the betterment of business,” Cardozo agreed that “This is delegation running riot. No such plenitude of power is susceptible of transfer.”²⁹

In the second and last time the Supreme Court threw out a delegation of power to the federal executive, Joseph Schechter and his brothers, chicken dealers from Brooklyn, had overturned the cornerstone of the National Industrial Recovery Act.³⁰

AGENCY POWER POST-SCHECHTER

Since *Schechter*, no congressional delegation of power to a government agency has been held too broad, although at least some of the delegations that have been upheld arguably have been at least as broad as the delegation in *Schechter*. In *National Broadcasting Co. v. United States*,³¹ the Court upheld the Communications Act of 1934, which gave the Federal Communications Commission (FCC) the power to grant broadcast licenses “if the public convenience, interest, or necessity will be served thereby.” The Court claimed that if the standard were more specific, the FCC could not accomplish the task intended for it. How such a standard could serve as an “intelligible principle,” the Court did not explain. In *FCC v. RCA Communications, Inc.*,³² the Court went even further when the FCC attempted to figure out the policy direction Congress wanted, and therefore based a decision “in favor of competition.” The Court actually objected to the FCC’s effort to determine congressional intent, scolding the FCC for failing to rely on its own judgment instead! Apparently, not only did Congress not need to supply a guiding principle, the agency need not even attempt to discern one.

Delegation to a Private Organization

The Court has never explicitly backed away from a 1936 decision rejecting a congressional delegation of power to a private organization, *Carter v. Carter Coal Co.*,³³ despite the fact that outsourcing of formerly government work has meant in reality that plenty of policy decisions affecting the public are now made by private entities.³⁴ The private identity of the recipient of delegated power seems to make the delegation worse, but “if legislative standards exist, the individual’s private status does not come into play.”³⁵ Rather, the test of constitutionality should be: first, whether the government (Congress or the president) has granted powers whose extent, importance, or nature exceed an appropriate private role; and second, “whether the actors in question are subject to enough governmental checks to guard against arbitrary or self-serving conduct.”³⁶ As “the Constitution does not authorize private parties to exercise decisional authority over their peers,” if the delegation fails these tests, it should be struck down.³⁷

State courts have generally been somewhat more willing to strike down statutes as violating the non-delegation doctrine, as noted in a leading Texas case, *Texas Boll Weevil Eradication Foundation Inc. v. Lewellen*.³⁸ Beyond informative *dicta* as to delegations to government agencies, the Texas decision also offered tests to determine whether a statute violates the prohibition against delegating government powers to a private entity: (1) Does the government exercise significant review power over the entity’s decisions? (2) Are the interests of the affected public represented in the decision-making process? (3) Does the entity enforce its decisions against individuals? (4) Do the entity’s interests conflict with those of the public? (5) Can it establish or impose criminal penalties? (6) Is the delegation broad or narrow? (7) Does the entity enjoy special expertise for its assigned role? (8) Does the delegation include guidelines or standards channeling the entity’s behavior?³⁹ Federal courts should perhaps consider applying the Texas tests as well.

***Ultra Vires*: “Outside the Power”**

And despite occasional obituaries to the contrary,⁴⁰ the non-delegation doctrine lives on. In *Kent v. Dulles*, the Court held that Congress did not really mean to give the Secretary of State unlimited power to withhold passports on the basis of “beliefs or association,” because that would have violated both the non-delegation doctrine and the Fifth Amendment right to liberty.⁴¹ In a 1980 Supreme Court decision, Justice Stevens opined that if a safety standard allowed the Secretary of Labor to limit benzene without a meaningful quantitative showing that it was dangerous, then the statute “might be unconstitutional under the Court’s reasoning in *A.L.A. Schechter Poultry Corp. v. United States* [citation omitted] and *Panama Refining Co. v. Ryan* [citation omitted]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.”⁴² Justice Rehnquist, concurring, argued that the statute did not justify the majority’s interpretation, that it therefore clearly violated the non-delegation doctrine, and that the Court should therefore have invalidated it on that basis, not reinterpreted it.⁴³

State courts have invoked the non-delegation doctrine to strike down statutes far more often than federal courts, but such use of the doctrine is in decline

even at the state level.⁴⁴ More typically, state courts sidestep the non-delegation doctrine, as did the Supreme Court in *Kent v. Dulles*, on the argument that the underlying statute would be overbroad if it allowed for the particular rule the agency had issued. The court then called the agency's action "*ultra vires*," or "outside the power" given to the agency.

Case in Point: New York City Ban on Sugary Drinks

For example, when Michael Bloomberg was Mayor of New York City, he seems to have felt a heavy responsibility for safeguarding the health of the people of his city. Thomas Farley, appointed by Mayor Bloomberg as his second Commissioner of Health and Mental Hygiene, strongly supported the Mayor's efforts in this regard. Bloomberg and Farley persuaded the New York City Council to restrict smoking—even outdoors, on public beaches, and in public parks.⁴⁵ Apparently pleased with the progress the City had made in reducing that major cause of illness, Bloomberg decided to take on what was becoming known as "the obesity epidemic," aiming his influence at one of its most publicized causes, sugary drinks. First, in 2009 and again in 2010 he sought a state tax on such drinks,⁴⁶ but the Legislature refused to enact it. Then, in 2011, he tried to persuade the federal government to prohibit the use of food stamps to purchase them, but failed.⁴⁷ Finally, in May, 2012, he proposed to ban the sale of sugary drinks of 16 ounces or more in any establishment subject to health inspections by the City of New York.⁴⁸ The New York City Board of Health adopted his proposal four months later, in the face of a huge and expensive public relations campaign against it by the soda industry.⁴⁹ The regulation did not cover grocery stores and convenience stores, since the City Board of Health has no jurisdiction over such establishments. Had the State legislature or the New York City Council been amenable to a law banning the sale of large sugary drinks, of course they could have included all sources.

The Court of Appeals, New York's highest state court, invalidated the regulation as beyond the agency's powers.⁵⁰ Using a four-part test, it found that the agency had violated three of those parts, which was enough for the court to strike it down. The regulation's "Portion-Cap Rule" prohibited the sale of a sugary drink in a container that can hold more than sixteen ounces of liquid, and defined "sugary drink" to exclude beverages with certain ingredients, such as those that are more than fifty percent milk or milk product. The court first explained that the Board of Health cannot make laws, but can only issue regulations carrying out laws that the City's lawmaking body, the City Council, has enacted. Then, it applied the first part of the test: did the regulation merely relate to the Board of Health's powers under the New York City Charter to advance public health? The court held that by restricting portions instead of banning the drinks, the Board of Health was factoring in "the economic consequences associated with restricting profits by beverage companies and vendors,"⁵¹ among other policy choices, and was thus making policy on its own, not just exercising the health-related powers it had been given. Furthermore, in limiting consumer choice the regulation reflected a policy choice on a range of compromises between personal autonomy and health protection. The court recognized that this test posed difficulties, in that almost any health-related regulation would

also have *some* other social and economic consequences; for example, the non-health-related consequences of some health regulations would be relatively minor, but the economic consequences of this regulation were significant. Even so, failing this test alone might not invalidate a regulation.

Accordingly, it then turned to the second factor: had the City Council or the State legislature enacted any laws that the regulation might reasonably be thought to have implemented? Again, the court recognized some difficulty: the very reason legislatures establish agencies is to allow them to determine the detailed choices needed to achieve broad policy goals. Those detailed choices may be hard to differentiate from the kind of policy choices that elected legislators should be making themselves. But neither the City Council nor the State legislature had enacted any laws whatsoever concerning the ingestion of sugary beverages: “Devising an entirely new rule that significantly changes the manner in which sugary beverages are provided to customers at eating establishments is not an auxiliary selection of a means to an end; it reflects a new policy choice,”⁵² said the court. Thus, the regulation failed the second test as well.

The court adopted the analysis of the reviewing court below, the Appellate Division of New York’s Supreme Court, in noting that the City Council and the State legislature had “repeatedly tried to reach agreement in the face of substantial public debate and vigorous lobbying by interested factions.”⁵³ In the face of their failure to do so, the Board of Health, in deciding to issue its regulation, ignored the clear message of lawmakers that regulation in this regard was unwarranted. In general, the law remains that legislative failure to enact legislation is not a statement of policy,⁵⁴ but when circumstances suggest that the legislature has affirmatively decided against enacting a particular law at present, courts may treat that apparent decision as a factor in determining whether an agency acted *ultra vires* in issuing a regulation.

The court suggested that the regulation might fail the test of the fourth factor as well, specifically whether the regulation at issue reflected the exercise of the agency’s special technical competence, in light of “the fact that the rule was adopted with very little technical discussion.”⁵⁵ However, it regarded analysis under that factor as unnecessary, since the regulation failed the basic test on which the various factors merely shed light: “an administrative agency exceeds its authority when it makes difficult choices between public policy ends rather than finds means to an end chosen by the Legislature. . . .”⁵⁶

The decision illustrates the greater willingness of state courts to invoke the non-delegation doctrine, even in using it to interpret legislation narrowly to find that executive action exceeded a legislative mandate. For example, however unlikely it might be for the Surgeon General to attempt to ban the sale of large sugary drinks nationally; if that had occurred, it would be equally unlikely that the Supreme Court would invoke the non-delegation doctrine to invalidate the ban.

GIVING AGENCIES JUDGE-LIKE POWERS

Giving agencies judge-like powers, like giving them rulemaking powers, also raises a question of legitimacy. When Congress gives agencies adjudicative

powers, it is not exactly delegating, because Congress itself has no such power (except under unusual circumstances like impeachment). But, at least since 1828, the Supreme Court has recognized the power of Congress to include such adjudicative duties within an agency's general mission when it explained that such agency "Courts" are not under Article III (the Judiciary article) of the Constitution, but Congress can create them "in the execution of those general powers which that body possesses. . . ."⁵⁷

More generally, the Court allows Congress to vest such powers in agencies when "Government sues in its sovereign capacity to enforce **public rights** [emphasis added] created by statutes within the power of Congress to enact."⁵⁸

The Constitution says "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . .," so agencies cannot impose criminal penalties.⁵⁹ They can seek and impose civil penalties. When Congress has enacted a law that imposes criminal penalties for violation of rules issued by an agency, because the agency is not an Article III court, it cannot hear cases under that statute. For criminal prosecution the agency must refer such cases to the Department of Justice, and a federal court may impose a sentence of imprisonment if it finds an individual guilty.⁶⁰ The Department of Homeland Security, through its Immigration and Customs Enforcement bureau, may seem to be an exception, but for technical reasons, it is not: it can "detain" people for years, but not "imprison" them. . . .⁶¹

Even at the state level, generally agency hearing officers do not exercise contempt powers, so state agencies, like federal agencies, cannot impose deprivations of liberty on citizens.⁶²

CONCLUSION

Agencies do operate within some limits. But, under the practical constraints of time and expertise Congress often cannot reach the level of detail necessary to clarify what it wants agencies to do; and often, when it can, it *chooses* not to do so in order to avoid arousing the antagonism of one faction or another. American law has evolved to track the consequent sometimes steady and sometimes dramatic increase in the power of agencies over the generations, and has accommodated the necessary shift of power away from direct control by the legislative branch, especially at the federal level and even in the states. For government to provide the services most Americans appear to want—even those who complain about the growth of government⁶³—inevitably Americans must sacrifice a significant degree of representativeness.

WHAT AM I SUPPOSED TO DO?

State Public Health Council and Smoking Restrictions: Interpretation of a Statute's Absence

Let's say you were the director of your state's Public Health Council in the mid-1980s. By then, the public had been well informed that secondhand

smoke from cigarettes contributed to lung cancer and other diseases. Your state legislature had, many years earlier, authorized the Public Health Council to issue and enforce such regulations as would improve the health of the citizens of the State. In the 1970s, the legislature had restricted smoking in some public places like libraries and museums. But, in the past few years, some liberal Democratic members of the State Assembly, passionate crusaders against the ill effects of tobacco smoke on health, had introduced legislation that would have greatly extended restrictions on smoking to many other workplaces and indoor areas. In the Assembly, with a Democratic majority, for several years in succession such legislation was reported out of committee to be voted on by the entire body. However, perhaps because of the influence of lobbyists for the cigarette manufacturers, and lobbyists for the bar and restaurant industry who thought such restrictions would keep some customers away, the bill was soundly defeated with a combination of Republican and conservative Democratic Assembly members. In the other House, the State Senate, the Health Committee refused to report the bill to the floor for a vote.

You are well aware that the Governor, who appointed you, supported the legislation, but would be even more pleased to see the change in law made by his administration—more specifically, by the agency you run—rather than by the legislature. The Governor surely would like to get credit for protecting the health of the public in this manner.

A well-established principle of statutory interpretation—perhaps more appropriately denominated as a principle of “non-statutory interpretation”—holds that legal inferences should not be drawn from legislative inaction on a piece of legislation.⁶⁴ That is, too many diverse reasons could explain the failure of a legislature to enact a law so that such failure cannot be the basis for assuming a particular motive like antipathy to the substance of the bill. For example, most of the opposition to a bill might come from legislators who thought it did not go far enough, and didn’t want its enactment to “take the wind out of the sails” of the support for a stronger law.

Therefore, should you, as the Public Health Council director, draft, propose, and promulgate a regulation carefully balanced to take into account the reasonable concerns of bar and restaurant owners that would require restaurants that can seat more than fifty people to establish smoke-free areas for customers who want to avoid tobacco smoke?

From a practical point of view, going forward with the regulation might seem the wiser course. You would probably please your boss, the Governor. The lobbyists would have to concede that you made an effort to accommodate their concerns in a reasonable way, and in any event, while they can complain, their actions have far less practical impact on you than they might have on legislators. The legislators who opposed the legislation themselves might object on principle, but so long as someone other than themselves annoyed the lobbyists, their friendly relationships with the lobbyists would remain undisturbed. This does not seem the kind of policy decision that might enrage the legislature enough for it to cut your agency’s funding or narrow its

jurisdiction. Of course, you would probably please the legislators who supported the legislation. And in terms of your own peace of mind, advancing public health would give you satisfaction—the very kind of satisfaction you wanted when you sought this job in the first place.

What are your legal responsibilities? The enabling legislation for your agency encourages such legislation, so arguably the legislature has almost commanded you to go forward. You report to the Governor, know that he would want you to issue the regulation, and therefore arguably have some duty to advance his policy agenda, since the public chose to elect him. The courts, in explaining that agencies should not draw legal inferences from legislative inaction, seem to have given you the green light, despite the legislature's rejection of tighter restrictions on smoking.

So why do you hesitate?

Something about the non-delegation doctrine bothers you. You know very well that the courts, for decades, have mostly treated it as a dead letter, allowing Congress and state legislatures to give agencies extremely broad powers—as your state legislature gave you: what *can't* you do in the name of advancing the health of the citizenry?

But, on some level you know that in a democracy, the people's elected representatives are still supposed to have the final word, not those who staff the agencies created and empowered by those elected representatives. And here, what the legislature did was not exactly "inaction": rather, it explicitly rejected the legislation several times, or at least one house did, while the other house did not give it a vote at all.

In *Boreali v. Axelrod*, the New York Court of Appeals justified your hesitation. The New York Public Health Council had not hesitated to issue such a regulation. The court said, "Unlike the cases in which we have been asked to consider the Legislature's failure to act as some indirect proof of its actual intentions [citations omitted], in this case it is appropriate for us to consider the significance of legislative inaction as evidence that the Legislature has so far been unable to reach agreement on the goals and methods that should govern in resolving a society-wide health problem . . . Manifestly, it is the province of the people's elected representatives rather than appointed administrators, to resolve difficult social problems by making choices among competing ends."⁶⁵

Thus, your point about legislative inaction was a valid one, but the Court of Appeals thought that the facts of this case demanded a different result. The fact that one house of the Legislature voted down the legislation several times recently—legislation that was the model for the Public Health Council's regulation—at least suggested something outside the category of "legislative inaction."

The court also invalidated the regulation on the basis of a weaker argument, claiming that in limiting its reach only to certain restaurants, the Council had entered into the realm of economic policy, which the court thought exceeded the boundaries of its public health powers. The court did not find overbroad, or a violation of the non-delegation doctrine, the original legislative

delegation of power to the Public Health Council. Rather, it found that in issuing the regulation, the Public Health Council had acted *ultra vires*, or “outside the powers” granted to it by the legislature by that delegation.

You should know that in the sugary drink case discussed above, the four-factor test used by the court came from *Boreali*.

In later years, the legislature itself enacted the kind of law it had earlier rejected; a law that the Public Health Council had tried to implement on its own. The lesson for public servants in government agencies may be one of patience: Notwithstanding the strength of your commitment to the particular policy goals of your agency, your overriding commitment must be to the fundamental principles of democratic self-government. The trial judge in *Boreali* may have overstated the matter somewhat, but his comment, criticizing those who would allow agency personnel to override legislative preferences when they are not explicit, but are nonetheless clear, still resonates for those of us who value representative democracy: “Defendants’ view of the executive power would have us come full circle from the old days of rule by benevolent autocrat to a modern rule of the benign bureaucrat.”⁶⁶

PRACTICE PROBLEMS

PROBLEM 1: It is 1990, when the AIDS epidemic terrified much of the public. Imagine that Congress passed a law giving the director of the Public Health Service the power to adopt “appropriate and necessary” rules to contain the AIDS epidemic. Violation of any such rule is a criminal offense. The Director finds that at least a million Americans are HIV-positive; cannot estimate how many will develop the disease; and knows that sex and blood contact and needle-sharing spread AIDS. The Public Health Service promulgates the following regulation: Every federal job holder and job applicant must take a blood test. All who test HIV-positive must be fired or rejected. You are the Director’s deputy. Does your oath to “support and defend the Constitution” require you to refuse to carry out his order for the firings and rejections on the basis that his directive is *ultra vires*, or “outside his powers,” because the statute itself violates the non-delegation doctrine? Why or why not?

PROBLEM 2: A state statute permits cities of a certain size to transfer all parking violations out of Criminal Court into agencies they may establish, to lessen congestion in the courts and to expedite such cases. While prosecutors must prove guilt “beyond a reasonable doubt,” agencies need only find liability by a preponderance of the evidence (and their rulings will be upheld by courts so long as the courts believe they are supported by the even weaker standard of “substantial evidence,” a matter we explain more thoroughly in Chapter 9), and they may impose a penalty of up to \$1,000 per violation. The Deputy Mayor, your boss, instructs you to take the necessary steps to create such an agency for your city. Should you object that the statute constitutes an unconstitutional delegation of power to an administrative agency?

ENDNOTES

1. *One in Five Americans Had a Legal Issue This Year That Could Have Involved Hiring a Lawyer*, Says New FindLaw.com Survey, (press release, *FindLaw* website, 1/6/10, <http://company.findlaw.com/pr/2010/010510.lawyer.html>).
2. Kathy Goldschmidt and Leslie Ochreiter, *Communicating with Congress: How the Internet has Changed Citizen Engagement* (based on survey research by Zogby International), (Washington, DC: Congressional Management Foundation, 2008, 10, http://nposoapbox.s3.amazonaws.com/cmfweb/CWC_CitizenEngagement.pdf). Some studies covering the same time period found that less than one-quarter of the public communicated with *any* federal government official within a year; Benjamin I. Page, Larry M. Bartels, and Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 *Perspectives on Politics* 51, 69, n.19 (March 2013).
3. 460 bills in the 110th Congress (2007–2008), Mark Murray, 113th Congress Not the Least Productive in Modern History, *NBC News*, 12/29/13, <http://www.nbcnews.com/politics/first-read/113th-congress-not-least-productive-modern-history-n276216>; 383 in the 111th Congress, A Summary of the Record of the 111th Congress of the United States, *id.* and http://www.congress-summary.com/A-111th-Congress/Laws_Passed_111th_Congress_Seq.html; 283 in the 112th Congress, A Summary of the Record of the 112th Congress of the United States, Murray, *id.* and http://www.congress-summary.com/B-112th-Congress/Laws_Passed_112th_Congress_Seq.html; as of December 29, 2014, 296 in the 113th Congress, Murray, *id.*, accessed 1/13/15.
4. Apparently using different metrics, the Pew Research Center reported that the 110th Congress enacted only 300 bills, the 111th, 215, and the 112th, 151, and of those, 121, 72, and 41, respectively, were merely ceremonial; Drew DeSilver, *Congress Continues Its Streak of Passing Few Significant Laws*, *FACTANK*, Pew Research Center, 7/1/14, <http://www.pewresearch.org/fact-tank/2014/07/31/congress-continues-its-streak-of-passing-few-significant-laws/>, accessed 8/4/14.
5. “On average, Federal agencies and departments issue nearly 8,000 regulations per year.” *Regulations.gov: Your Voice in Federal Decision-Making*, <http://www.regulations.gov/#!siteData>, Site Data, website, accessed 12/3/14; This figure probably includes interpretive and procedural rules, accounting for the disparity between it and the following figure: Between FY2003 and FY2012, the Federal Register published 37,786 final and interim final rules, an average of about 3,800 rules a year. U.S. Office of Management and Budget, 2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations, 10, available at http://www.google.com/url?sa=t&rc=j&q=&esrc=s&source=web&cd=25&ved=0CDoQFjAEOBQ&url=http%3A%2F%2Fwww.whitehouse.gov%2Fsites%2Fdefault%2Ffiles%2Fomb%2Fforeg%2F2013_cb%2Fdraft_2013_cost_benefit_report.pdf&ei=9mV_VKi9LMH2yQSxYD4Bg&usg=AFQjCNGixbx1vHS1mvy8TTopqOP_9do1bA&sig2=WR-P41kvLETkPuoF6jE1nQ&bv=bv.80642063,d.aWw, accessed 12/3/14; The latter figure is similar to that estimated by Clyde Wayne Crews, *Ten Thousand Commandments 2014*, Competitive Enterprise Institute, available through <http://cei.org/studies/ten-thousand-commandments-2014>, accessed 9/16/15; about “seven thousand rules and policy statements each year” as of 2009, according to Christine Harrington and Lief Carter, *Administrative Law and Politics*, 4th ed., (Washington, DC: CQ Press, 2009), 9; over one thousand “significant regulations in each of several two-year periods preceding 2011, Final Rules Issued by Year, Regulatory Studies Center, George Washington University, http://www.regulatorystudies.gwu.edu/images/pdf/04_20_12_annual_final_rules.pdf, not counting regulations with “an annual effect on the economy” of under \$100 million a year or that do not raise certain other issues. Section 3(f) of Executive Order of the President 12866, *Regulatory Planning and Review*, 9/30/93, http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf, published in *Federal Register* Volume 58, Number 190, 10/4/93.
6. Daniel L. Feldman, *The Logic of American Government*, (New York: William Morrow & Co., 1990), 40 (citations omitted).
7. Cornelius M. Kerwin and Scott R. Furlong, *Rulemaking*, 4th ed., (Washington, DC: Sage/CQ Press 2011), 2.

8. The U.S. Supreme Court decides about 160 to 170 cases a year. Table A-1: Supreme Court of the United States—Cases on Docket, Disposed of, and Remaining on Docket at Conclusion of December Terms, 2008 Through 2012, available at Statistical Tables—Supreme Court, United States Courts website, <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/statistical-tables-us-supreme-court.aspx>, accessed 1/13/15; The federal Circuit Courts of Appeals closed 55,803 cases in the year ending on June 30, 2014, a typical recent year. Table B, U.S. Court of Appeals—Cases Commenced, Terminated and Pending During the 12-Month Periods Ending June 30, 2013 and 2014, available at Statistical Tables June 2014, United States Courts website, <http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/june-2014.aspx>, accessed 1/3/15; The federal district courts disposed of 327,467 cases in the year ending on June 30, 2014. The total figure is the sum of the civil and criminal cases from the two different tables: Table C, U.S. District Courts—Civil Cases Commenced, Terminated and Pending During the 12-Month Periods Ending June 30, 2013 and 2014 and Table D, Criminal Cases Commenced, Terminated and Pending During the 12-Month Periods Ending June 30, 2013 and 2014, available at Statistical Tables June 2014, *id.*
9. Jonathan Turley, The Rise of the Fourth Branch of Government, 5/24/13, *The Washington Post*, http://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html, accessed 1/25/14; See also Administrative Decisions and Other Actions—by Agency, University of Virginia Library: Government Information Resources, http://www2.lib.virginia.edu/govtinfo/fed_decisions_agency.html. Accessed 1/13/15.
10. Table 2.F9, Annual Statistical Supplement 2013, U.S. Social Security Administration Office of Retirement and Disability Policy website, <http://www.ssa.gov/policy/docs/statcomps/supplement/2013/2f8-2f11.html>, accessed 1/13/15.
11. This is not to denigrate other fields of study in any way. Indeed, in a later chapter I argue strongly for serious engagement with constitutional values and tradition to enable administrative agency personnel to meet their responsibilities more fully.
12. Article I, Section 1.
13. 1 Stat. 95, Act of September 29, 1789, Chapter 24. The next year Congress enacted a law licensing “traders with the Indians” and requiring them to obey applicable laws, including, similarly, “such rules and regulations as the President shall prescribe”; 1 Stat. 137, Act of July 22, 1790, Chapter 33, cited on page 97 of the Attorney General’s Report on Administrative Procedure, Senate Documents, no. 8, 77th Congress, 1st Session, (Washington, DC: Government Printing Office, 1941), cited in John Rohr, *To Run a Constitution*, (Lawrence, Kansas: University of Kansas Press, 1986), 167; and see page 253, n.1 and page 257, n. 59.
14. James D. Ridgway, The Splendid Isolation Revisited: Lessons from the History of Veterans’ Benefits Before Judicial Review, 3 *Veterans Law Review* 135, 145 (2011), http://www.bva.va.gov/docs/VLR_VOL3/3-Ridgway-TheSplendidIsolationPages135-219.pdf; William Henry Glasson, *Federal Military Pensions in the United States*, (New York: Oxford University Press, 1918), 62, http://books.google.com/books?id=EsOEAAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.
15. Glasson, *supra* at 63–71.
16. Article I, Section 8, Clause 18 (the “Necessary and Proper” Clause).
17. At best, the next Congress, if it included a majority so inclined, could do the firing (by defunding or repealing the authority for the agency in question). Or, a sympathetic president, perhaps a new one, could simply fire the civil servant unless Congress had arranged for civil service protection shielding the civil servant. John Stuart Mill anticipated modern (and at least somewhat unfair) complaints about bureaucracy: “having no longer a mind acting within it, [bureaucracy] goes on revolving mechanically though the work it is intended to do remains undone.” *Representative Government* [1861], forgottenbooks.org, 2008, Chapter 6: Of the Infirmities and Dangers to Which Representative Government is Liable, 73, http://books.google.com/books?id=JlwiZ19_TfMC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.
18. *Shankland v. Washington*, 30 U.S. (5 Pet.) 390, 395.

19. *U.S. v. Grimaud*, 220 U.S. 506, 31 S. Ct. 480 (1911).
20. *U.S. v. Chic., M., St. P. and P.R. Co.*, 282 U.S. 311, 324, 51 S. Ct. 159, 162 (1931).
21. *Federal Trade Commission v. Gratz*, 253 U.S. 421, 431, 40 S. Ct. 572, 576 (1920)
22. *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 273, 53 Sup. Ct. 627, 631 (1933).
23. 293 U.S. 388, 55 S. Ct. 241
24. Dissent, 293 U.S. at 433ff., 55 S. Ct. at 255ff.
25. See *Schechter Poultry Corp. v. United States*, *TheFreeDictionary* by Farlex, <http://legal-dictionary.thefreedictionary.com/The+sick+chicken+case>. At one time, I owned a tee shirt sold by the NYU bookstore displaying the name of the case and its citation over a picture of a chicken with a bandaged leg.
26. Article VII, § 14 of the Live Poultry Code, cited at 295 U.S. 495, 526, 55 S. Ct. 837, 842 (1935).
27. See discussion of the Schechter case in Amity Shlaes, *The Forgotten Man: A New History of the Great Depression*, HarperCollins ebooks, no date indicated, <http://www.scribd.com/doc/22737739/Amity-Shlaes-The-Forgotten-Man-A-New-History-of-the-Great-Depression>, 214–225, 239–245.
28. Concurrence, 295 U.S. at 551, 55 S. Ct. at 852.
29. 295 U.S. at 552-3; 55 S. Ct. at 853.
30. I have a personal connection to the Schechter case. In the late 1970s, my widowed father and I lived together in Rockaway, Queens. From time to time he brought home roast chickens for dinner. Since I was teaching administrative law at the time, one day I noticed that the bag the chicken came in said “Schechter Poultry,” with the address on Brighton Beach Avenue in Brooklyn. Out of curiosity, I stopped in one day after work. It was no longer a live poultry market, of course, but a store selling cooked chicken. I asked the lady behind the counter if, by any chance... She said “He’s in the back.” Joseph Schechter, probably in his nineties at the time, came out front. Someone had a camera, and a few weeks later I showed my class photographs of me with the man who brought down the National Industrial Recovery Act. Unfortunately, the pictures are lost in the mists of time.
31. 319 U.S. 190, 219, 63 S. Ct. 997, 1011 (1943).
32. 346 U.S. 86, 94, 73 Sup. Ct. 998, 1004 (1953).
33. 298 U.S. 238 (1936).
34. See, e.g., Daniel Feldman, *The Legitimacy of Government Agency Power*, 75(1) *Public Administration Review*, pp. 75–84, January/February 2015, DOI: 10.1111/puar.12279.
35. Harold Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 *U. Miami L. Rev.* 507, 510–11 (2011).
36. 65 *U. Miami L. Rev.* at 538.
37. 65 *U. Miami L. Rev.* at 554.
38. *Texas Boll Weevil Eradication Foundation Inc. v. Lewellen*, 952 S.W. 2d 454, 468, 40 Tex. Sup. J. 523 (1997).
39. 952 S.W. 2d at 472.
40. See, e.g., William T. Gormley Jr. and Steven J. Balla, *Bureaucracy and Democracy*, 3rd ed., (Los Angeles, California: Sage/CQ Press 2013), 106: “a moribund tenet of administration law known as the nondelegation doctrine.” In the very decision cited as support for this declaration of death of the doctrine, Justice Scalia wrote, “The scope of discretion § 109(b)(1) [the section of the Clean Air Act in question] allows is in fact well within the outer limits of our nondelegation precedents.” *American Trucking Association v. EPA*, 531 U.S. 457, 474, 121 S. Ct. 903, 913 (2001). While the decision certainly can be cited as an example of the very wide limits the Court allows before it will find a violation of the non-delegation doctrine, quite clearly the Court continues claim adherence to it, and as I have noted elsewhere, wide limits are still limits.
41. *Kent v. Dulles*, 357 U.S. 116, 129–130, 78 S. Ct. 1113, 1119–1120 (1959).
42. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646, 100 S. Ct. 2844, 2866 (1980).
43. 448 U.S. at 671–688, 100 S. Ct. at 2878–2887.

44. Gary J. Greco, Survey: Standards or Safeguards: A Survey of the Delegation Doctrine in the States, 8 *Admin. L. J. Am. U.* 567–603 (Fall 1994).
45. Javier C. Hernandez, Smoking Ban for Beaches and Parks is Approved, *The New York Times*, 2/2/11, <http://www.nytimes.com/2011/02/03/nyregion/03smoking.html>, 7/8/14.
46. A.G. Sulzberger, Bloomberg Says a Soda Tax “Makes Sense,” *The New York Times*, 3/7/10, http://www.nytimes.com/2010/03/08/nyregion/08soda.html?_r=0, accessed 7/8/14.
47. Patrick McGeehan, U.S. Rejects Mayor’s Plan to Ban Use of Food Stamps to Buy Soda, *The New York Times*, 8/19/11, <http://www.nytimes.com/2011/08/20/nyregion/ban-on-using-food-stamps-to-buy-soda-rejected-by-usda.html>.
48. Michael M. Grynbaum, Bloomberg Plans a Ban on Sugary Drinks, *The New York Times*, 5/30/12, <http://www.nytimes.com/2012/05/31/nyregion/bloomberg-plans-a-ban-on-large-sugared-drinks.html?pagewanted=all>, accessed 7/8/14.
49. Michael M. Grynbaum, Health Board Approves Restriction on Sale of Large Sugary Drinks, *The New York Times*, 9/13/12, <http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html>, accessed 7/8/14.
50. *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene*, 2014 NY Slip Op. 4014, 2014 N.Y. LEXIS 1442 (June 26, 2014).
51. *Id.* at **6, *18.
52. *Id.* at **8, *22.
53. *Id.* at **2, *6–7.
54. *Clark v. Cuomo*, 66 N.Y. 2d 185, 486 N.E. 2d 794, 495 N.Y.S. 2d 936 (1985); *Flanagan v. Mt. Eden Gen. Hospital*, 24 N.Y. 2d 427, 248 N.E. 2d 871, 301 N.Y.S. 2d 23 (1969).
55. 2014 NY Slip Op. 4014 at **9, 2014 N.Y. LEXIS 1442 at *24.
56. *Id.* at **8, *23–4.
57. *American Insurance Company v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 545, 7 L. Ed. 242, 257.
58. *Atlas Roofing v. Occupational Health & Safety Review Commission*, 430 U.S. 442, 450, 97 S. Ct. 1261, 1266 (1977).
59. Article III, Section 2.
60. *U.S. v. Grimaud*, 220 U.S. 506, 521, 31 S. Ct. 480, 484–5 (1911).
61. Deportation “has been consistently classified as a civil rather than a criminal procedure.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 594, 72 S. Ct. 512, 521 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698, 730, 13 S. Ct. 1016, 1028–1029 (1893); Detention pending deportation would be classified as civil as well.
62. *Wright v. Plaza Ford*, 164 N.J. Super. 203, 218, 395 A. 2d 1259, 1266 (App. Div. N.J. 1978).
63. See, e.g., Press Release, Many Americans Ambivalent Over Laws Aimed at Healthy Living: Poll, *Harris Interactive*, 3/20/12, <http://www.harrisinteractive.com/NewsRoom/PressReleases/tabid/446/ctl/ReadCustom%20Default/mid/1506/ArticleId/986/Default.aspx>.
64. See, e.g., “congressional silence ‘lacks persuasive significance,’” *Brown v. Gardner*, 513 U.S. 115, 121, 115 S. Ct. 552, 557 (1994), quoting *Pension Benefit Guarantee Corporation v. LTV Corp.*, 496 U.S. 633, 650, 110 S. Ct. 2668 (1990); “Legislative inaction is a weak reed upon which to lean in determining legislative intent [citation omitted]”; *Flanagan v. Mt. Eden Gen. Hospital*, 24 N.Y. 2d 427, 433, 248 N.E. 2d 871, 874, 301 N.Y.S. 2d 23, 28 (1969).
65. 71 N.Y. 2d 1, 13, 523 N.Y.S. 2d 464, 471 (1987).
66. *Boreali v. Axelrod*, No. 47-304-87 at 5 (Sup. Ct. Schoharie Co. 1987).