Legislative Delegations of Power and Judicial Review -- Preventing Judicial Impotence

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LEGISLATIVE DELEGATIONS OF POWER AND JUDICIAL REVIEW—PREVENTING JUDICIAL IMPOTENCE

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Courts, commentators, political theorists, and historians all agree that legislatures may delegate power to administrative agencies.1 All have long abandoned the notion that separation of powers principles demand segregation of powers. Even so, the volume and persistence of scholarship discussing legislative delegations attest to the continuing vigor of the classic separation of powers ideology associated with Montesquieu, Madison, and the other framers of our basic scheme of government. Although there seems to be universal agreement that administrative agencies should be restrained in the use of delegated power in order to ensure that private parties will be protected against abuses of discretion, there is disagreement as to how that restraint should be accomplished.2

The delegation cases from various state jurisdictions are confusing, but in the last thirty years two basic approaches have evolved for determining whether delegated power is sufficiently restrained. The two approaches will be referred to as "traditional" and "modern." The traditional approach holds that constitutional principles of separation of powers and due process require meaningful legislative standards and, to a lesser extent, procedural safeguards.3 This approach is premised on the traditional mechanisms of positive law, which include the practice of judicial review according to determinate standards. Although procedural processes are deemed

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1. See, e.g., Wayman v. Southard, 23 U.S. 1, 42-43 (1825), in which Chief Justice Marshall stated:

   It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, 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.

See also L. Tribe, AMERICAN CONSTITUTIONAL LAW § 5-17, at 284-85 (1978). Professor Tribe notes that the only exception to the rule of delegable power is when the Constitution specifically states that a certain power is nondelegable. He points to U.S. CONST. art. II, § 2, as one such exception. That constitutional provision prohibits Congress from delegating the power to approve treaties.


to be important, the traditional approach demands that the legislature “legislate as far as reasonably practicable” and is the approach adopted by Florida, Arizona, and Illinois. It is important to note that this approach does recognize that some discretion must be delegated to administrative agencies—hence the qualifier “as far as practicable.” The traditional approach does not necessarily prohibit a period of experimentation. For example, if the legislature is legislating in a new area, more discretion may be granted to the agency than would otherwise be allowed. Despite this flexibility, however, the traditional approach prohibits the legislature from merely identifying problem areas and passing responsibility for their complete remediation to an administrative agency.

One of the more prominent advocates of the modern approach, Professor Kenneth Davis, argues to the contrary that “[t]he criterion for determining the validity of a [legislative] delegation should be the totality of the protection against arbitrariness, not just the one strand having to do with statutory standards.” As we shall see, the statutory standards emphasis in fact disappears under this approach and is replaced by an emphasis on procedural safeguards, administrative standards, or a combination of the two. Because the modern approach is still evolving, jurisdictions that have adopted it have been reluctant to withdraw completely from the more traditional approach. As a result, some legislatures have used very broad legislative standards in an effort to avoid abandoning the traditional approach. Despite the fact that such standards are actually no more than statements of legislative intent, some courts have considered them to be sufficient to meet the requirements of the traditional approach. For example, the New Jersey Supreme Court ostensibly insists upon the need for legislative standards, yet the decisions of

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8. K. Davis, supra note 2, § 3:15 at 209. Professor Davis refers to his proposal as being a small alteration in the nondelegation doctrine. Id. at 211. This adds some confusion because courts and commentators now are all in agreement that the nondelegation doctrine is dead. It seems that it would have been more appropriate and helpful if Davis had referred to his proposal as being a small alteration to the doctrine of delegation with meaningful legislative standards.
9. Professor Davis himself has continued to suggest modification to the modern approach. Although procedural safeguards still are the key to the Davis approach, he has recently suggested that meaningful administrative standards may also be appropriate. K. Davis, supra note 2, § 3:15 at 211.
that court indicate that such standards are only required in theory.\textsuperscript{11}

One aspect of the relationship between separation of powers principles and legislative delegations of power that is not fully developed in the literature is the effect a legislative delegation can have on the judicial branch of government. The scholarship in the delegation area has centered on the constitutional legitimacy of one branch of government, the legislative, relinquishing a portion of its powers to another branch, the executive. The thesis of this article is that meaningful legislative standards are necessary to prevent the legislative branch from nullifying the power of the judicial branch to review agency action.\textsuperscript{12} To undermine such review is to compromise the check and balance system of our three-branch government.

This article argues that the modern approach to questions concerning the validity of legislative delegation to administrative agencies is improper on both separation of powers and due process grounds.\textsuperscript{13} As to separation of powers, the modern approach represents a commitment to administrative and legislative efficiency at the cost of judicial effectiveness. The administrative agency under this approach is something more than a "fourth" branch of government; it is a microcosm of the other three branches. Procedural safeguards are seen as sufficient to protect the structural separation of powers within the agency. The legislative and judicial roles in this scheme are very modest; the legislature identifies a goal and tells the agency to achieve it, and the judiciary reviews the agency action for compliance with nonexistent statutory standards. The rationale behind this charade is that the legislature and judiciary must recognize the inevitable complications of a highly complex society. But

\textsuperscript{11} See, e.g., Avant v. Clifford, 341 A.2d 629 (N.J. 1975). The modern approach, or variations thereof, has also been endorsed by the New York Court of Appeals, see, e.g., Levine v. Whalen, 349 N.E.2d 820 (N.Y. 1976); the Washington Supreme Court, see, e.g., Barry & Barry, Inc. v. Department of Motor Vehicles, 500 P.2d 540 (Wash. 1972); and the federal courts, see, e.g., Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971). The United States Supreme Court has only twice held delegations of power to administrative agencies to be unconstitutional. Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). This article, however, will limit its discussion to state court decisions.

\textsuperscript{12} Justice Harlan, dissenting in Arizona v. California, noted that legislatively delegated authority must be adequately limited to insure "that the fundamental policy decisions in our society will be made . . . by the body immediately responsible to the people [and to prevent] judicial review from being merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged." 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part) (emphasis added).

\textsuperscript{13} This article will limit its discussion to the legislative delegation of power to administrative agencies. The constitutionality of legislative delegation has arisen in other contexts. See, e.g., Westervelt v. Natural Resources Comm'n, 263 N.W.2d 564, 578 n.21 (Mich. 1978) (court noted other areas of legislative delegations besides the legislative delegation of law-making power to administrative agencies).
the doctrine of separation of powers teaches that it is impossible for the courts to exercise their power of judicial review in the absence of substantive legislative standards. Courts, under the modern approach, are left with nothing to review except the procedure of the agency and the agency’s conformity with its self-imposed standards; there is no other criterion by which to judge the substantive action taken by the agency. The principle of judicial review, which has become the central identifying feature of the judicial branch in separation of power theory, simply disappears. Therefore, the modern approach violates the separation of powers principle by eliminating the practical possibility of judicial checks.

At the same time, the modern approach violates due process because procedural protections, even coupled with broad legislative standards, will not prevent improper exercises of power. The danger to due process is even greater when administrative standards are substituted for broad legislative standards as the modern approach advocates. On the other hand, the presence of meaningful legislative standards, which permit effective judicial review, ensures impartial exercises of power and therefore due process. Since Florida and New Jersey typify contrasting approaches, this article will examine cases from those two jurisdictions.

In the period from 1949 to 1954, there were only five cases in which the New Jersey Supreme Court held legislative delegations of power to an administrative agency to be unconstitutional. Since 1954, however, the court has consistently found very broad legislative delegations to be constitutional despite the fact that legislative standards have been all but nonexistent. In Motyka v. McCorkel the New Jersey Supreme Court discussed the need for legislative

14. See Drexel v. City of Miami Beach, 64 So. 2d 317 (Fla. 1953), cert. denied, 66 So. 2d 510 (Fla. 1953).
15. Weiner v. Borough of Stratford, 104 A.2d 659 (N.J. 1954) (no standards present to guide determination of borough council as to when license for new business was to be granted); Jamouneau v. Local Gov’t Bd., 78 A.2d 553 (N.J. 1951) (statute failed to specify conditions upon which approval for sale of government property would be granted); Abelson’s Inc. v. New Jersey State Bd. of Optometrists, 75 A.2d 867 (N.J. 1950) (vague standards used by the Board which made decisions concerning license to practice optometry); New Jersey Turnpike Auth. v. Parsons, 69 A.2d 875 (N.J. 1949) (State Highway Commissioner given discretion as to amount of funds to be suballocated to the Turnpike Authority); State v. Traffic Tel. Workers’ Fed’n, 66 A.2d 616 (N.J. 1949) (statute failed to provide guidelines to the board of arbitration).
16. See, e.g., Motyka v. McCorkel, 276 A.2d 129 (N.J. 1971); Burton v. Sils, 248 A.2d 521 (N.J. 1968). It should be noted that at least one critic argues that a court’s willingness or unwillingness to accept broad delegations depends on the subject matter of the statute. “It is when delegated power affects the use of real property or the practice of a profession that the judicial nerve tingles.” Jaffe, An Essay on Delegation of Legislative Power: II, 47 Colum. L. Rev. 561, 586 (1947).
standards in connection with the statute authorizing that state's participation in the Aid for Families with Dependent Children (AFDC) program.\textsuperscript{18} Although the court expounded on the need for legislative standards to guide the exercise of delegated power, the standards that the court found sufficient were general standards indeed.\textsuperscript{19} In actuality it appears that no meaningful legislative standards existed in the delegation at all. What did exist, was a statement of a legislative goal along with a judicial finding that procedural safeguards had been established within the agency.\textsuperscript{20}

Similarly, in \textit{Burton v. Sills} the New Jersey Supreme Court narrowed its focus to concentrate almost exclusively on administrative procedural standards.\textsuperscript{21} In doing so, it unfortunately again held broad legislative standards to be sufficient. The court stated that "the statute explicitly directs the Superintendent to prescribe standards and qualifications necessary for 'the public safety, health and welfare'; this guideline, though general, is comparable to that set forth in many other State enactments and is, in its context, clearly sufficient."\textsuperscript{22} The court also noted that safeguards against arbitrary official action were probably more significant than a highly detailed statutory standard.\textsuperscript{23}

It is important to note that this emphasis on procedural protection in lieu of specific legislative standards does not mean that administrative agencies in New Jersey are totally unrestricted. In \textit{Pascucci v. Vagott}, for example, regulations promulgated by the New Jersey Division of Public Welfare providing that a lesser amount of financial assistance be awarded to persons classified as employable than to those classified as unemployable were held to be invalid.\textsuperscript{24} The New Jersey Supreme Court held that the

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\textsuperscript{18} N.J. STAT. ANN. §§ 44:10-1 to 10-8 (West Supp. 1979). The court stated that the challenged statute:

did not endeavor to fix the standards of need or the level of benefits but left these matters, along with most other matters, to administrative regulation. Thus the Commissioner of Institutions and Agencies was authorized and directed, under general policies established by the State Board of Control, to issue "all necessary rules and regulations and administrative orders," and, stressing the legislative goal to obtain maximum federal funding, the Commissioner was authorized and directed to do all things "necessary to secure for the State of New Jersey the maximum Federal financial participation that is available with respect to a program of assistance for dependent children . . . ."

276 A.2d at 130-31 (citations omitted).

\textsuperscript{19} See \textit{id}.

\textsuperscript{20} Id. at 131. The goal was "to secure for the State of New Jersey the maximum Federal financial participation that is available . . . ." N.J. STAT. ANN. § 44:10-3 (West Supp. 1979).

\textsuperscript{21} 248 A.2d 521 (N.J. 1968).

\textsuperscript{22} Id. at 523 (quoting N.J. STAT. ANN. § 2A:151-19 (West 1969)).

\textsuperscript{23} Id. See also Avant v. Clifford, 341 A.2d 629, 659-60 (N.J. 1975).

\textsuperscript{24} 362 A.2d 566 (N.J. 1976).
"necessary and proper" language of the enabling statute provided the essential legislative standards. But this did not hinder the court in reaching its conclusion that the regulations were invalid. Rather, the court focused on legislative intent and held that the problem was not the broad delegation allowed by the enabling statute but the fact that the subsequent regulations did not comply with a proper understanding of the objectives of the legislative policy. In other words, the condemning factor as to validity was the actual implementation of the power by the administrative agency rather than the initial delegation of power by the legislature. Thus, even though the court ignored the importance of specific legislative standards, it still restricted the power of the agency.

It would appear that the New Jersey Supreme Court is unwilling to state specifically that by allowing the use of general rather than detailed legislative standards it has created a framework where virtually no legislative standards are required. This reluctance is evidenced by the judicial conclusion that such language as "public convenience and necessity" and "just and reasonable" is sufficiently restrictive to meet the legislative standards requirement. The court appears to have abandoned all interest in putting operative meaning into any nominal constitutional requirement of legislative standards. Indeed the court has specifically stated that it will not require that "standards be set forth in express terms, if they may reasonably be inferred from the statutory scheme as a whole."

New Jersey is not the only state which has adopted the modern approach to determining the constitutionality of legislative delegations. Although this article disagrees with the conclusion that such

25. Id. at 571.
26. Id.
28. Id. at 659 (quoting from Schierstead v. City of Brigantine, 119 A.2d 5, 8 (N.J. 1955)). See also In re Berardi, 129 A.2d 705, 708 (N.J. 1957).
29. See Levine v. Whalen, 349 N.E.2d 820 (N.Y. 1976). The New York Court spoke of a standards requirement even though the legislative standards it found to be sufficient were very broad. The legislative standard challenged in Levine stated: "In order to provide for the protection and promotion of the health of the inhabitants of the state, . . . the department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services." Id. at 823. The court held that this standard was "not so vague and indefinite as to set no standard or to outline no policy. . . . The policy of the State, the requirements it imposes and the context of the questioned provision demonstrate the contrary." Id. Unlike the New Jersey court in Motyka, 276 A.2d at 135, however, the New York Court did not mention the usefulness or the necessity of procedural safeguards. This omission is troublesome because procedural safeguards are essential under the modern approach. See also Board of Supervisors v. Department of Revenue, 263 N.W.2d 227 (Iowa 1978); Butler v. United Cerebral Palsy of N. Ky., Inc., 352 S.W.2d 203 (Ky. 1961); Barry & Barry, Inc. v. Department of Motor Vehicles, 500 P.2d 540 (Wash. 1972).
approaches are best, it will be interesting to note whether courts will eventually forego the "legislative standards" requirement in theory as well as in fact. The all-out effort of the judiciary to discover implied standards serves only to fictionalize the very concept of legislative standards.  

Under the traditional approach, the process of judicial review is thought to require the existence of legislative standards to be effective. States such as New Jersey, although appearing to reject this approach, continue to search for standards when reviewing agency action. If the traditional approach is to be abandoned in theory, as well as in fact, those states which have adopted the modern view must first face the seemingly impossible task of developing a means to enable their courts to perform judicial review on the basis of procedural or administrative protections. Otherwise, the judiciary will cease to perform its appropriate role.

In contrast, the Florida Supreme Court has clearly held that either procedural protections or administrative standards alone will not be deemed an adequate substitute for legislative standards. The court has specifically rejected the modern approach and demands that a legislative delegation of power be accompanied by clear and narrow legislative standards.  

In Askew v. Cross Key Waterways, the enabling statute provided relatively precise criteria for the Division of State Planning to use in identifying geographic areas of critical state concern. Nevertheless, the Florida Supreme Court

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30. The Washington Supreme Court has stated:

[A] strictly construed standards doctrine is logically unsound and legally meaningless. The needs and demands of modern government require the delegation of legislative power without specific guiding standards. . . . We think that it is time to abandon the notion that the presence or absence of vague verbalisms like "public interest" or "just and reasonable" make all the difference between valid legislation and unlawful delegation.


32. 372 So. 2d 913 (Fla. 1978). The statute under consideration provided:

An area of critical state concern may be designated only for:

(a) An area containing, or having a significant impact upon, environment-
found those standards to be insufficient because a fundamentally legislative task had been delegated to an administrative agency. The court stated that the modern view "maintains that there should be a shift in emphasis from legislatively imposed standards for administrative action to procedural safeguards in the administrative process. . . . [I]t clearly has not been the view in Florida."33

This decision was followed by Department of Business Regulation v. National Manufactured Housing Federation, Inc., where a mobile home tenant-landlord commission was established to regulate rental increases in mobile home parks.34 Elaborate procedural safeguards were included within the statutory scheme. These safeguards specifically provided for notice, hearing, and subsequent appeal procedures in accordance with the Administrative Procedure Act.35 Despite these safeguards, the court held that "[t]he criteria for determining the validity of rental or service charge increases in subsections (1)(a) and (2)(a) . . . are constitutionally defective because they charge the commission with the fundamental task of striking [the] balance between mobile home park owner and mobile home park tenant, without any meaningful guidance."36

33. 372 So. 2d at 922-24. The court in Cross Key made much of the fact that the "geographic area to be regulated by the administrative agency" was not defined in the Florida statute there under consideration. Id. at 920. The court went on to cite cases from other jurisdictions, including New Jersey, to support its position that broader statutory standards were upheld in those jurisdictions because there was a geographical limitation. Id. at 920-22. The New Jersey case cited by the Cross Key court, Toms River Affiliates v. Department of Envt'l Protection, however, stated:

It should also be noted that the act affords adequate procedural safeguards to insure against unreasonable and unwarranted administrative action. . . . These include provisions for a hearing before the Commissioner and review by the Board. Dissatisfaction with the result of these proceedings permits judicial review by appeal to the Appellate Division of the Superior Court.


In short, the Toms River case does not conflict with the other New Jersey cases discussed supra, even though it contains more legislative guidance because the court stressed procedural safeguards.

34. 370 So. 2d 1132 (Fla. 1979).
35. Id. at 1134; FLA. STAT. ch. 120 (1979).
36. 370 So. 2d at 1135 (emphasis added). The statutory provisions under review provided:

(1)(a) Upon petition of 51 percent of the tenants of any dwelling units in a mobile home park . . . the commission shall hold a hearing . . . to determine whether or
Florida's approach to the question of the constitutional validity of legislative delegations of power centers upon the separation of powers principle. The Florida Constitution states specifically that: "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."\(^{37}\) The court in *Cross Key* thought that this section of the Florida Constitution was dispositive since it represented an express limitation on the ability of the legislature to delegate power to an administrative body.\(^{38}\)

The court itself recognized, however, that "other jurisdictions which subscribe to the [modern approach] have constitutional provisions similar to Article II, Section 3, Florida Constitution . . . ."\(^{39}\) In fact, the language of the New Jersey Constitution is nearly identical to that contained in the Florida Constitution.\(^{40}\) It is interesting to note that the New Jersey Supreme Court evidently found this language relatively unimportant and certainly not dispositive.\(^{41}\)

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not the rental or service charge increase or a decrease in services is so great as to be unconscionable or not justified under the facts and circumstances of the particular situation.

(2)(a) The increased costs to the owner of a mobile home park attributable to:
1. Increases in utility rates;
2. Property taxes;
3. Fluctuation [sic] in property value;
4. Governmental assessments;
5. Cost of living increases attributable to and relevant to incidental services, normal repair, and maintenance; and
6. Capital improvements not otherwise promised or contracted for may be passed on to the tenants . . . if such increases are reasonable and justified under the facts and circumstances of the particular case.

*FLA. STAT.* §§ 83.784(1)(a), (2)(a) (1979).

The court in *National Manufactured Housing* went on to say:

The terms "unconscionable or not justified under the facts and circumstances" . . . and the terms "reasonable and justified under the facts and circumstances of the particular case" . . . are not accompanied by any standards or guidelines to aid a court or administrative agency in ascertaining the true legislative intent underlying the act.

370 So. 2d at 1136.

37. *FLA. CONST.* art. II, § 3.
38. 372 So. 2d at 924.
39. *Id.* (footnote omitted).
40. *N.J. CONST.* art. III, § 1 states:

The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

41. Concerning the separation of powers provision in the New Jersey Constitution, the New Jersey Supreme Court has stated:

[T]he Federal Constitution does not expressly call for a division of the total power "among three distinct branches" as does Art. III, § 1, of the State Constitution quoted above, or explicitly bar, as does that provision of the State Constitution, a
It would seem that an underlying ideology is influencing the Florida Supreme Court's position. The key factor in the court's determination of the constitutionality of an attempted legislative delegation is whether or not the legislature has "legislated as far as practicable." This approach is more democratic than the modern approach because it ensures that the people's representatives are doing what they were elected to do, that is, legislate.

It should be added that this approach by the Florida court is not completely altruistic. Ostensibly, it would appear that the Florida court is concerned with whether the delegation of excessive legislative authority to the executive branch of government violates the separation of powers doctrine. By conceiving the issue as whether the legislature has delegated too much authority to the executive branch, the judiciary avoids the appearance of acting to protect its own interests. Close scrutiny of the more recent delegation cases, however, additionally reveals the Florida court's concern as to whether the legislature has intruded upon the judiciary. The court

person belonging to or constituting one branch from exercising any of the powers properly belonging to either of the other branches. Plaintiffs say that our Constitution is therefore more restrictive and sufficiently so to prevent the delegation here involved even though a like delegation by the Congress may not offend federal organic law.

There is no indication that our State Constitution was intended, with respect to the delegation of legislative power, to depart from the basic concept of distribution of the powers of government embodied in the Federal Constitution. It seems evident that in this regard the design spelled out in our State Constitution would be implied in constitutions which are not explicit in this regard. . . . We have heretofore said our State Constitution is "no more restrictive" in this respect than the Federal Constitution. . . . Indeed in our State the judiciary has accepted delegations of legislative power which probably exceed federal experience. Brown v. Heymann, 297 A.2d 572, 576-77 (N.J. 1972) (citations omitted).

42. Buttfield v. Stranahan, 192 U.S. 470, 496 (1904); see State v. Griffin, 239 So. 2d 577 (Fla. 1970) (wherein the court noted that legislative delegations of power cannot be made in general terms which leave no standards for the agency to use when performing its official acts).


44. The Florida court has frequently expressed its concern that broad delegations will interfere with its judicial review function. For example, the Cross Key court noted:

A corollary of the doctrine of unlawful delegation is the availability of judicial review. In the final analysis it is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature. When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.

372 So. 2d at 918-19.

See also Justice Harlan's dissenting opinion in Arizona v. California, 373 U.S. 546, 626 (1963), concerning a delegation to the Secretary of the Interior: "[W]hatever the Secretary
recognizes that if a statute allows a broad delegation to an administrative agency, a court will encounter great difficulty if it attempts to review the agency's actions. Therefore, in order to eliminate this difficulty and to protect the court's review function, meaningful legislative standards must exist. The Florida court's approach prohibits wholesale delegation of legislative power and thereby protects both legislative and judicial authority. The judicial branch, however, finds itself wielding tremendous veto power in precisely those areas of welfare, planning, and general economic concern where the lessons of the New Deal are assumed to have taught the judiciary to intrude with extreme caution. By mandating that the legislature "legislate as far as practicable," the court is likely to become engaged in a subjective analysis. Given the choice between locating

decides to do, this Court will surely be unable effectively to review his actions, since it will not know what guides were intended by Congress to govern those actions."

45. Straughn v. O'Riordan, 338 So. 2d 832 (Fla. 1976) is consistent with this concept. There the statute provided that the Department of Revenue could require a bond from sales tax registrants in "all cases where it is necessary to insure compliance with the provisions of this chapter . . . ." Id. at 833. Although the court found this standard to be constitutionally proper, it was able to take an easier way out. The court focused its attention on the Department's failure to create strict standards which could "be applied to each sales tax applicant." Id. at 834. Without the procedural deficiency, the court would not have been able to overturn the action of the Department under the "necessary" standard.

46. The Cross Key court noted that: "Professor Davis maintains that . . . the doctrine, in fact, has been used as a label to invalidate legislation of which courts disapprove without any rational distinction between standards approved and those disapproved . . . ." 372 So. 2d at 922-23.

Professor O. Douglas Weeks, however, has argued that judicial acceptance of broad standards may amount to judicial usurpation of legislative authority:

The question still remains, however, "what is a standard?" . . . . How much of a standard has been set up . . . . that its rates be "just and reasonable" . . . . and . . . . its rules be "consistent with the public interest." If these vague terms are to be given meaning in the last analysis by the courts, then it is obvious that the judicial branch throws itself open to the charge of usurping legislative authority.


47. This analysis is similar to the substantive due process activism found in Lochner v. New York, 198 U.S. 45 (1905), where the Court determined that a law restricting the right of employers and employees to contract to work was in violation of the due process clause of the fourteenth amendment.

A more modern example of a subjective analysis is Sheeran v. Nationwide Mut. Ins. Co., 404 A.2d 625 (N.J. 1979). The New Jersey Supreme Court found an adequate standard in the delegation of power to the Commissioner of Insurance to promulgate "reasonable rules and regulations" in order to implement that state's No-Fault Act. The court proceeded further, however, by supplying the "meaningful standards" that the legislature had neglected to add to the delegation. Id. at 630.

By the boldness of this decision, the Sheeran court has perhaps illustrated that impotence does not have to befall the judicial branch in those jurisdictions which have adopted the Davis approach. Sheeran also nicely illustrates a situation where the legislature did not "legislate as far as practicable." If the court can sua sponte list some meaningful standards to guide the agency, why not the legislature? The separation of powers principle should be preserved
broad unchecked power in low-visibility administrative agencies, as opposed to the more visible judiciary, the politically desirable preference seems obvious.

Although Florida's approach to determining the validity of legislatively delegated power is expressed in separation of powers rhetoric, due process considerations also play a very large role. In order to ensure due process, and thereby protect private interests against arbitrary action by an administrative agency, the court recognizes that it must look beyond mere procedural safeguards. Accordingly, the Florida Supreme Court has deemed meaningful legislative standards to be inexorably connected with due process protections.

so as to ensure against arbitrariness. Consequently, the judicial branch must be provided with some meaningful legislative standards to allow for effective review. This review is impossible if standards are nonexistent or if they are provided by either the court or the agency.

48. See, e.g., Lewis v. Bank of Pasco County, 346 So. 2d 53 (Fla. 1976). The Lewis court stated:

The legal principal [sic] guiding the Circuit Judge in this case and which is dispositive of the issue under consideration is so well known as to be deemed "hornbook" law. This Court had held in a long and unvaried line of cases that statutes granting power to administrative agencies must clearly announce adequate standards to guide the agencies in the execution of the powers delegated. The statute must so clearly define the power delegated that the administrative agency is precluded from acting through whim, showing favoritism, or exercising unbridled discretion.

Id. at 55-56. See also Dickinson v. State, 227 So. 2d 36, 37 (Fla. 1969).

49. Cross Key, 372 So. 2d at 918. Although a Florida appellate court in Albrecht v. Department of Envt'l Reg., 353 So. 2d 883, 887 (Fla. 1st Dist. Ct. App. 1978), has stated that the 1974 Florida Administrative Procedure Act provides an "array of procedural safeguards [and] has lessened the need for strict statutory standards in the delegation of power to administrative agencies," that position has not been followed by the Florida Supreme Court. At one time, it seemed that then Justice (now Chief Justice) England of the Florida Supreme Court was about to adopt the modern position:

In summary, I conceive that the Legislature has lawfully delegated to the executive branch the enforcement of its announced policy in this area. There is no abuse of that delegation so long as the class of prohibited acts are more specifically defined by prospective administrative action to which the Administrative Procedure Act applies.

Department of Legal Affairs v. Rogers, 329 So. 2d 257, 269 (Fla. 1976) (England, J., concurring). However, Chief Justice England's concurring opinion in Cross Key is diametrically opposed to the Davis view:

Justice Sundberg [the author of the Askew v. Cross Key Waterways opinion] has revitalized a vastly more important doctrine—one that guarantees that Florida's government will continue to operate only by consent of the governed. He is saying, quite simply, that whatever may be the governmental predilections elsewhere, in Florida no person in one branch of our government may by accident or by assignment act in a role assigned by the Constitution to persons in another branch.

372 So. 2d at 925. Then, however, in Department of Business Regulation v. National Manufactured Hous. Fed'n, Inc., 370 So. 2d 1132, 1137 (Fla. 1979), the Chief Justice concurred in the result only. Although all this may lead one to speculate about the Chief Justice's position, the recent cases indicate that the position of the Florida Supreme Court cannot be questioned. See, e.g., Florida Home Builders Ass'n v. Division of Labor, 367 So. 2d 219 (Fla. 1979).

50. For example, that court said in Drexel v. City of Miami Beach:
Therefore, the key to predicting the position of the Florida Supreme Court in borderline cases is to understand that the meaningful legislative standards requirement has its roots in both separation of powers and due process principles. Meaningful legislative standards ensure that the judiciary will be able to exercise its review function after agency action, thereby preserving a classic vision of the separation of powers. Prospectively speaking, the doctrine also ensures that a court will be able to prevent favoritism by the agency. More importantly, the doctrine promotes legitimate lawmaking by policing the legislative tendency to avoid painful policy decisions through the delegation of power.

CONCLUSION

Anything short of "meaningful legislative standards," including procedural protections, will not suffice. In point of fact, no proce-

We think a [governmental body] may not deprive a person of his property by declining a permit . . . where the only restriction on the use of the police power is that it shall not be exercised before "due consideration" is given . . . to the effect of the building upon traffic. Both the quoted words, as well as their synonyms, could be construed to allow all manner of latitude in the grant of a permit in one case and the denial of a permit in a similar one, and would give every opportunity for the exercise of the power with partiality. Such laxness and inexactness in a delegation of the power is not sanctioned by the courts.

64 So. 2d 317, 319 (Fla. 1953). Similarly, in Conner v. Joe Hatton, Inc., the court stated:

When the statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law, it must be held unconstitutional as attempting to grant to the administrative body the power to say what the law shall be.


51. Professor Sotirios Barber has noted:

It has been argued that, instead of always helping Congress achieve regulatory aims it may not otherwise achieve, broad delegations can defeat such purposes. The absence of reasonably clear statements of congressional policy has been seen as one of the conditions under which the independence of administrative agencies is threatened through the pressure of groups they are supposed to regulate and the friends of those groups in Congress and the executive branch.


52. Professor Tribe, in referring to the federal system of checks and balances, sets forth the necessity of legislative standards:

This requirement that delegated power include at least roughly intelligible "standards" to guide the delegated party preserves, at least theoretically, both sets of constitutional checks—judicial and political—on the exercise of coercive authority in a "government of laws." So far as judicial checks are concerned, the theory has been that, if the recipient of delegated power may exercise that power only within judicially cognizable boundaries, then courts can determine (1) whether any given action falls within the scope of delegated power and is thus defensible against
dural protections can prevent arbitrary action by an administrative agency (or any other organ of government). Procedurally proper interference with someone's personal or property interests does not lessen the arbitrariness of that interference. Formal constraints are tautological when substantive concerns are at stake. Without the existence of meaningful legislative standards a court has nothing to review except compliance with internal, generalized procedural requirements.

This is the primary point of distinction between the approach taken by courts following the modern view, and those following the more activist "meaningful legislative standards" approach. In the former, the court resorts to procedural due process to protect interests it deems worthy of protection despite a lack of legislative standards. This highly discretionary and unpredictable approach results in wholesale delegation of power to administrative agencies. Legislators will attempt to avoid hard policy decisions in order to evade the rancor of special interest groups. In our present era of one issue politics the fewer decisions that legislators have to make the better they like it.

In Florida, a strict reading of the separation of powers principle results in broad power being placed in the hands of the judiciary and consequently requires the legislature to "legislate as far as practicable." Florida's populist position ensures a more democratic form of government, and in an era when governmental regulation has run rampant, it at least ensures that the people's representatives and not the bureaucrats are at the helm.

Delegation of lawmaking power is, of course, a categorical imperative in modern government. But it is essential that the people's representatives retain the primary legislative function, even while delegating secondary power to legislate to agencies. In a representative system, it is the job of the people's representatives to make

* a charge of complete lawlessness; (2) whether the power thus delegated is one constitutionally possessed by Congress in the first place; and (3) whether the power in question is one which is delegable or rests only in Congress. If the legislative policies and standards guiding the agency are at least roughly understandable, judicial review of the means chosen by the agency in exercising its delegated power provides a safeguard of sorts against statutory or constitutional excesses.

Often, to be sure, the primary mode of governmental accountability is political rather than legal. To the degree that this is so, limits on delegation of power serve less to facilitate judicial review than to foster the political processes ordinarily checking congressional action. From the political perspective, broad delegations of power are objectionable because they permit responsibility for government action to pass out of the hands of Congress. To a certain degree, therefore, broad delegations undermine the electoral check on congressional power.

L. Tribe, *supra* note 1, § 5-17 at 287-88 (footnote omitted).
the hard choices that are necessary to set meaningful policies. When Congress delegates wholesale powers, confined only by a vague "public interest" standard, it abdicates its job of making the difficult policy decisions. If the policy choices are thereby removed from the political process, they are also removed from popular control. To let the people's representatives pass the buck on policy choices to the administrative experts is to let them cast their vote for paternalism and against democracy.53

Although procedural protections are important, a meaningful legislative standards requirement is absolutely essential to preserve effective judicial review of administrative agency actions and powers. By ensuring effective judicial review, constitutional principles of separation of powers and due process are preserved. But as Mr. Justice Jackson aptly stated concerning such issues:

Just what our forefathers did envision or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more

53. Schwartz, supra note 40, at 460. In addition to Florida, two of the other jurisdictions that have resisted the modern approach are Illinois and Arizona. In Stofer v. Motor Vehicle Cas. Co., 369 N.E.2d 875 (Ill. 1977), the Illinois Supreme Court discussed the need for intelligible legislative standards:

Without sufficient statutory directions against which to compare administrative regulations, the mere existence of judicial review is not a meaningful safeguard against administrative abuses. . . . Thus, unless found in the statute, the restraints which the judiciary is to apply to safeguard against the abuse of discretion in administrative rule making simply do not exist.

Id. at 879 (citations omitted). Of great importance to the hypothesis of this article is the statement of the court that "The legislature must do all that is practical to define the scope of the legislation, i.e., the persons and activities which may be subject to the administrator's authority. This effort is necessary to put interested persons on notice of the possibility of administrative actions affecting them." Id.

While also rejecting the modern approach, an Arizona appellate court seemed less concerned about broad delegations interfering with judicial power than either the Florida or Illinois courts:

The Court recognizes that some writers have advocated the discontinuance of the "adequate standards" rule for testing claimed unconstitutional delegations of legislative power in favor of a test involving an examination of the challenged legislation to determine whether there are sufficient procedural safeguards to protect those affected by the law. . . . We find no Arizona decisions adopting this view, and we are not persuaded. . . .

"'One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority.'"

or less apt quotations from respected sources on each side of any question.\textsuperscript{54}

Therefore, even if courts like the New Jersey Supreme Court are not persuaded to reverse their noninterventionist position on this matter, perhaps they will avoid future confusion by abandoning the pretense that they observe a legislative standards requirement. A court which finds language such as "in the public interest"\textsuperscript{55} to be a sufficient legislative standard, is not in truth requiring any such standard at all and should therefore adjust its opinions to reflect the realities of its conduct.

\textsuperscript{54} Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

\textsuperscript{55} See, e.g., Ward v. Scott, 93 A.2d 385, 388 (N.J. 1952), where the court stated: "[T]he exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards in regulatory enactments under the police power. Thus, the Board of Public Utility Commissioners has been guided by simple standards of 'public convenience and necessity' . . . and 'just and reasonable.'"

See also F. Cooper, Administrative Agencies and the Courts 47 (1951):

A standard which attempts to anticipate every possible situation is likely to defeat the whole purpose of delegation. On the other hand, one which reflects the empty generalities of "reasonableness" or "public interest"—criteria which would be supplied by implication in any event—tends to substitute a government by men for one of laws.